


1988

Facilitative Ethics in Divorce Mediation: A Law and Process Approach

Steven H. Hobbs

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Family Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Steven H. Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. Rich. L. Rev. 325 (1988).

Available at: <http://scholarship.richmond.edu/lawreview/vol22/iss3/3>

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

FACILITATIVE ETHICS IN DIVORCE MEDIATION: A LAW AND PROCESS APPROACH

*Steven H. Hobbs**

I.	Introduction	326
II.	The Family Law Setting	327
	A. The Divorce Arena	327
	B. The Consequences of Divorce — An Example ..	329
	C. Summary	333
III.	Family Dissolution Process: The Adversarial Setting ..	333
IV.	Family Dissolution Process: The Mediation Setting ..	336
	A. The Goals of Mediation	336
	B. The Role of the Attorney in the Mediation Setting	338
	C. Ethical Dilemmas in the Mediation Setting	340
V.	The New Mediation Standards	345
	A. The Collective Search for Uniform Standards ...	345
	B. Standards as Promulgated by the State of Florida — An Illustrative Response	351
	1. General Parameters	351
	2. Specific Guidelines	353
	a. The Mediation Process	354
	b. The Participants	354
	c. The Mediator	355
	d. The Outside Counsel	356
	C. Mediation Ethics Shortfall	356
VI.	Facilitative Ethics in the Family Law Setting	358
	A. The Mediation Process as an Ethical Source ...	358
	B. Riskin's Neutral Lawyer	359
	C. Riskin's Fairness Value	360
	D. Riskin's Maximization Value	362

* Associate Professor of Law, Washington and Lee University School of Law; B.A., Harvard College, 1975; J.D., University of Pennsylvania, 1979.

The author expresses his gratitude to colleagues James Alfani, Denis Brion, Roger Groot, Louis Hodges, Brian Murchison, Thomas Shaffer and Joan Shaughnessy for their thoughtful input on earlier drafts, and to Franklin Graham, Sarah Kirby and Joyce Stewart for their research assistance. Special thanks go to Fay Wilson Hobbs and Elzy Williams for their help.

E.	Beyond Fairness and Maximization: The Facilitative Value	363
VII.	Critique of the Mediation Standards	364
A.	The Mediation Process	364
B.	The Ethical Responsibilities of the Participants	367
C.	The Ethics of the Mediator	367
D.	The Ethics of the Outside Legal Advisor	374
VIII.	Conclusion	375

I. INTRODUCTION

Mediation is becoming a vital part of family legal problem solving and is creating new challenges for the lawyer practicing in the family law setting. The American Bar Association, the Association of Family and Conciliation Courts and others recently have proposed standards of behavior for mediators where none have existed before.¹ States also have attempted to define the appropriate realm of ethical practice for family mediation.²

Within the family law setting, a tension exists between the state's primary goal of ordering family relationships and the state's adversarial divorce process that dissolves those relationships. The adversarial divorce process, involving a lawyer guided by adversarial ethics, frustrates the ability of divorcing spouses to fulfill their family legal obligations mandated by the state. Consequently, the mediated divorce has evolved as an alternative mechanism that promises to be more consistent with the state's primary goals for the family. The mediation process, like the adversarial process, necessarily generates a framework of ethical practice. Specifically, lawyers in family dissolution mediation should have an ethical obligation to *facilitate* the post-dissolution division of family responsibilities. This article proposes a value system of facilitative ethics that encourages mediation participants to work out post-dissolu-

1. These standards were drafted by a group of individuals and associations from different professions. Many groups had developed their own standards for mediation practice and several of the drafters participated in the promulgation of more than one set of standards. The standards can be found in the following sources: STANDARDS OF PRACTICE FOR DIVORCE MEDIATORS (19___) *reprinted in* 2 *Dispute Resolution F. 5* (1984) [hereinafter ABA STANDARDS]; Bishop, *Standards for Family and Divorce Mediation*, 2 *Dispute Resolution F. 3* (1984); *see also* MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (Association of Family and Conciliation Courts, 19___) *reprinted in* 22 *CONCILIATION CTS. REV. 1* (1984) [hereinafter AFCC STANDARDS]; Note, *Standards of Practice for Family Mediators*, 17 *Fam. L.Q.* 455 (1984).

2. *See infra* notes 157-205 and accompanying text.

tion arrangements that promote continuing cooperation and fulfill the state's primary goal of ordering family relationships.

Although the underlying purpose of this article is to promote the use of mediation, the article focuses on the ethical values a lawyer should demonstrate when using legal counseling skills in divorce mediation. The premise is that the lawyer's ethical standards are framed by the mediation process and family law as it affects separating spouses.

First, this article considers the classic family dissolution process and the necessary use of traditional adversary ethical values in this process. Second, the article reviews the literature which discusses mediation and the ethical dilemmas engendered by mediation. Third, the article considers what principles should form the basis for ethics in the mediation process. Two proper sources of these principles will be explored—the range of possibilities shaped by the mediation process itself, and the necessity of effecting society's goals for the family. It will be argued that these sources suggest an ethical framework which facilitates the fulfillment of post-dissolution family obligations. These facilitative principles will be used to critique the proposed mediation standards. Finally, this article urges that the legal profession, under the leadership of the organized bar, seriously consider the idea that a lawyer engaged in the unique role of family mediator has ethical duties shaped by the mediation process in the family law setting. In so doing, the author hopes to present a model for attorneys working to facilitate the fulfillment of their clients' legal and moral family obligations.

II. THE FAMILY LAW SETTING

A. *The Divorce Arena*

The traditional role of the family is to provide each member with financial, material and emotional support within the family unit, and to prepare each family member to function as an independent, productive member of society.³ Furthermore, the family unit, when viewed as an economic enterprise accumulating wealth and property, provides society with a mechanism for ordering property rights.⁴ For example, at marital dissolution, courts have

3. For a discussion on the essential functions of the family, see W. GOODE, *THE FAMILY* (1982); Hobbs, *We Are Family: Changing Times, Changing Ideologies and Changing Law*, 14 CAP. U. L. REV. 511, 519-24 (1985).

4. See generally UNIF. MARITAL PROPERTY ACT, 9A U.L.A. 109 (1987); *The Uniform Mar-*

divided businesses,⁵ pensions,⁶ and inherited wealth.⁷ In addition, though a professional degree is not subject to division at divorce, courts have ordered reimbursement alimony to a spouse who has contributed financially toward the other spouse's education.⁸

The principle issues in a divorce are the care and custody of children, support for a needy spouse and property distribution. The task of the participants in the divorce process (spouses, lawyers and judge) is to seek an equitable resolution which accommodates the state's primary goals, yet respects the vital interests of each participant. The state has a vital interest in the parties not only during marriage, but also after marital dissolution:

We have heretofore held that the authority to regulate marriages and correspondingly to provide for their dissolutions is vested in the Legislature. It is inherent in the state's police power to do so in the regulation of society and its relationships, including the very essential and important family relationship within marriage. The marriage contract perhaps more than any other has a vital and essential effect on the very life and society of the State and therefore is a very proper subject of the state's police power; the subject of marriage (and correspondingly the dissolution thereof) has a very definite bearing upon the public interest with which the Legislature is concerned and charged with its regulation.⁹

ital Property Act: New Concepts for Divorce Lawyers, 12 Fam. L. Rep. (BNA) 3001 (Dec. 10, 1985) (discussing the impact of the Wisconsin Marital Property Act on Community property-based divorce law).

5. See *Chaachou v. Chaachou*, 135 So. 2d 206 (Fla. 1961) (divorce on grounds of cruelty where wife awarded a special equity in value of four hotels).

6. For an analysis of cases dealing with retirement benefits, see J. KRAUSKOPF, *CASES ON PROPERTY DIVISION AT MARRIAGE DISSOLUTION*, 119-36 (1984); see also Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, title X, 96 Stat. 718, 730 (codified as amended in scattered sections of 10 U.S.C.) (providing for retirement and other benefits for married members of the armed forces).

7. For an analysis of problems connected with the distribution of inherited property on divorce, see J. KRAUSKOPF, *supra* note 6, at 151-59.

8. See *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982) (a spouse who supported the other spouse who was in school is entitled to fair compensation when the marriage is dissolved before the contributing spouse is able to realize the expected benefits); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982) (Earning potential provided by a degree or license is not marital property subject to division at divorce; however, when one spouse contributes toward the other spouse's education with the expectation of increased income and marital benefits, reimbursement alimony can be awarded at divorce.); *O'Brien v. O'Brien*, 106 A.D.2d 223, 485 N.Y.S.2d 548 (1985) (Where spouse had contributed to advance the other spouse's career and where virtually no material property existed for equitable distribution, the court awarded the contributing spouse rehabilitation and maintenance alimony, taking into consideration the other spouse's future increased earning capacity.).

9. *Ryan v. Ryan*, 277 So. 2d 266, 273 (Fla. 1973) (footnotes omitted); see also *Posner v.*

The state's interest in facilitating an equitable resolution is reflected in the language of Florida's marital dissolution statute which expresses the following goals:

- (1) This chapter shall be liberally construed and applied to promote its purposes.
- (2) Its purposes are:
 - (a) To preserve the integrity of marriage and to safeguard meaningful family relationships;
 - (b) To promote the amicable settlement of disputes that have arisen between parties to a marriage; and
 - (c) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.¹⁰

The state's interest in terminating a marriage is to facilitate a non-traumatic disengagement.¹¹ Moreover, "[p]ublic policy demands that when a marriage relationship is terminated, each party shall be placed in a position to rehabilitate himself and start anew, completely free of the former spouse. The decree of divorce is a conclusive presumption that the possibility of restoring the marital status is gone forever."¹² The marriage dissolution process strives, not always successfully, to achieve this public policy.

B. *The Consequences of Divorce—An Example*

Of the many issues that arise at marital dissolution, none are more challenging than those involving the care and custody of children. This is especially true in jurisdictions which require or strongly endorse joint custody¹³ or shared parental responsibility.¹⁴

Posner, 233 So. 2d 381, 383 (Fla. 1970) (A divorce cannot be awarded by consent of the parties because of the state's interest in the preservation of marriage, however, the court upheld an antenuptial agreement concerning the limitation of a spouse's right to alimony.), *aff'd in part, rev'd in part*, 315 So. 2d 175 (1975); *Ex parte Lovier*, 156 Fla. 147, 23 So. 2d 272 (1945) (state is interested in divorce and the custody of minor children); *accord Maynard v. Hill*, 125 U.S. 190 (1888) (rights and obligations in marriage and divorce depend upon state law).

10. FLA. STAT. ANN § 61.001 (West Cum. Supp. 1987).

11. "We recognize that the new 'no fault' concept was a principle basis of the new legislation for a desired simplification of the procedure aimed at reducing the trauma of the dissolution experience." *Ryan*, 277 So. 2d at 273.

12. *Martin v. Martin*, 157 Fla. 456, ___, 26 So. 2d 183, 184 (1946).

13. *See Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981). *But see Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) (holding that custody of younger children is awarded to the parent who is the primary caretaker, i.e., the parent who exercises the most parenting skills in the day-to-day care of the child).

Here it is incumbent on both parents to work together, raising their children under less than ideal circumstances. Although a full examination of these issues is beyond the scope of this article, one example might illustrate the consequences engendered by marital dissolution.

In the case of *Azzara v. Waller*,¹⁵ two parents litigated whether their eight-year-old daughter's surname should be changed to the surname taken by the mother upon remarriage. The mother, who had primary custody, petitioned for the name change.¹⁶ The father, who had visitation privileges and resided in New York, filed a counterclaim "to enjoin the mother from allowing or encouraging the child to be known by any surname other than his."¹⁷ Each party had an expert witness who lent support to their own position.¹⁸ Mary Beth, the child whose name was in controversy, was reported to be "very disinterested (she said 'bored')"¹⁹ in the whole affair. As to Mary Beth's resolution of the issue the court found:

Apparently she uses the name 'Waller' around Dade County and the name 'Azzara' when she is with her father. It also appears clearly that she warmly loves her mother, her father and her step-father, and feels very secure in their love for her. She refers to both her father and her step-father as 'Daddy' and when she feels it necessary to distinguish between them, refers to her father as her 'Daddy in New York' and her step-father as her 'Daddy here'.²⁰

The court decided that the controlling standard should be the welfare of the child: "[A] change of a minor's surname over the

14. See, e.g., FLA. STAT. ANN. § 61.13 (2)(b)(2) (West Cum. Supp. 1987). For a thoughtful discussion on the concept of shared parental responsibility in the legal and physical custody of the child, see Note, *Shared Parental Responsibility: Florida Statutes Section 61.13*, 7 NOVA. L.J. 277 (1983).

15. 495 So. 2d 277 (Fla. Dist. Ct. App. 1986).

16. *Id.* at 277-78.

17. *Id.* at 278.

18. The psychologist who testified on behalf of the mother urged "that it was his professional philosophy that all children should have the same name as the family they live with . . . [C]hildren [think] a different name means something is wrong and therefore feel guilty." *Id.*

The psychologist for the father alternatively claimed that "[i]n his opinion changing the child's name to Waller [the mother's surname] would cause estrangement from her natural father and would eliminate her current freedom to use either the name 'Waller' or the name 'Azzara' as she chooses." *Id.*

19. *Id.*

20. *Id.*

objection of one parent [should be ordered] only where the evidence affirmatively shows that such change is necessitated by the welfare of the child."²¹

The court did not find affirmative evidence that Mary Beth's welfare necessitated a name change.²² In fact, the court deferred to the real expert in this controversy, Mary Beth, and declared that

[I]t would be contrary to the best interests of Mary Beth for this Court to . . . in any way fetter Mary Beth's freedom to use whichever surname with which she feels the most comfortable. When her surname becomes important to her, she can decide this issue for herself and leave this Court to decisions with which it feels much more comfortable.²³

This case illustrates two important concerns which are at the center of a family dissolution. First, the court is generally not "comfortable" with making these kinds of decisions. It is more comfortable with structuring the general outlines of a custody arrangement.²⁴ As long as the child's welfare is not endangered, the state has no real interest in the day-to-day details of child rearing, even when the child rearers are no longer living together.²⁵ The details of custody are better left to the parents.²⁶

The second concern is implicated by the first. At stake in *Azzara* (indeed in most family dissolution cases with children) were the primary family interests of the individuals involved—the two par-

21. *Id.* (citing *Lazow v. Lazow*, 147 So. 2d 12, 14 (Fla. Dist. Ct. App. 1962)).

22. *Id.* at 279. Interestingly, one of the sub-issues in the case was whether changing a female child's name was important. The expert for the mother "seemed to believe that changing Mary Beth's surname now was of diminished importance because she is a girl and will change her name by marriage in a few years in any event." *Id.* But the judge recognized that in our modern society, women do not always change their names upon marriage. *Id.* In fact, the judge noted that Mrs. Waller "testified—with justifiable pride—that her name is 'Jane Huckaby Waller.'" *Id.* "Huckaby" was Mrs. Waller's maiden name.

23. *Id.*

24. See sources cited *supra* note 14.

25. See Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835-39 (1985) (discussing the history of the legal tradition of non-interference in day-to-day affairs of the family).

26. Child custody disputes are perfectly suited for mediation. No doubt the *Azzara* case would have been settled more expeditiously and with less cost if handled through a competent mediator. See generally GARDNER, *CHILD CUSTODY LITIGATION: A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS* 162-210 (1986); Saposnek, *Strategies in Child Custody Mediation: A Family Systems Approach*, 2 MEDIATION Q. 29 (Dec. 1983); Saposnek, *What is Fair in Child Custody Mediation?*, 8 MEDIATION Q. 9 (June 1985).

ents and the child. The foremost concern was the best interests of the child, Mary Beth. She, however, was "disinterested and puzzled" by all the fuss. In fact, she had already worked out a way to cope with being in two families with different names.²⁷

In *Azzara*, the mother's interest derives either from the custody responsibilities imposed upon her by the dissolution process, or from her personal desire to make a statement about the way she lives her life.²⁸ In the first instance, as the person with primary custody in a shared parental responsibility jurisdiction, she has the task of handling the day-to-day activities.²⁹ Practically speaking, it is much easier to manage a household if all of the members use the same surname, especially in school.³⁰ Also, the possible embarrassment of having to explain family circumstances is reduced. From this point of view, the name change request had some validity.

Alternatively, the mother might want her child to benefit from the social status obtained by her new husband, "a prominent attorney."³¹ Arguably, she would merely be seeking the best for her child through social positioning. Finally, the action could be inspired by a personal desire to bury her past marriage completely and get on with a new life. However, at this point, the continuing interest of the father in the companionship of his daughter must be considered.³²

For the father in *Azzara*, divorce cut the marital bond but had not terminated his parental rights. Moreover, award of primary custody to his former spouse had cut the direct parental tie of daily involvement. The father's relationship with his daughter was further strained by geographic distance. As the father's expert witness suggested, the changing of the surname "would cause estrangement."³³

27. *Azzara*, 495 So. 2d at 278. Children face a severe challenge in surviving the dissolution of their parents' marriage. See GARDNER, *supra* note 26, at 162-210; see also M. WHEELER, *DIVIDED CHILDREN* (1980).

In *Azzara*, much wisdom came from the "mouths of babes." Dr. Robert Kline, the father's expert witness noted that "Mary Beth's discretion to use the surname of either 'Waller' or 'Azzara' should remain unfettered by either judicial pronouncement or parental pressure 'She knows that she has two names that represent the families she loves very much.'" *Azzara*, 495 So. 2d at 278.

28. See *supra* Section VI.2E.

29. Florida presumes that both parents should be responsible for raising the children. See sources cited *supra* note 14.

30. See *Lazow v. Lazow*, 147 So. 2d 12 (Fla. Dist. Ct. App. 1962).

31. *Azzara*, 495 So. 2d at 279.

32. See *id.* at 278.

33. *Id.*

At a time when many fathers are defaulting on child support payments³⁴ and visitation schedules, the state should not encourage paternal drop-out, but should facilitate a father's involvement to an extent not inconsistent with the fulfillment of tasks by the primary custodian.

C. *Summary*

The law imposes legal obligations on individuals forming families which may continue after marital dissolution. If society is serious about enforcing familial obligations, then family law, family lawyers and the familial dispute resolution mechanisms should address these obligations in terms which facilitate their fulfillment. Specifically, if parents are charged during marriage with the care (physical, emotional and spiritual) of their progeny, then the processes which order post-marital custody and support obligations should be designed to facilitate the discharge of these obligations as well. Similarly, if marriage is deemed to be an emotional and economic partnership, then partnership concepts should be employed in the distribution of marital property.³⁵

III. FAMILY DISSOLUTION PROCESS: THE ADVERSARIAL SETTING

The adversarial nature of the divorce process does not lend itself to achieving the fulfillment of post-divorce obligations.³⁶ There is

34. The severity of the nonpayment problem was reported in Lauter, *The Custody Support Crises*, NAT'L L.J., Feb. 27, 1984, at 1.

[N]on-compliance currently amounts to a \$4 billion annual arrearage bill, according to recent congressional testimony. Census Bureau figures show that fewer than half of those custodial parents who do receive awards actually get the amount coming to them. For the rest, enforcement efforts face crowded court calendars that often mean months of delay before a hearing, as well as a legal system that makes its easy to frustrate an enforcement action.

Id. at 45; see also D. CHAMBERS, MAKING FATHERS PAY (1979).

35. See UNIF. MARITAL PROPERTY ACT § 4, 9A U.L.A. 109 (1987); see also Glendon, *The New Family and the New Property*, 53 TUL. L. REV. 697 (1979); Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. FAM. L. 263 (1984).

36. See GARDNER, *supra* note 26, at 19.

The adversary system, which professes to help parents resolve their differences, is likely to intensify the hostilities that it claims it is designed to reduce. It provides the litigants with ammunition that they may not have realized they possessed. It contributes to an ever-increasing vicious cycle of vengeance—so much so that the litigation may bring about greater psychological damage than the pains and grief of the mar-

an inherent tension between the state divorce process and the state's primary goals for the family. Divorce wreaks havoc in the lives of the individuals involved,³⁷ and the adversarial divorce process intensifies this turmoil. The couple whose united love resulted in the birth of children now fight with dogged determination to obtain "possession" of their offspring.³⁸ Liberalized property distribution schemes provide additional incentives to battle.³⁹ The spoils of this legal battle are obtained at great emotional and psychological cost to the participants.⁴⁰

The ethics of adversarial lawyers are shaped by their role in escorting their clients across the marital dissolution battleground.⁴¹ They protect the client's rights and shield him or her from emotional and economic exploitation by the "other" side.⁴² The lawyer

riage that originally brought about the divorce. Although some attorneys are genuinely appreciative of the vicious effects of protracted litigation and recognize the terrible psychological trauma that may result from adversary proceedings, other lawyers are not. For the latter, the name of the game is to "win". They believe their reputations rest on their capacity to win and they fear that if they appear to be moderate and conciliatory they will lose clients.

Id.

37. See generally D. CHAMBERS, *supra* note 34; U.S. COMM'N ON CIVIL RIGHTS, CLEARING HOUSE PUB. 78, A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN (1983); Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women* 6 HARV. WOMEN'S L.J. 1 (1983); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981).

38. See GARDNER, *supra* note 26, at 19.

People involved in custody litigation are fighting. They are fighting for their most treasured possessions—their children. The stakes are extremely high. Litigation over money, property and other matters associated with the divorce produce strong feelings or resentment and anger. However, they are less likely to result in reactions of rage and fury than are conflicts over the children. Children are the extensions of ourselves, our hopes for the future, and thereby closely tied up with our own identities. Fighting for them is almost like fighting for ourselves. The two may become indistinguishable, and the fight becomes a 'fight of life.'

Id.; see also Federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1982); Baker & Seiler, *How to Recover a Missing Child After a Parental Kidnap*, FLA. B.J., Mar. 1986, at 57.

39. See sources cited *supra* note 35.

40. See GARDNER, *supra* note 26, at —; J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); R. WEISS, GOING IT ALONE: THE FAMILY LIFE AND SOCIAL SITUATIONS OF THE SINGLE PARENT (1983); Peterson, Leigh & Day, *Family Stress Theory and the Impact of Divorce on Children*, 7 J. OF DIVORCE 1 (1984).

41. For a general discussion of ethics in the adversary system, see M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM (1975); G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30 (1978).

42. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-1 (1981).

zealously strives to capture the better position for his client in the realms of property division, child custody and support monies.⁴³

In this scenario, a lawyer's ethics are governed by the classic attorney-client relationship in the adversarial legal system.⁴⁴ The ethics of the adversarial process dictate uncompromised loyalty to the client.⁴⁵ The client's cause is to be pursued zealously within the bounds of the law.⁴⁶ Secrets and confidences are to be shared with

In discussing the lawyer's role in adversarial divorce litigation, Gardner makes the following observation:

C. Sopkin describes in dramatic terms how sordid and sadistic such litigation can be. He focuses particularly on the role of attorneys in intensifying and prolonging such conflicts. In his article "The Roughest Divorce Lawyers in Town" he describes a brand of attorney often referred to in the field as a "bomber." Sopkin quotes one such bomber (Raoul Lionel Felder, a New York City divorce attorney) as saying: "If it comes to a fight, it is the lawyer's function using all ethical, legal and moral means to bring his adversary to his knees as fast as possible. Naturally, within this framework the lawyer must go for the "soft spots." The kinds of antics that such lawyers utilize and promulgate are indeed hair-raising. One husband is advised to hire a gigolo to seduce his wife into a setting where a band of private detectives are engaged to serve as witnesses. Another husband is advised to get his English-born wife deported because she is not yet a citizen.

GARDNER, *supra* note 26, at 21 (citing C. Sopkin, *The Toughest Divorce Lawyers in Town*, New York (Nov. 4, 1974)).

43. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-1 (1981); see also *Schneider v. Richardson*, 411 A.2d 656 (Me. 1979).

44. See sources cited *supra* note 41.

45. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1.

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Id.; see also *id.* EC 5-21.

46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-1 (1981). *But see* *The Florida Bar v. Wendel*, 254 So. 2d 199 (Fla. 1971). The attorney in *Florida Bar* was charged with misconduct in handling a divorce matter. The attorney presented the Final Judgment of Divorce which indicated that the divorcing parties had agreed that custody of the child would go to the husband (attorney's client). Unbeknownst to the court, the attorney and his client had entered into a secret agreement with the wife by which she would have actual child custody. By having an official record awarding custody to the husband, the attorney was able to preserve his client's exemption from the U.S. Selective Service System draft.

The Florida Supreme Court found that:

The record before us shows Respondent to be a young, enthusiastic attorney with a good reputation in his community . . . but who in this isolated instance was overzealous in his attempt to serve his client. While we certainly do not condone his action, and we agree it was unethical for him to keep from the trial judge the intention to have the secret agreement executed, we do not feel he should be suspended or disbarred due to the extenuating circumstances. He received no pecuniary gain from his actions other than the usual divorce fee.

Id. at 202. The attorney received a public reprimand and "two years probation, during which time he [was] not to handle dissolution of marriage cases . . ." *Id.*

the opposing side only with the knowledge and consent of the client.⁴⁷ It is impermissible for a lawyer to advocate a generous, equitable settlement offer if the best interests of the client require seeking a less costly result, even though it would be less fair to the former spouse.⁴⁸

In sum, the adversarial divorce process sets up a system of winners and losers.⁴⁹ Victories count more than seeking peaceful coexistence where individuals rebuild their lives and still fulfill family obligations.

IV. FAMILY DISSOLUTION PROCESS: THE MEDIATION SETTING

A. *The Goals of Mediation*

New approaches must be developed which minimize the horrible consequences the adversarial process has on marital dissolution. Fortunately, recent changes in the practice of divorce law suggest that solutions are being found.⁵⁰ For couples facing divorce, mediation of the dissolution by a trained mediator is an increasingly

47. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, EC 4-1, EC 4-2 (1981).

48. The lawyer's perception of his role . . . affects how the client's interests are served. Dr. H. O'Gorman chronicles the distinctly different attitudes among attorneys, which he characterizes, in summary, as presenting those of either the advocate or counselor. The advocate sees his job as getting the "best deal" for the client, and is apt to perceive this as mainly an economic issue. One divorce lawyer's answer to O'Gorman's inquiry as to his role was that "in matrimonial cases clients are primarily interested in money. If you represent the wife, then your job is to get as much as possible for her. If you represent the husband pay out as little as possible."

The counselors, on the other hand, are more inclined to help the clients make decisions. [T]hey would attempt to induce the client to make what they thought was the "right" decision.

Chang, *Nonadversarial Representation: Rule 2.2 and Divorce Mediation*, in A STUDY OF BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION, 111, 119 (1984) (citing H. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 135 (1963)).

49. Gardner considers the psychological costs of adversarial battle:

Unfortunately, many such well-meaning couples, in spite of every attempt to avoid such a catastrophe, gradually descend into the same kind of psychologically devastating experience. An important contributing element to such unfortunate deterioration relates to the anger and rage engendered by their having involved themselves in protracted adversary proceedings. The system fosters sadism. The aim of simply winning often degenerates into one in which each side is bent on depleting the other of funds, producing psychological deterioration, or even destroying the other party. The result, however, is most often a Pyrrhic victory in which both sides lose, even though one may ostensibly be the winner.

GARDNER, *supra* note 26, at 25.

50. See generally AMERICAN BAR ASSOCIATION, *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* (1982) [hereinafter cited as ALTERNATIVE MEANS].

popular choice. Divorce mediation is less expensive, limits the amount of legal bloodshed, and better promotes an amicable split.⁵¹ Instead of frustrating the fulfillment of family obligations, mediation allows couples to craft their own solutions defining their own responsibilities.⁵²

Jay Folberg defines mediation as follows:

Divorce mediation is a non-therapeutic process by which the parties, together with the assistance of a neutral resource person or persons, attempt to systematically isolate points of agreement and disagreement, explore alternatives and consider compromises for the purpose of reaching a consensual settlement of issues relating to their divorce or separation. It is a process of conflict resolution and management which returns to the parties responsibilities for making their own decisions about their own lives.⁵³

The mediation process is designed to achieve the following goals: (1) help the parties learn to communicate, (2) help the parties learn to work together, (3) isolate issues to be decided, (4) help the parties cooperate for positive gains, and (5) handle the legal issues with minimum state intervention.⁵⁴ In sum, family mediation facilitates each person's compliance with his or her primary legal obligations upon divorce.

51. For a comprehensive discussion of the mediation process, see F. BIENEFELD, *CHILD CUSTODY MEDIATION* (1983); R. FISHER & W. UREY, *GETTING TO YES* (1981); J. FOLBERG & A. TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); C. MOORE, *THE MEDIATION PROCESS* (1986).

52. Some experts advocate an approach to mediation which emphasizes cooperation and fairness as necessary ingredients to lasting post-marital agreements and downplays adversarial techniques by:

[s]how[ing] ways in which a separating or divorcing couple can be encouraged to cooperate and design solutions based on needs, abilities, and aptitudes, rather than on fault and blame. Resolutions derived from strength will be more vital and longlasting than those arrived at through weakness and fault. Moreover, this method both addresses immediate needs and also helps the couple to look forward to separate and independent features through its practical orientation and commitment to maximizing opportunities for all parties in the years to come. It thereby enables the couple to continue their relationship as parents in as positive and respectful a way as possible.

The Carrot Instead of the Stick: A More Positive Approach to Resolving the Problems of Separation and Divorce, 11 Fam. L. Rep. (BNA) 3029, 3029 (Sept. 24, 1985) [hereinafter *The Carrot Instead of the Stick*].

53. Folberg, *Divorce Mediation—A Workable Alternative*, in *ALTERNATIVE MEANS*, *supra* note 50, at 13.

54. See Gaughan, *An Essay on the Ethics of Separation and Divorce Mediation*, in *ALTERNATIVE MEANS*, *supra* note 50, at 321-37.

B. *The Role of the Attorney in the Mediation Setting*

Individuals who use mediation generally seek to avoid the trauma of a nasty adversarial divorce and to obtain a fair settlement of post-marital obligations.⁵⁵ Accordingly, the goal of the family attorney in mediation should be to assist the client in achieving the most amicable divorce possible.⁵⁶ The disengagement process should be geared towards dissipating conflict and encouraging cooperation to determine the legal responsibilities each party owes the other.⁵⁷

In mediation, the attorney generally assumes the role of counselor.⁵⁸ She is an instrument of peace trained to avoid litigation.⁵⁹ As a result, the legal counselor influences and facilitates choice in the law office and not in court.⁶⁰ The attorney is also an advisor, trained to advise, plan, conciliate and negotiate the social goals of the individuals in the family unit.⁶¹ The attorney helps the client

55. See Bishop, *Mediation Standards: An Ethical Safety Net*, 4 MEDIATION Q. 5, 6 (1984); Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984).

56. *The Carrot Instead of the Stick*, *supra* note 52, at 3029.

57. See J. FOLBERG & A. TAYLOR, *supra* note 51, at 19-20.

Conflict is commonly viewed by the participants as a crisis. A crisis mentality lends itself to destructive processes because people will often rush to use anything they believe will relieve the conflict. Intervention techniques have been developed to help create constructive outcomes from crisis, which may result from intrapersonal conflicts. By controlling the perception of what is at stake in a conflict, a mediator can prevent destructive outcomes. This ability to defuse conflict, reframe the issues, and realistically analyze outcomes is an important skill in mediation

Id.; see also Martin v. Martin, 157 Fla. 456, 26 So. 2d 183 (1946).

58. One commentator believes that the counselor role is an essential function, especially when the mediation participants have children.

As [a] counselor I facilitate expression of feelings, concerns, and wishes. This promotes freer, more effective communication between spouses and between parents and children. I help parents to become aware of their attitudes, beliefs, behavior, and communication patterns that interfere with satisfying family relationships and personal growth. I encourage parents to acknowledge their own responsibility for the way things have been in the past, and help them focus on the present and future. I try to reduce family conflict and tension and to prevent further psychosocial damage to the children and family.

F. BIENENFELD, *supra* note 51, at 9-10. See generally GARDNER, *supra* note 26; *The Carrot Instead of the Stick*, *supra* note 52, at 3029-30.

59. F. BIENENFELD, *supra* note 51, at 5-6; J. HAYNES, DIVORCE MEDIATION 4-5 (1981).

60. See sources cited *supra* note 58.

61. [Lawyers] are by training problem solvers, who have experience in seeking compromise alternatives. They are skilled in exploring issues to isolate points of agreement and disagreement. Lawyers can predict the consequences of various choices, and inform the clients of various legal norms so that they can make informed and intelligent choices. By equalizing the information concerning the law, financial considera-

make informed and rational choices among alternative courses of conduct.⁶² The counselor advises about the legal, practical and social consequences of a given course of conduct.⁶³ The chosen course of conduct should be the most beneficial to the individual client as well as other interested parties (e.g., grandparents and children) and society.⁶⁴

In divorce mediation, lawyers must be able to work closely with other professionals.⁶⁵ Counselors, social workers, psychologists, and clergy can assist the parties in dealing with emotional problems.⁶⁶ By contrast, lawyers in the adversarial divorce process typically use emotions to fight for their clients.⁶⁷ However, only if the fear, anger and resentment can be dissipated can the parties better

tions, tax issues, custody created parameters, lawyers can help balance the power between clients. They could facilitate the client's assessment of choices which would lead to a more informed settlement agreement.

Chang, *supra* note 48, at 114.

62. *Id.*; see also Folberg, *supra* note 53, at 38.

The attorney's task is to help the mediation participants arrive at informed decisions concerning their post-marital relationships.

[T]he role of the professional is not to recommend certain decisions or to give advice. Rather, the professional structures the discussions so that all necessary topics are covered, gives information about the legal requirements and practical consequences of each of the options available, and facilitates a thorough inquiry into the advantages and disadvantages of each possible choice.

The Carrot Instead of the Stick, *supra* note 52, at 3030.

63. See Bishop, *supra* note 55, at 8.

64. See *The Carrot Instead of the Stick*, *supra* note 52, at 3030.

The people who will have to live with the outcome of these choices are the ones who make the decisions. Thus, the professional in this context is more of a teacher than an advisor: providing information, explaining the legal questions and requirements, helping the couple to explore the impact of each possible solution on all members of the family, and, finally, allowing the family to determine what is in its best interests.

Id.

65. This is considered to be an obligation of attorneys generally. The comment to Rule 2.1 of the *Model Rules of Professional Conduct* articulates the general duty as follows:

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 comment (1983).

66. See Brown, *The Emotional Context of Divorce: Implications for Mediation*, in *ALTERNATIVE MEANS*, *supra* note 50, at 43. "[T]he mediator is the person in a position to spot problem areas and can refer the family members to other appropriate sources of help. He or she can also draw on the expertise of other professionals for the clients' benefits." *Id.* at 48.

67. See sources cited *supra* note 42.

come to terms with the drastic changes in their lifestyles.⁶⁸ If the emotional problems can be resolved in the counselor's office where supportive help is available, they can be kept out of the legal proceedings.⁶⁹

A middle ground is thereby created between no legal representation, when the parties proceed pro se, and adversarial representation, when the parties hire attorneys to wage war. Using mediation, the lawyer can facilitate a positive domestic reorganization which both recognizes the need to protect the individual's family interests and promotes the fulfillment of family obligations.⁷⁰

C. *Ethical Dilemmas in the Mediation Setting*

The lawyer engaged in divorce mediation must resolve a number of ethical dilemmas.⁷¹ For instance, how does a mediating lawyer promote each participant's interests and yet facilitate the participants' family legal obligations? Most of these ethical dilemmas stem from the adversarial ethics of the ABA *Code of Professional Responsibility*.⁷² The organized bars, expressing uneasiness with the lawyer who "represents" both partners in mediating a divorce settlement, have articulated a variety of responses to the ethical problems of mediation.⁷³ Responses by scholars such as Laurence

68. See Folberg, *supra* note 53, at 39.

69. See generally GARDNER, *supra* note 26; *The Carrot Instead of the Stick*, *supra* note 52.

70. See *supra* text accompanying notes 3-12.

71. The following materials explore the ethical dilemmas faced by the lawyer-mediator. J. FOLBERG & A. TAYLOR *supra* note 51, at 251-89; Cornblatt, *Legal Essay: Matrimonial Mediation*, 23 J. FAM. L. 99 (1984-85); Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219 (1982); Hyde, *Child Custody In Divorce*, 35 JUV. & FAM. CT. J., Spring 1984, at 57. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982).

72. These dilemmas include, among others, conflicts of interest, unauthorized practice of law, full conflict disclosure with knowledgeable client consent, loyalty, confidentiality, solicitation, and the appearance of impropriety.

73. Several commentators have chronicled the development of state and local bar opinions on the appropriateness of lawyers engaging in mediation. See, e.g., Crouch, *supra* note 71; Hyde, *supra* note 71; Silberman, *supra* note 71. The bar opinions depict a broad range of ethical reflection. The thinking of bar ethics committees has been summarized as follows:

The message that emerges from the ethics opinion in jurisdictions that allow attorneys to serve as mediators or advise participants before a mediated agreement is finalized is that the participants must be made aware of the attorney's limited role and the risks of mediation. The mediation participants must explicitly understand that a mediating attorney cannot advance either party's interest over the interest of the other and can give only nonpartisan legal advice to each party in the presence of the other. It must be explained that the attorney's role is dependent upon full disclosure

M. Hyde, Jr., Edward E. Crouch and Linda J. Silberman provide an insightful background to the dilemmas of lawyering in the family setting.

As Silberman points out, "[a] lawyer who wishes to undertake divorce mediation as part of his legal practice faces the prohibition of Canon 5, preventing representation of conflicting or potentially differing interests."⁷⁴ The conflict can occur when the lawyer must advocate a position favoring one marital partner when he ought to oppose the very same position on behalf of the other partner. This classic conflict of interest problem is exacerbated by the multiple roles the lawyer-mediator can play. As mediator, the lawyer is the neutral third party who moderates the process.⁷⁵ The lawyer is also a legal advisor who identifies the legal issues, articulates legal rules and judicial precedent and offers professional legal judgment.⁷⁶ He can also be a draftsman, capturing the parties' agreement in legal language that the court will enforce.⁷⁷ Finally, the lawyer can serve as a litigation representative, presenting the uncontested divorce petition in court on behalf of one partner when the other partner agrees to forego legal representation.⁷⁸

With this myriad of potential roles, one questions whom or what the lawyer represents in the mediation process.⁷⁹ Certainly repre-

of all relevant facts by the participants and that in a divorce case without full disclosure the settlement may be set aside by the court upon the insistence of either party. The participants must be urged to obtain independent review of the agreement and must be aware from the outset that the attorney may not represent any or all of them in any proceeding relating to the conflict or in any subsequent capacity.

J. FOLBERG & A. TAYLOR, *supra* note 51, at 252-53.

74. Silberman, *supra* note 71, at 109.

75. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983).

76. See *id.* Rule 2.1.

77. The lawyer, as a neutral mediator, must explain to both parties the legal ramifications of the agreement he has drafted and must "[serve] as an amanuensis, or notary in the European sense, who is educated enough to 'put into legal language' the parties' common intentions once their thoughts have been straightened out and agreement reached in mutual discussion." Crouch, *supra* note 71, at 229-30.

78. In order for the lawyer to serve in the capacity of litigation representative, both partners must give informed consent after successful mediation of an agreement. If mediation fails, the lawyer cannot represent either party in subsequent, "real," adversarial litigation. See Crouch, *supra* note 71, at 230-31.

79. The concept of representation is difficult to define because its meaning fluctuates with the changing nature of the attorney-client relationship.

Dual representation contemplates, in its most innocent form, representation by one lawyer to the court of the one desire that warring parties can unite in: their desire for a divorce that incorporates the written agreement they have reached. *Mediation*, as in labor-management conflicts, contemplates each side's presenting its arguments to the other in the presence of a neutral third party who aims at a resolution of the issues that will represent the least detriment to each party.

Id. at 224.

sentation could include all of the tasks previously mentioned.⁸⁰ The lawyer-mediator could represent the divorce situation either between the parties or in court as contemplated by Rule 2.2 of the *Model Rules of Professional Conduct*.⁸¹ Similarly, she could represent "the family" as "it" attempts to resolve the divorce dispute. Crouch, however, finds the family "an abstraction incapable of being a client."⁸² Moreover, the interests of the individual family members, including the children, usually diverge.⁸³ The lawyer could represent the interests of both partners or of just one partner, provided that the other partner agrees to be unrepresented. Some bar ethics committees, however, have declared that the lawyer mediator represents neither party, with each disavowing legal representation.⁸⁴

One way to eliminate the conflict of interest problem is to have each partner consult independent counsel, especially before a final agreement is signed.⁸⁵ This approach involves two or three lawyers

80. See Silberman, *supra* note 71, at 122.

81. RULE 2.2 Intermediary

(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 clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

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

(c) A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in paragraph (a) is 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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983).

82. Crouch, *supra* note 71, at 227.

83. *Id.* at 227, 229.

84. See Silberman, *supra* note 71, at 109-23 (discussion of ethics opinions issued in Boston, New York, and Portland, Or.); see also Crouch, *supra* note 71, at 225-27; Hyde, *supra* note 71, at 65-66.

85. See Crouch, *supra* note 71, at 234.

in the process, resulting in higher costs and the increased possibility of the mediated dispute turning into an adversarial conflict. This result may be unavoidable, however, because there may be simply too many hidden and unresolvable conflicts for one lawyer to comply with the applicable professional ethics requirements.⁸⁶

If the mediator is a non-lawyer, concerns about the unauthorized practice of law arise.⁸⁷ The non-lawyer usually is a social worker or mental health professional.⁸⁸ The best results could be achieved by using a team approach combining a mental health professional (an individual skilled in personal counselling) and a lawyer.⁸⁹ However, this approach could involve the attorney in aiding the unauthorized practice of law, which includes improperly practicing law with a non-lawyer, splitting fees with a non-lawyer, and working for clients of a lay employer at a mediation center.⁹⁰

The mediation center, clinic or association which promotes divorce mediation creates unique ethical problems for the lawyer.⁹¹ In the structured mediation model designed by O.J. Coogler, the mediation center selects an attorney from a panel of qualified lawyers to answer all legal questions and to formalize the agreement.⁹²

86. *Id.* at 235-37; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-105 (1981) (an attorney may not accept or continue employment if the interests of another client may impair his independent professional judgment); MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983) (an attorney may act as an intermediary between clients under certain conditions); Silberman, *supra* note 71, at 226. Crouch succinctly states the dilemma the lawyer-mediator faces as follows:

Does the representation that is disavowed (or shared, depending on how you look at it) include advice that benefits one party to the detriment of the other? Presumably so. The question that naturally arises is what happens when the attorney-mediator sees one party being "disadvantaged" in negotiations. If the mediatory cannot advise one party to break off mediation without hurting the interests of the one who is gaining by mediation, then a real conflict of interests problem seems to arise. Obviously the definitions of benefit and detriment in this context are infinitely debatable and presumably framed by the preliminary assumption that a fair, compromised and conflict-avoiding settlement is the desire of both.

Crouch, *supra* note 71, at 226.

87. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3, DR 3-101 (1981).

88. *See* Silberman, *supra* note 71, at 123-29.

89. This is viewed as a preferred method of mediation because the legal complexities and the emotional turmoil of marital dissolution can be managed as interrelated problems. *See* Hyde, *supra* note 71, at 67-68; Silberman, *supra* note 71, at 129-34; *see also* Cornblatt, *supra* note 71, at 105-06.

90. *See* J. FOLBERG & A. TAYLOR, *supra* note 51, at 255-57; Silberman, *supra* note 71, at 131.

91. *See* Silberman, *supra* note 71, at 134-45.

92. O. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* (1978).

There are obvious problems concerning the unauthorized practice of law in the Coogler mediation center model. The conflict of interest problems are even more difficult to solve. Does the center's interest in promoting successful mediation conflict with the client's interests, which may be better served by resort to adversarial litigation? Who has control of the mediation process and therefore directly or indirectly influences the lawyer's professional legal judgment? Since the attorney-advisor is chosen by the mediation center, do the parties have an opportunity to give knowing consent to this unique form of attorney-client relationship? Is the lawyer's participation in the mediation center an impermissible solicitation of legal business, since the lawyers render legal judgments and then share in the fees charged for that service?⁹³ Additionally, is providing mediation services through a center or a mediation association different from providing legal services as a form of political or associational expression as permitted by *The Model Code of Professional Responsibility*?⁹⁴

There is still the ultimate problem of sufficiently protecting each partner's rights, even if they avail themselves of independent counsel. The discussion becomes sterile if we say that full disclosure and consent of both parties is sufficient to resolve the ethical dilemma.⁹⁵ Crouch questions whether any client would ever have enough sophistication to know what rights and alternatives really have been given up in consenting to any of the mediation processes.⁹⁶ Intelligent consent is made even more difficult by problems inherent in the mediation process, such as overreaching by the mediator, imbalance of negotiating power between the parties, and reluctance to abandon a failing mediation because of the heavy investments of time and money.⁹⁷

Certain confidentiality and jurisdictional problems in the mediation process must also be addressed. Confidentiality in the mediation process is essential to preserve the open nature of the pro-

93. Silberman, *supra* note 71, at 140-41.

94. *Id.*; see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D) (1981). Folberg and Taylor also recognize these problems but suggest that they "can generally be avoided with careful structuring of the practice and sensitivity to the legitimate concerns of the bar . . ." J. FOLBERG & A. TAYLOR, *supra* note 51, at 255.

95. See Crouch, *The Dark Side of Mediation: Still Unexplored*, in ALTERNATIVE MEANS, *supra* note 50, at 349-50.

96. See Crouch, *supra* note 71, at 237-39.

97. For a discussion of the inherent problems of divorce mediation, see Crouch, *supra* note 71, at 240-45; Hyde, *supra* note 71, at 63; Silberman, *supra* note 71, at 111-14.

cess.⁹⁸ Furthermore, as mediation practice evolves, individual jurisdictions will be pressed to regulate the mediators. Licensing, certification, competency evaluations, continuing education requirements, and disciplinary procedures must be developed to protect the consumer of mediation services.⁹⁹ A full discussion of these issues is beyond the scope of this article but the issues nevertheless deserve to be highlighted here.

V. THE NEW MEDIATION STANDARDS

A. *The Collective Search for Uniform Standards*

Dozens of professional mediation organizations and individuals involved in the mediation process have come together to draft standards of conduct for mediators, both lawyers and non-lawyers.¹⁰⁰ In May, 1984, the Association of Family and Conciliation Courts (AFCC) composed the *Model Standards of Practice for Family and Divorce Mediation*.¹⁰¹ In addition, the American Bar Association (ABA) has approved the *Standards of Practice for Lawyer Mediators in Family Disputes*.¹⁰²

In general, mediation standards can be adopted by agencies with regulatory authority over mediation. Mediation standards may also "become accepted as normative behavior for mediators by judicial or administrative bodies called upon to evaluate claims or requests concerning specific mediatory behaviors."¹⁰³ The standards are significant because they promote dialogue on acceptable mediator conduct, and they educate the public on the mediation process.¹⁰⁴ Thomas Bishop compares mediation standards to canons of ethics

98. For an analysis of mediation confidentiality issues, including mediation evidentiary privilege of nondisclosure, confidentiality contracted by the parties, judicially mandated mediator testimony, and the work-product doctrine, see J. FOLBERG & A. TAYLOR, *supra* note 51, at 263-80.

99. See generally, J. FOLBERG & A. TAYLOR, *supra* note 51, at 260-63; Carnevale & Sinicropi, *Professionalization: Selected Ethical Issues in Dispute Resolution*, 9 JUST. SYS. J. 228, 236 (1984); Hyde, *supra* note 71, at 68.

100. For a discussion of the drafting process and a listing of organizations and individuals participating in the process, see AFCC STANDARDS, *supra* note 1, Introduction; Bishop, *supra* note 55, at 6; Loeb, *Introduction to the Standards of Practice for Family Mediators*, 17 FAM. L.Q. 5 (1984).

101. See AFCC STANDARDS, *supra* note 1.

102. See ABA STANDARDS, *supra* note 1.

103. Bishop, *supra* note 1, at 4; see also Bishop, *supra* note 55 at —; Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation & Comments*, 17 FAM. L.Q. 461 (1984).

104. Bishop, *supra* note 1; see also AFCC STANDARDS, *supra* note 1.

because they are not rules of conduct in the formal sense. He states that:

As such, they are statements of axiomatic norms expressing in general terms the standards of professional conduct expected of mediators in their relationship to the public, to mediation participants, and to other professionals, such as mediators, lawyers, and mental health care givers, who may have involvement with mediating parties.¹⁰⁵

The following discussion describes the general concepts upon which the mediation standards are based. A more detailed discussion of particular standards will be presented in Section VI.

Each set of standards begins with a preamble and an introduction presenting the concept of mediation,¹⁰⁶ the goals of the mediation process¹⁰⁷ and the role of each participant.¹⁰⁸ First, it is incumbent upon the mediator to explain the nature of mediation, and describe how mediation differs from other family dispute resolution mechanisms.¹⁰⁹ Mediation ground rules are established for, among other purposes, use of outside experts,¹¹⁰ confidentiality,¹¹¹

105. Bishop, *supra* note 1, at 4. The *Code of Professional Conduct for Mediators*, promulgated by the Center for Dispute Resolution, emphasizes the value of these standards to practicing mediators who seek guidelines for their behavior. It states:

This code is not designed to override or supersede any laws or government regulations which prescribe responsibilities of mediators and others in the helping professions. It is a personal code relating to the conduct of the individual mediator and is intended to establish principles applicable to all professional mediators employed by private, city, state, or federal agencies.

CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS Preamble (Center for Dispute Resolution 1982), *reprinted in* J. FOLBERG & A. TAYLOR, *supra* note 51, at 349.

106. "Mediation is a family centered conflict resolution process in which an impartial third party assists the participants to negotiate a consensual and informed settlement." AFCC STANDARDS, *supra* note 1, Preamble.

"For the purposes of these standards, family mediation is defined as a process in which lawyer helps family members resolve their disputes in an informative and consensual manner." ABA STANDARDS, *supra* note 1, Preamble. *See generally* Bishop, *supra* note 55.

107. *See* AFCC STANDARDS, *supra* note 1, Preamble; ABA STANDARDS, *supra* note 1, Preamble.

108. *See* AFCC STANDARDS, *supra* note 1, Preamble; ABA STANDARDS, *supra* note 1, Preamble.

109. *See* AFCC STANDARDS, *supra* note 1, Preamble, Standard I(A); ABA STANDARDS, *supra* note 1, Standard I(A)(1).

110. *See* AFCC STANDARDS, *supra* note 1, Standard VII(A) (discussing the need to obtain outside expert information and advice when necessary to reach agreement), Standard VII(C) (discussing the need for independent legal counsel); ABA STANDARDS, *supra* note 1, Standard VI (noting the mediator's duty to advise mediation participants to seek independent legal review of all agreements).

111. "The mediator shall not voluntarily disclose any information obtained through the mediation process without the prior consent of both participants." ABA STANDARDS, *supra*

individual caucuses,¹¹² and disclosure of information necessary for the complete development of all issues.¹¹³ Second, it is necessary to establish an understanding of the expectations and roles of all the participants.¹¹⁴ The mediator should disclose her individual biases,¹¹⁵ expose potential conflicts of interest,¹¹⁶ disclose her training and experience,¹¹⁷ and describe in detail her role as the impartial third party.¹¹⁸ At this juncture, the mediator must make an assessment of the participants' ability (emotional and intellectual) to engage fruitfully in the divorce mediation process.¹¹⁹ This is a

note 1, Standard II; *see also* AFCC STANDARDS, *supra* note 1, Standard IV. Both sets of standards require the mediator to inform the participants that a mediator may be required by law to disclose information. *See infra* text accompanying notes 133-38.

112. *See* AFCC STANDARDS, *supra* note 1, Standard IV(C); ABA STANDARDS, *supra* note 1, Standard I(A)(7). Generally, both parties must consent to individual caucuses with the mediator.

113. *See* AFCC STANDARDS, *supra* note 1, Standard I(B); ABA STANDARDS, *supra* note 1, Standard I(A)(2). "The mediator shall assure that there is full financial disclosure, evaluation, and development of relevant factual information in the mediation process, such as each would reasonably receive in the normal discovery process." ABA STANDARDS, *supra* note 1, Standard IV(A).

114. Understanding *how* the "mediation game" is played and what *role* each player has is crucial to an individual's ability to participate in the process.

Bishop advises:

[T]he mediator should define himself or herself as part of this process. The orientation is also a time of assessment. The mediator has a responsibility to determine whether a couple is suited for the process, or whether another form of conflict resolution is more appropriate. This is also an opportunity for the mediator to make a self-assessment. Just as there are patients who are a poor match for the counselor or therapist or potential poor matches between clients and lawyers, there may be couples or individuals with interests, personalities, or disputes inappropriate for the mediator. All this should be explored and discussed before any agreement is made.

Bishop, *supra* note 55, at 8.

115. AFCC STANDARDS, *supra* note 1, Standard I(D)(1); ABA STANDARDS, *supra* note 1, Standard III(B).

116. *See, e.g.*, AFCC STANDARDS, *supra* note 1, Standard II(B)(1) (prior relationships), Standard II(B)(2) (relationship to participants), Standard II(B)(3) (conflicts of interest). In particular, ABA STANDARDS, *supra* note 1, Standard III(A), states that "The mediator shall not represent either party during or after the mediation process in any legal matters. In the event the mediator has represented one of the participants beforehand, the mediator shall not undertake the mediation;" *see also id.* Standard I(A)(6) ("The mediator shall inform the participants of the need to employ independent legal counsel for advice throughout the mediation process . . .").

117. AFCC STANDARDS, *supra* note 1, Standard I(D)(2). There is no equivalent position in the ABA Standards.

118. *See* AFCC STANDARDS, *supra* note 1, Standard II(A); ABA STANDARDS, *supra* note 1, Standard III(D). For a more detailed analysis of the concept of impartiality, *see infra* text accompanying notes 201-08.

119. The mediator shall assure that each participant has had an opportunity to under-

duty which continues throughout the process.¹²⁰ If there is doubt, the parties should be advised to seek other methods of dispute resolution.¹²¹ The participants must understand that they enter into mediation in order to reach their own informed resolution of the issues.¹²² This will require trust and honesty, and will involve risks not assumed in the adversarial process.¹²³ Finally, recognizing the benefits to be gained by mediation, "[t]he mediator and the participants shall agree upon the duties and responsibilities that each is accepting in the mediation process. This may be by a written or verbal agreement."¹²⁴

There are general provisions which should aid the public in gauging commonly accepted mediation practices.¹²⁵ The costs and fees for mediation and the responsibility for payment should be

stand the implications and ramifications of available options The mediator shall explore whether the participants are capable of participating in informed negotiations. The mediator may postpone mediation and refer the parties to appropriate resources if necessary.

AFCC STANDARDS, *supra* note 1, Standard VIII.

The mediator shall assess the ability and willingness of the participants to mediate. The mediator has a continuing duty to assess his or her own ability and willingness to undertake mediation with the particular participants and the issues to be mediated. The mediator shall not continue and shall terminate the process, if in his or her judgment, one of the parties is not able or willing to participate in good faith.

ABA STANDARDS, *supra* note 1, Standard I(A)(4).

120. ABA STANDARDS, *supra* note 1, Standard I(A)(4).

121. *Id.*

122. AFCC STANDARDS, *supra* note 1, Standard VI(A) provides that "[t]he primary responsibility for the resolution of a dispute rests with the participants" This requirement is implicit in ABA STANDARDS, *supra* note 1, Standard IV, which states that "[t]he mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge." Bishop's explanation of the *ABA Standards* emphasizes the notion of self-determination:

Mediation is defined and promoted as a process of decision-making in which the participants negotiate with the assistance of a qualified and impartial mediator. Their participation is consensual; they make decisions based on complete information that each fully understands. Also, mediation is intended to be a private process in which the participants have the authority as well as the responsibility to make decisions that they intend to be durable.

Bishop, *supra* note 55, at 9.

123. See AFCC STANDARDS, *supra* note 1, Standard VIII. ABA STANDARDS, *supra* note 1, Standard II(C) provides that "[a]t [the] orientation session, the mediator must discuss with the participants the potential outcome of their disclosure of facts to each other during the mediation process."

124. AFCC STANDARDS, *supra* note 1, Standard I(F).

125. Bishop, *supra* note 55, at 7.

discussed early in the process.¹²⁶ A reasonable fee¹²⁷ should be set in advance, because “[i]t is inappropriate for a mediator to charge a contingency fee or to base the fee on the outcome of the mediation process.”¹²⁸ Advertisement of mediation services must not be false or misleading.¹²⁹ Mediators should form cooperative relationships with other professionals whose services the participants may need.¹³⁰ Mediators should also work to promote the development of mediation.¹³¹ To further protect the public, mediators should acquire advanced training and participate in continuing education.¹³²

The issue of confidentiality is always addressed with a recognition that each jurisdiction will have rules of privilege governing the non-disclosure of confidential information. In recognizing that the integrity of this private process should be protected, three disclosure situations are emphasized.¹³³ First, the participants must voluntarily and individually disclose to each other personal information normally protected by the attorney-client privilege.¹³⁴ “The mediator shall discuss with the participants the potential consequences of their disclosure of facts to each other during the mediation process.”¹³⁵ Second, the mediator should not disclose information to third parties without the consent of the participants.¹³⁶ Third, a mediator’s testimony may be compelled by the court.¹³⁷ The individual participant may also compel mediator testimony, prior agreements to the contrary notwithstanding.¹³⁸

126. See AFCC STANDARDS, *supra* note 1, Standard III; ABA STANDARDS, *supra* note 1, Standard I(A)(5).

127. AFCC STANDARDS, *supra* note 1, Standard III(B); defines a reasonable fee as follows: “When setting fees, the mediator shall ensure that they are explicit, fair, reasonable and commensurate with the service to be performed. Unearned fees should be promptly returned to the clients.”

128. ABA STANDARDS, *supra* note 1, Standard I(A)(5); see also AFCC STANDARDS, *supra* note 1, Standard III(C).

129. See AFCC STANDARDS, *supra* note 1, Standard XI.

130. See *id.* Standard XII.

131. See *id.* Standard XIII.

132. See *id.* Standard X.

133. See *supra* note 98.

134. See AFCC STANDARDS, *supra* note 1, Standard I(B); ABA STANDARDS, *supra* note 1, Standard I(A)(2); see also J. FOLBERG & A. TAYLOR, *supra* note 51, at 264.

135. AFCC STANDARDS, *supra* note 1, Standard IV(A)(3); see also ABA STANDARDS, *supra* note 1, Standard II(C).

136. See AFCC STANDARDS, *supra* note 1, Standard IV(B)(1); ABA STANDARDS, *supra* note 1, Standard II(A).

137. See AFCC STANDARDS, *supra* note 1, Standard IV(A)(2); ABA STANDARDS, *supra* note 1, Standards II(B), III(F).

138. Most private mediators require their clients to sign an agreement expressly providing that the mediation sessions will be confidential and that the mediator will not be

The principle of self-determination by the participants is fundamental to the process. "The primary responsibility for the resolution of a dispute rests with the participants. The mediator's obligation is to assist the disputants in reaching an informed and voluntary settlement. At no time, shall a mediator coerce a participant into agreement or make a substantive decision for any participant."¹³⁹

The principles of impartiality¹⁴⁰ and neutrality¹⁴¹ can be distinguished by focusing on the mediator's conduct and his relationship with the participants. An impartial mediator directs the process but does not advocate a particular solution or favor one participant over another.¹⁴² A neutral mediator will consider his personal background and prior relationships with a participant.¹⁴³ Here the focus is on eliminating actual or perceived conflicts of interest.¹⁴⁴

The standards include rules to encourage the use of outside experts to provide legal, financial or psychological information and advice.¹⁴⁵ Finally, the standards suggest conduct for concluding the mediation process.¹⁴⁶ The available options depend on the mediator's assessment of the fairness and reasonableness of the participants' agreement.¹⁴⁷

called to testify about what is said or to give any professional opinion related to the case in court. A court would not necessarily be bound to honor this private contract, though it may be persuaded by public policy considerations to do so.

J. FOLBERG & A. TAYLOR, *supra* note 51, at 271.

139. AFCC STANDARDS, *supra* note 1, Standard VI(A). The ABA Standards do not have a similar explicit standard, but do imply the doctrine of self-determination in the Preamble, stating that it is important that participants "reach decisions voluntarily; that their decisions be based on sufficient factual data; and that each participant understands the information upon which decisions are reached." ABA STANDARDS, *supra* note 1, Preamble. In addition, the ABA Standards forbid lawyer-mediators to represent either party individually in any legal matters during or following the mediation. ABA STANDARDS, *supra* note 1, Standard III(A). Furthermore, "[t]he mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement." ABA STANDARDS, *supra* note 1, Standard VI.

140. See AFCC STANDARDS, *supra* note 1, Standard II(A); ABA STANDARDS, *supra* note 1, Standard III.

141. See ABA STANDARDS, *supra* note 1, Standard II(B).

142. AFCC STANDARDS, *supra* note 1, Standard II(A).

143. *Id.* Standard II(B).

144. See *id.* Standard I(D)(1).

145. See *id.* Standard VII; ABA STANDARDS, *supra* note 1, Standard VI.

146. See AFCC STANDARDS, *supra* note 1, Standard IX; ABA STANDARDS, *supra* note 1, Standard V.

147. See AFCC STANDARDS, *supra* note 1, Standard IX(B)(2); ABA STANDARDS, *supra* note 1, Standard V(B).

B. *Standards as Promulgated by the State of Florida—An Illustrative Response*

This section will consider how states are currently wrestling with the problem of defining appropriate ethical standards for lawyers engaged in divorce mediation.¹⁴⁸ The primary focus will be on the State of Florida, which is illustrative of what other states have done in this area. Some state bars have issued ethical opinions that permit divorce mediation in varying degrees and articulate ethical guidelines.¹⁴⁹ Other states have set ethical standards for lawyer-mediators through judicial opinions in cases reviewing the appropriateness of attorneys' mediation of family dissolutions.¹⁵⁰

1. General Parameters

Given the emerging body of professional opinions, judicial case law, and literature, Florida's response to divorce mediation illustrates a trend in mediation ethical standards. As of January 1, 1987, the new *Rules and Regulations of the Florida Bar*, a modified version of the *ABA Model Rules of Professional Conduct*, will be in effect.¹⁵¹ Of specific interest is Rule 4-2.2, which sets ethical standards for the lawyer who acts as an intermediary.¹⁵² Also, the Florida Bar has adopted Formal Advisory Opinion 86-8 which sets out specific guidelines for lawyers engaged in divorce mediation.¹⁵³

Any lawyer seeking to engage in mediation between clients is guided by the mandates of Rule 4-2.2 of the *Rules Regulating the Florida Bar*.¹⁵⁴ Rule 4-2.2 imposes three conditions with which the

148. See generally *supra* note 48.

149. Ethical opinions are responses to written inquiries by lawyers about ethical conduct. The opinions may be promulgated by ethics committees at both the state and national levels. While these opinions are merely advisory in nature, it is quite unlikely that a lawyer would be disciplined for relying on an ethical opinion. *Id.* at 111 n.4.

150. See, e.g., *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); *Blum v. Blum*, 59 Md. App. 584, 477 A.2d 289 (1984); *Goldberg v. Goldberg*, 691 S.W.2d 312 (Mo. Ct. App. 1985); *Levine v. Levine*, 56 N.Y.2d 42, 436 N.E.2d 476, 451 N.Y.S.2d 26 (1982); *Christian v. Christian*, 42 N.Y.2d 63, 365 N.E.2d 849, 396 N.Y.S.2d 817 (1977); *Barbour v. Barbour*, 146 Vt. 506, 505 A.2d 1217 (1986).

151. On July 7, 1986, the Florida Supreme Court passed the Rules Regulating the Florida Bar, to become effective on January 1, 1987, and supercede all other rules of professional conduct in effect in Florida. See *Rules Regulating the Florida Bar*, 494 So.2d 977 (Fla. 1986) (*per curiam*); *RULES REGULATING THE FLORIDA BAR* (West Supp. 1987).

152. *RULES REGULATING THE FLORIDA BAR* Rule 4-2.2 (West Supp. 1987).

153. See Florida Bar Comm. on Professional Ethics, Advisory Op. 86-8 (1986); see also Fla. B. News, Oct. 15, 1986, at 2, col. 1.

154. *RULES REGULATING THE FLORIDA BAR* Rule 4-2.2 (West Supp. 1987) (governing circumstances under which an attorney may act as an intermediary).

attorney must comply. The attorney must first engage in active, educational consultation with the parties.¹⁵⁵ The clients must also consent to this method of professional service after being informed of the nature of the service and the risks involved.¹⁵⁶ Second, the attorney must assess the clients' capacity to participate in mediation.¹⁵⁷ In addition, the attorney must determine whether the particular subject matter is one in which mediation is appropriate and whether each party will be able to protect his respective interests.¹⁵⁸ Third, the attorney must conduct a self-assessment to insure that he will remain impartial and still fulfill other ethical duties.¹⁵⁹ To be impartial, the attorney must not favor one party over

155. Rule 4-2.2 provides that

(a) A lawyer may act as an 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.

. . .

(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 . . .

Id. Rule 4-2.2(a)(1), (b).

156. *Id.* The comment to Rule 4-2.2 requires that "[i]n acting as intermediary between clients, the lawyer is required to consult with the clients on implications of doing so and to proceed only upon consent based on such a consultation." *Id.* Rule 4-2.2 comment.

157. The Florida Rules also require that:

[(a)](2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful . . .

Id. Rule 4-2.2(a)(2).

158. *Id.* The comment following Rule 4-2.2 states:

The appropriateness of intermediation can depend on its form. Forms 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 clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Id. Rule 4-2.2 comment.

159. Rule 4-2.2 requires that "[t]he 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." *Id.* Rule 4-2.2(a)(3).

The comments after Rule 4-2.2 suggest that other responsibilities might include client-lawyer confidentiality and the attorney-client privilege. Specifically, the comments state:

In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the repre-

the other.¹⁶⁰ These three conditions must be maintained throughout the mediation process or the attorney must withdraw and may not subsequently represent any of the clients in that matter.¹⁶¹

2. Specific Guidelines

The guidance of Rule 4-2.2 of the *Rules Regulating the Florida Bar*, however, is not sufficient for the attorney seeking to engage in divorce mediation. The Rule is designed for situations where the lawyer continues to represent more than one client, focusing on a traditional representational relationship.¹⁶² In Florida, the lawyer historically has been prohibited from representing both parties in a divorce.¹⁶³ Proposed Advisory Opinion 86-8, adopted in 1986, was promulgated to remedy the situation and provide guidance for lawyers providing divorce mediation services.¹⁶⁴

The guidelines in Proposed Advisory Opinion 86-8 can best be discussed by considering the following four broad concerns: the mediation process, the mediation participants, the mediator and outside counsel.¹⁶⁵

sentation. . . . Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Id. Rule 4-2.2 comment.

160. *See id.* Rule 4-2.2 comment.

161. *Id.* Rule 4-2.2(c).

162. *See* RULES REGULATING THE FLORIDA BAR Rule 4-2.2 comment (West Supp. 1987).

163. *See* Florida Bar Comm. on Professional Ethics, Advisory Op. 71-45 (1971), reprinted in 1 PROFESSIONAL ETHICS OF THE FLORIDA BAR 418-24 (1982).

164. *See* Florida Bar Comm. on Professional Ethics, Proposed Advisory Op. 86-8 (1986), reprinted in 1 Nat'l Rep. on Legal Ethics and Professional Responsibility (University Publications of America) Florida Opinions 5-7 (1987) [hereinafter Advisory Op. 86-8]. The assumption behind the opinion is that the lawyer does not serve in a representative capacity and that the mediation participants must seek traditional legal advice, protection, and guidance from independent counsel. Proposed Advisory Opinion 86-8 was a response to an inquiry by an attorney with a master's degree in counseling psychology who proposed to offer divorce mediation services.

165. These are broad categories that express the general concerns of the bar. Some of the eight guidelines could be classified in multiple categories, but are presented under the one to which they are most nearly related. Many of the concerns expressed in Proposed Advisory Opinion 86-8 are also implicit in Rule 4-2.2 of the *Rules Regulating the Florida Bar*.

a. The Mediation Process

The first task of the mediator is to "conduct an orientation session to explain the mediation process, to agree with the parties on scope and procedures, and to assess the appropriateness of mediation for the parties."¹⁶⁶ It is at this time that the lawyer should state the risks involved in proceeding with divorce mediation.¹⁶⁷ Included in this statement should be a declaration that: (1) the mediator represents neither participant,¹⁶⁸ (2) that the attorney-client privilege may not apply,¹⁶⁹ and (3) that the participants should consult independent counsel.¹⁷⁰ Because the lawyer represents neither party, he "shall not communicate with one mediation party alone except with the prior consent of the other party."¹⁷¹ In addition, the mediator should discuss the payment of fees with both participants. These fees cannot be assessed on a contingency basis.¹⁷²

b. The Participants

The guidelines are not explicitly addressed to the participants, but they do imply that the participants have responsibilities. The participants must be willing and able to engage in the mediation process in good faith.¹⁷³ The lawyer "should suspend or terminate the mediation if it becomes apparent that one of the parties is not participating in good faith."¹⁷⁴ However, the critical question left unanswered in Proposed Advisory Opinion 86-8 is how one measures good faith.

166. Advisory Op. 86-8, *supra* note 164.

167. *Id.*

168. "He must explain the limitations of his role as mediator, specifically that he does not represent either of the parties and will not be able to represent either of them in obtaining the dissolution of marriage or in any matter related to the mediation." *Id.*

169. "The mediator should explain that because he is not representing the parties, the attorney-client privilege may not apply to communications between the parties and himself." *Id.*

170. "He should explain the risks of proceeding without independent counsel and advise the parties to consult independent counsel during the course of the mediation and before signing any settlement agreement that he might prepare for them." *Id.*

171. *Id.*

172. "The lawyer shall explain the fees for mediation. It is inappropriate for a mediator to charge a contingency fee or to base the fee on the outcome of the mediation process." *Id.*

173. "The lawyer must not agree to undertake mediation . . . if the conduct of either party suggests that the party is unwilling or unable to participate in good faith." Advisory Op. 86-8, *supra* note 164.

174. *Id.*

Presumably, the nature of mediation requires good faith in several areas. For instance, cooperation between the parties is a necessary prerequisite. Therefore, one requirement of good faith is that each participant must bring all of the information necessary to resolve the pertinent issues.¹⁷⁵ The lawyer has the duty to "attempt to ensure that the parties have an equal understanding of the information."¹⁷⁶ Accordingly, all information should be disclosed to the mediator in the presence of the other party.¹⁷⁷

c. The Mediator

The duties of the mediator parallel the duties mandated by Rule 4-2.2¹⁷⁸ of the *Rules Regulating the Florida Bar*. First, the mediator educates the participants on the nature and risks of the mediation process during the initial orientation session.¹⁷⁹ During the mediation process, the mediator should be certain that the participants have adequate information, including financial information.¹⁸⁰ Further, "[t]he lawyer may define legal issues and advise the parties on the legal consequences of various courses of action."¹⁸¹

Second, the lawyer must "assess the appropriateness of mediation for the parties."¹⁸² Since the lawyer represents neither party, each party must be able to make the ultimate decisions with possible assistance from independent counsel.¹⁸³ The lawyer's evaluation of the parties' capacity must satisfy him "that the parties understand the nature and risks of mediation and the significance of the fact that he represents neither party."¹⁸⁴ The threshold for this determination is whether "the parties [can] reach a prudent resolution without the advice of separate and independent legal counsel."¹⁸⁵

175. "The lawyer has a duty to assure that the participants make decisions based upon adequate information, including financial information." *Id.*

176. *Id.*

177. *Id.*

178. RULES REGULATING THE FLORIDA BAR Rule 4-2.2 (West Supp. 1987); *see also supra* notes 151-60 and accompanying text.

179. *See supra* text accompanying notes 154-56.

180. Advisory Op. 86-8, *supra* note 164.

181. *Id.*

182. *Id.*

183. *Id.* "If the parties so desire, the lawyer may prepare a settlement agreement for the parties that reflects the decisions made by them during the mediation. The lawyer should advise the parties to consult independent legal counsel before signing any such agreement."

184. *Id.*

185. *Id.*

Third, the mediator must continually remain impartial.¹⁸⁶ Arguably, because he represents neither of the parties, he cannot promote one over the other.¹⁸⁷ Additionally, his impartiality is compromised if he has or has had a professional relationship with either party in another context before or during the present mediation.¹⁸⁸ If he cannot be impartial, he must terminate the mediation.¹⁸⁹ These three conditions must exist throughout the mediation process; if one is not present, mediation must be terminated.¹⁹⁰

d. The Outside Counsel

None of the guidelines specifically address the ethical obligation of outside counsel. The parties are to be advised to consult independent counsel.¹⁹¹ The mediator may "not refer either of the participants to any particular attorney."¹⁹² However, the mediator can refer the participants to a "bar association list" or "provide a list of qualified family law attorneys in the community."¹⁹³ Presumably, independent counsel would be guided by the ethical standards of Rule 4-2.1 of the *Rules Regulating the Florida Bar*.¹⁹⁴

C. Mediation Ethics Shortfall

Mediation standards advance the cause of family dispute resolution through mediation. With the proliferation of mediation centers and individuals claiming to be mediators, these standards and the debate they should inspire will ensure the development of com-

186. *Id.*

187. *See id.*

188. "Thus the lawyer should not undertake mediation if he previously provided legal representation to either of the parties and he must not represent either of the parties in any legal matter during mediation." *Id.*

189. *Id.*

190. *Id.*

191. Advisory Op. 86-8, *supra* note 164.

192. *Id.*

193. *Id.*

194. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." RULES REGULATING THE FLORIDA BAR Rule 4-2.1 (West Supp. 1987).

petent, ethical mediation. Society will benefit because citizens can make more intelligent decisions about the appropriateness of the mediation option.¹⁹⁵

However, the standards leave some questions unanswered and also raise new concerns. They recognize potential ethical dilemmas, but offer limited assistance to the mediator confronted with these dilemmas. How should the mediator react to unequal bargaining power between the participants when they insist upon self-determination of their marital dissolution? Should outside counseling be recommended or does this breach the principle of impartiality? How does the mediator successfully walk the tightrope of impartiality and neutrality? When should he counsel a participant to be less irrational in his or her demands? What advice may be rendered and what resolutions may be suggested without invading the couple's right of self-determination? If the mediator is to refer the participants to outside experts, what role do these experts play? What principles direct the behavior of the outside experts? On what basis can it be determined whether a settlement is fair? How can it be determined whether the participants' conduct or their agreement is unreasonable? If termination of the mediation process becomes a necessity, on what basis should the mediator respond?

When confronted with these dilemmas which have no ready solution, the mediator should have more guidance in choosing appropriate and ethical responses. Fortunately, there are ethical imperatives in the family law setting which may help. The next section of this article will explore the ethical texture of the family mediation process and suggest a philosophical framework for guiding the divorce mediator.

195. Bishop argues that the popularization of mediation may give the public a false impression of the potentials of mediation in family dissolutions. He suggests:

The publication and dissemination of standards would counter this misapprehension by educating the public to how mediation can serve their needs. If potential mediation participants have a better understanding of the purpose of the process and its characteristics before committing themselves to participate, they are likely to benefit from it The standards are written to convey the idea that mediation is not a manipulative process in which the most persuasive or powerful prevails. In sum, read by potential mediation consumers, the standards are a label for the practice. They permit would-be participants to make a preliminary assessment of whether the process is suitable for them.

Bishop, *supra* note 1, at 4-5.

VI. FACILITATIVE ETHICS IN THE FAMILY LAW SETTING

A. *The Mediation Process as an Ethical Source*

The principle task of the divorce process and the divorce lawyer should be to facilitate the establishment of financial, social and emotional security for the parties to the greatest extent practicable.¹⁹⁶ If the law is designed to facilitate the discharge of family legal obligations, the lawyer should also facilitate these duties.¹⁹⁷

One of the most noble functions of law is to serve as a model of what is expected. Adjudicatory procedures, instead of providing models, are too often used coercively to supplant self-determination with no evidence that the disputants have been encouraged and helped to resolve their differences. The law should be premised on the expectation that people will not abdicate to a lawyer or a judge the responsibility of deciding what is fair. Using mediation to facilitate conflict resolution and encourage self-determination thus strengthens democratic values and enhances the dignity of those in conflict.¹⁹⁸

As suggested in the literature describing the adversarial process, the present state codes of professional conduct do not readily allow attorneys to employ a facilitative approach to the practice of mediation.¹⁹⁹ This portion of the article will consider how an attorney can ethically practice mediation in a family law setting. It will propose a style of ethics called "facilitative ethics."²⁰⁰

196. See *supra* text accompanying notes 55-70.

197. One commentator suggests that one proper framework for analyzing ethical issues is to consider the rights and duties of the client, especially in relationship to others (e.g., former spouses and children). L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY*, § 8.01 (1982). Patterson says, "[s]ince the law of legal ethics is derivative in nature, being derived from the positive law defining the rights and duties of the client, the lawyer's rights and duties . . . are derivative in nature He can properly exercise only such rights and fulfill only such duties as the client has." *Id.* at 8-1 to -2. One way of viewing this framework in the mediation setting is to urge that the lawyer has a duty to aid the mediation participants in arriving at solutions fulfilling their post-dissolution obligations.

198. J. FOLBERG & A. TAYLOR, *supra* note 51, at 35.

199. See sources cited *supra* note 71.

200. Many commentators use the term "facilitate" when describing the fundamental nature of divorce mediation. "[m]ediators can facilitate private ordering, or negotiated outcomes, between disputants by helping them get information on applicable legal norms and principles, as well as the probable outcome in court if the case is litigated." J. FOLBERG & A. TAYLOR, *supra* note 51, at 36. "As counselor I facilitate expression of feelings, concerns, and wishes. This promotes freer, more effective communication between spouses and between parents and children." F. BIENENFELD, *supra* note 51, at 9; see also Chang, *supra* note 48, at 111, *The Carrot Instead of the Stick*, *supra* note 52.

B. Riskin's Neutral Lawyer

Professor Leonard L. Riskin, in a recent article, attempts to push beyond the constraints of adversarial ethics and develop standards of fairness and maximization that better reflect the concept of the mediation process.²⁰¹ Riskin urges that the analysis be extended further to capture what should be the spirit of the family mediation process—the legal and moral obligations inherent in the family and in family law.²⁰²

According to Professor Riskin, a neutral lawyer is one who can participate in the family mediation process and allow both voices to be expressed.²⁰³ In the mediation process a neutral lawyer can offer a variety of legal services depending upon the needs and desires of the parties involved. As Riskin explains:

The legal services supplied by neutral lawyers in mediation fall along a continuum. At one extreme is the so-called "impartial advisory attorney" who meets with the parties jointly to answer legal questions or to incorporate the decisions they have reached into a written contract. Such lawyers normally do not function as mediators, *i.e.*, they do not try explicitly to help the parties reach an agreement. In an intermediate position on the continuum is the lawyer who performs the same kind of service as an impartial advisory attorney, but does so as part of a team with a mediator, ordinarily a psychotherapist. Finally, some lawyers serve explicitly as mediators.²⁰⁴

The neutral lawyer gives legal protection to parties by informing them of their legal rights and options in a non-adversarial posture.²⁰⁵ Moreover, the neutral lawyer, as legal expert, can free the parties from dependence upon typical norms of the legal process and constraints of the adversarial system by suggesting solutions

201. Riskin, *supra* note 55.

202. *See id.* at 353-54.

203. *See id.* at 333. Riskin observes that:

For the individual lawyer, a neutral position offers the potential of freedom from the constraints of the usual adversary role and the chance to help empower people to deal with their own problems. In helping people resolve their disputes in a more responsible and humane way, the lawyer may herself derive satisfactions not available in adversary practice.

Id. at 332.

204. *Id.* at 335.

205. *Id.* at 336.

that best fit the needs of the participants.²⁰⁶ The lawyer, to the best of his ability, can identify the essential legal issues and predict what a judge would do in a given situation.²⁰⁷ Having informed the parties of the law, the neutral lawyer must encourage the parties to trust each other in order to arrive at a mutual agreement. Riskin suggests that mediation by a neutral lawyer "reduce[s] the need for and influence of lawyers on the individual parties. This may enable the parties to reach their own agreement and free them from the adversarial/materialistic perspective, the 'lawyers' standard philosophical map.'"²⁰⁸

C. Riskin's Fairness Value

Riskin proposes that the neutral lawyer be guided by the principle values of fairness and maximization.²⁰⁹ The standard of fairness contemplates what society views as fair.²¹⁰ This is usually reflected in judicial opinions which analyze and reconcile traditional societal norms and new patterns of familial relationships.²¹¹ The fairness element also takes into account the participants' own sense of fairness.²¹² This concept of fairness certainly takes into account notions of due process and procedural fairness.²¹³ Finally,

206. *Id.*

207. Riskin points out, however, that:

It is often difficult for lawyers to make clear predictions of what courts would do. Even where the neutral lawyer can make clear predictions, the parties may have difficulty perceiving her as neutral. In some cases, the best way for the neutral lawyer to inform the parties of their rights is to tell them what she thinks they would be told by individual lawyers. Often this will satisfy the needs of the parties, thus saving legal fees and, perhaps, avoiding unnecessary conflict.

Id.

208. *Id.* at 335-36.

209. *See id.* at 353-59.

210. *Id.* at 354.

211. *See LaRue v. LaRue*, 304 S.E.2d 312 (W. Va. 1983) (household services of the stay-at-home spouse to be valued when considering property distribution); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) (standard for child custody determination based on which parent is the primary caretaker); *see also Brown v. Brown*, 300 So. 2d 719 (Fla. Dist. Ct. App. 1974) (wife should have been compensated for her contribution to marriage), *cert. dismissed*, 307 So. 2d 186 (Fla. 1975).

212. Riskin, *supra* note 55, at 354-55. Some commentators suggest that the common goal of fairness begins with the first phone call where:

one can restrict the content of the first telephone conversation to general topics that would subsequently be addressed (e.g., are there children, will support need to be considered), and emphasize that fairness to each protects both from inequitable treatment and that fair agreements are easier to comply with than unfair ones.

The Carrot Instead of the Stick, *supra* note 52, at 3029.

213. For a discussion of social realities at marital dissolution which affect the notion of fair treatment, see Weitzman, *supra* note 37, at 1241.

the fairness value considers the interests of unrepresented third parties such as children or future and former spouses.²¹⁴

The legal requirement of fairness is reflected in cases concerning property distribution. The principle of equitable distribution was developed in recognition of the fact that the marital unit is indeed a joint endeavor.²¹⁵ "The new concept of the marriage relation implicit in the so-called 'no-fault' divorce law . . . places both parties to the marriage on a basis of complete equality as partners sharing equal rights and obligations in the marriage relationship and sharing equal burdens in the event of dissolution."²¹⁶ At marital dissolution, it was only fair to treat property acquired during the marriage as if it belonged to both partners, irrespective of which one had legal title.²¹⁷ Yet on the other hand, if one spouse used her financial resources acquired before the marriage to assist in the purchase of the marital abode, fairness demands a recognition of her "special equity" in that property which must be recompensed at marital dissolution.²¹⁸ Similarly, if she contributed money, property or industry to the enhancement of separate property owned by her husband, it is also fair to grant her a "special equity" in his separate property.²¹⁹

214. See Riskin, *supra* note 55, at 354; see also *The Carrot Instead of the Stick*, *supra* note 52, at 3035-37.

215. See *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); *Brown*, 300 So. 2d 719.

216. *Thigpen v. Thigpen*, 277 So. 2d 583, 585 (Fla. Dist. Ct. App. 1973).

217. The court emphasized that its policy was not grounded upon principles of community property, but on basic fairness; a dissolution award should be sufficient to compensate the wife for her contribution to the marriage. "We recognize that a trial court need not equalize the financial position of the parties. However, a trial judge must ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, and, in viewing the totality of the circumstances, one spouse should not be 'shortchanged'." *Canakaris*, 382 So. 2d at 1204.

218. See *Landay v. Landay*, 429 So. 2d 1197 (Fla. 1983). In *Landay* the wife contributed 41% of the purchase price of the marital home from her separate property. *Id.* This created a percentage ratio of her separate property contribution to the total purchase price. *Id.* at 1198. The court held the following:

We are of the opinion that the percentage ratio approach adopted by the district court is the fairest one. It recognizes that the spouse who furnishes some but not all of the consideration for property has, in effect, made a capital investment, which should give the contributing spouse an enhanced interest in the property. Having invested his or her capital in the property, the contributing spouse should be permitted to reap the fruits of such investment, if any.

Id. at 1199.

219. The doctrine of special equities was primarily a device used to return to the wife her economic contributions to property titled in her husband, and avoid the unfairness of the rule that an adulterous wife should receive no alimony. In *Heath v. Heath*, 103 Fla.

D. Riskin's Maximization Value

The maximization value sets out to garner the parties' resources and stretch them as far as possible.²²⁰ Financial resources, in particular, are strained at family dissolution.²²¹ Resources should not be squandered on inefficient legal battles. The neutral lawyer can help the parties marshal their resources in a way which maximizes their collective ability to take care of legal familial obligations.²²²

Accordingly, the resolution of custody and financial issues should be accomplished with flexible permanence.²²³ For example, child support should be payable directly to the court or a state

1071, 138 So. 796 (1931) the court found:

There is undoubted proof that the wife materially assisted the husband in the conduct of his business of operating a chain of stores and that she put into her husband's business a substantial amount of her own capital in addition to what personal services she rendered. Whatever consequences the wife may be compelled under the law to suffer for her marital derelictions by the severance of the bonds of matrimony, she is not required to incur the forfeiture of any of her already vested equitable property rights which were acquired by her while the matrimonial barque was sailing on smoother seas.

Id. at 1075, 138 So. at 797; *see also Landay*, 429 So. 2d 1197; *Canakaris*, 382 So. 2d 1197; *Ball v. Ball*, 335 So. 2d 5 (Fla. 1976); *Brown*, 300 So. 2d 719.

220. *See Riskin*, *supra* note 55, at 358-59.

221. *Id.*

222. *Id.* Lynn Jordan and Paul Nathan, in describing mediation as a more positive approach to marital dissolution, expressed the following conceptualization of maximization:

The purpose of this article is to show ways in which a separating or divorcing couple can be encouraged to cooperate and design solutions based on needs, abilities, and aptitudes, rather than on fault and blame. Resolutions derived from strength will be more vital and longlasting than those arrived at through weakness and fault. Moreover, this method both addresses immediate needs and also helps the couple to look forward to separate and independent features through its practical orientation and commitment to maximizing opportunities for all parties in the years to come. It thereby enables the couple to continue their relationship as parents in as positive and respectful a way as possible.

The Carrot Instead of the Stick, *supra* note 52, at 3029. For a discussion of property and support, *see id.* at 3034-37.

223. Jordan and Nathan take a long-term view of the agreement arrived at through mediation. They suggest the following:

In sum, as with support, we let the needs of the children and the practical requirements of the situation guide the discussion. We start with areas of agreement, whether it be the parents' shared desires for the children to have contact with grandparents, play softball, attend a certain school. By the time we reach a difficult subject, much of the topic is already resolved in a way satisfactory to both and people generally are eager to bring the matter to conclusion. By stressing that both parents are concerned and will be involved regardless of the details of the agreement and that changes will need to be made as the children and the situation age, we can encourage flexibility and the occasional concession.

The Carrot Instead of the Stick, *supra* note 52, at 3037.

administered child advocate office.²²⁴ This relieves the custodial parent of the burden of being a support enforcer, making frequent, costly trips to court when support payments are delinquent. A support agreement might also recognize the inflation factor.²²⁵ The amount of support can then go up or down depending on the needs of the children and ability of the supporting spouse to pay, while encouraging self-sufficiency.²²⁶ These devices minimize the likelihood of relitigating the vital obligation of child support and maximize the resources of the parties.

E. *Beyond Fairness and Maximization: The Facilitative Value*

The values of fairness and maximization are excellent principles to guide the conduct of a lawyer in the family law setting. However, these two values only indirectly address the keystone principle—that the family lawyer is to facilitate the fulfillment of the client's moral and legal family obligation.²²⁷

Much of a spouse's identity is tied up in the marital relationship. Divorce is a reorganization of that fundamental relationship. The lawyer who must work within it should promote the preservation of a spouse's identity as well as the fulfillment of post-marital obligations. This is the essence of the mediating lawyer's facilitative duty and it assumes that clients with unresolved family disputes basically seek to fulfill those family moral commitments as reflected in family law. It also assumes that individuals in need of dispute resolution are consulting a trained professional who can fairly and impartially help them realign their legal relationship. The individuals' deepest desire is that in the relationship realignment they will maximize their limited resources as well as the po-

224. See, e.g., 42 U.S.C.A. § 602 (West 1985 & Supp. 1987); 231 PA. CODE § 1910.22 (19—); W. VA. CODE § 48A-2-13 (1986).

225. Franks, *How to Calculate Child Support*, 86 CASE & COM. 3 (1981).

226. New pension planning techniques should facilitate pension planning. See generally, *Pension Evaluation and Equitable Distribution*, 10 FAM. L. REP. (BNA) [hereinafter *Pension Evaluation*] (Nov. 22, 1983).

227. It is, after all, the legal rights of the client that the lawyer is dealing with, and this point provides a seldom-used key for resolving the client conundrums the lawyer so often faces. Since the law of legal ethics is derivative in nature, being derived from the positive law defining the rights and duties of the client, the lawyer's rights and duties as lawyer in acting for a client are derivative in nature. The lawyer's job is not only to aid the client in the implementation of his rights but also in the fulfillment of his duties. [He can properly exercise only such rights and fulfill only such duties as the client has.]

L. PATTERSON, *supra* note 197, § 8.01, at 8-1 to -2.

tential for whatever post-resolution relationships continue to exist, especially the relationship between parent and child. Therefore, the lawyer who mediates is obligated to facilitate that desire.

The facilitation principle further assumes that what is at stake is a significant change in the way attorneys practice in the family law setting. The neutral lawyer's ethical conduct should embody his new role as facilitator of family dispute resolution which society has demanded of the profession. In restructuring family relationships, the attorney should not minimize the parties' legal responsibilities nor try to maximize individual personal benefits to the financial emotional detriment of the other spouse. Such a course of conduct has a negative effect on marital partners as well as on the very fabric of society.²²⁸

VII. CRITIQUE OF THE MEDIATION STANDARDS

It is hoped that the application of the principles discussed in Section VI to the proposed mediation standards will inject a different perspective into the current debate on the usefulness of the standards. This section will evaluate the mediation standards in terms of the four broad areas of conduct covered by the standards: (1) rules for the mediation process, (2) responsibilities of the participants, (3) responsibilities of the mediator, and (4) responsibilities of outside professionals.

A. *The Mediation Process*

Mediation creates ethical responsibilities that promote the purity of the mediation process itself.²²⁹ Certainly, facilitative ethics are not inconsistent with the goals of mediation as set forth in the preambles of the mediation standards. Mediation by individuals seeking to fulfill family legal and moral obligations is promoted if "[m]ediation is based on . . . the needs and interests of the participants, fairness, privacy self-determination, and the best interests of all family members."²³⁰ These goals are also reflected in Riskin's fairness and maximization values.

The nature of mediation suggests that the mediator stands in a

228. See *supra* note 34 and accompanying text.

229. See Lande, *Mediation Paradigms and Professional Identities*, 4 *MEDIATION Q.* 19 (1984).

230. AFCC STANDARDS, *supra* note 1, Preamble.

fiduciary relationship to the parties.²³¹ The mediator must exercise due care in handling the couple's relationship realignment. The mediator, in his zeal for mediation, should not force the process on unwilling and ill-prepared parties.²³² The success of the mediation process should not be measured by the number of agreements achieved, but rather in terms which recognize the humanity of the participants. Minimization of psychic and emotional damage is the hallmark of an effective mediation process and a goal toward which all mediators should strive.²³³

Two major features of the mediation standards promote the facilitative approach. First, the standards demand that the mediator take primary responsibility for educating the participants as to how mediation works. Successful mediation is contingent upon informed participation. The mediator must fully describe the mechanics of the process and the mediator's role within the process.²³⁴ Second, the educational process is incomplete without drawing information from the participants themselves and evaluating which issues are suited for discussion.²³⁵

The mediator must be aware that individuals have varying levels of education, intelligence and emotional stability. The mediator's fiduciary duty is to protect the process and the participants by repeating the ground rules, if necessary, and being receptive to questions.²³⁶

The standards do not adequately encourage the mediator to educate the participants on their legal and moral obligations. The rules suggest that the mediator may impart some information, but

231. Those who engage in the practice of mediation must be dedicated to the principle that all disputants have a right to negotiate and attempt to determine the outcome of their own conflicts. They must be aware that their duties and obligations relate to the parties who engage their services, to the mediation process, to other mediators, to the agencies which administer the practice of mediation, and to the general public.

CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS, Preamble (Center for Dispute Resolution 1982), reprinted in J. FOLBERG & A. TAYLOR, *supra* note 51, at 349.

232. See AFCC STANDARDS, *supra* note 1, Standard I(C); ABA STANDARDS, *supra* note 1, Standard I(A)(1); see also Advisory Op. 86-8, *supra* note 164.

233. See generally, GARDNER, *supra* note 26; J. FOLBERG & A. TAYLOR, *supra* note 51.

234. See generally, AFCC STANDARDS, *supra* note 1, Standards I, VIII; ABA STANDARDS, *supra* note 1, Standard I; see also Advisory Op. 86-8, *supra* note 164.

235. "The mediator shall elicit sufficient information from the participants so that they can mutually define and agree on the issues to be resolved in mediation." AFCC STANDARDS, *supra* note 1, Standard I(B); see also Advisory Op. 86-8, *supra* note 164.

236. See ABA STANDARDS, *supra* note 1, Standard IV(B); see also AFCC STANDARDS, *supra* note 1, Standard VII; Advisory Op. 86-8, *supra* note 164.

should encourage the participants to obtain outside counsel as the primary source of legal information. The ABA Standards propose the following:

B. [T]he mediator shall promote the equal understanding of such information before any agreement is reached. This consideration may require the mediator to recommend that either or both obtain expert consultation in the event that it appears that additional knowledge or understanding is necessary for balanced negotiation.

C. The mediator (who is a lawyer) may define the legal issues. The lawyer-mediator shall not direct the decision of the mediation participants based upon the lawyer-mediator's interpretation of the law as applied to the facts of the situation. The mediator shall endeavor to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process.²³⁷

What information and knowledge does the mediator impart? For what aspects of the mediation does the mediator advise use of outside counsel as the information source? If the participants do consult outside counsel, how is the mediator to judge whether the participants have been fully informed on all legal issues? By what standard will the mediator judge the fairness of the process and the reasonableness of the agreement, unless all agree on the parameters of the family obligations set out by the law?²³⁸

The facilitative mediator has a duty to educate the parties concerning their legal and moral obligations as articulated by the law and judicial precedent. Otherwise there is not common ground for discussion, nor an understanding of where the law allows some give and take. These issues are addressed in greater depth in Part C of this section.

237. ABA STANDARDS, *supra* note 1, Standard IV; *see also* Advisory Op. 86-8, *supra* note 164.

238. The ABA Standards suggest the following standard of fairness: "The mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques utilized by either of the participants." ABA STANDARDS, *supra* note 1, Standard V(E).

B. *Ethical Responsibilities of the Participants*

The second area of broad ethical consideration in the mediation standards is the responsibilities of the participants. A humane mediation process requires the participants to refrain from manipulation and intimidation tactics.²³⁹ Because emotions are a factor in marital breakups, the participants must understand "the connection between one's own emotions and the bargaining process."²⁴⁰ They must not let emotions hinder them from freely disclosing all facts and circumstances necessary for the complete resolution of the issues.²⁴¹ The process requires the participants to hold confidential all information disclosed during mediation and to refrain from using that information if a subsequent adversarial proceeding becomes necessary.²⁴²

The biggest responsibility the parties owe to each other is a willingness to accept the outcome of their own resolution. The standards assume that "[t]he primary responsibility for the resolution of a dispute rests with the participants."²⁴³ Implicit in this assumption is the notion that the participants know or can find out what their legal and moral responsibilities are.

C. *The Ethics of the Mediator*

The responsibilities of the mediator are grounded in the notion of self-determination by the participants. The mediator stands as the neutral, impartial referee whose responsibility is to inform the parties of their rights and obligations and to negotiate a dissolution of their relationship. During the process the mediator must remain impartial and neutral, two concepts that the mediation standards emphasize.²⁴⁴ However, they are at times inconsistent when evaluated with other provisions. Moreover, the ABA Stan-

239. See AFCC STANDARDS, *supra* note 1, Standard VIII(A); ABA STANDARDS, *supra* note 1, Standard V(E).

240. ABA STANDARDS, *supra* note 1, Standard V(D).

241. See AFCC STANDARDS, *supra* note 1, Standard V; ABA STANDARDS, *supra* note 1, Standards I(A)(2), IV(A); see also Advisory Op. 86-8, *supra* note 164.

242. See AFCC STANDARDS, *supra* note 1, Standard IV; ABA STANDARDS, *supra* note 1, Standards II, III(F), VI(B), VI(C).

243. AFCC STANDARDS, *supra* note 1, Standard VI(A); see also AFCC STANDARDS, *supra* note 1, Preamble; ABA STANDARDS, *supra* note 1, Preamble.

244. AFCC STANDARDS, *supra* note 1, Standard II; ABA STANDARDS *supra* note 1, Standard III; see also Advisory Op. 86-8, *supra* note 164.

dards and the AFCC Standards define impartiality differently.²⁴⁵ A fuller analysis of these concepts is undertaken in light of the facilitative principle.

The AFCC Standard II, ABA Standard III, and Proposed Advisory Opinion 86-8 require the mediator to be neutral. Neutrality is a straightforward concept because it resembles more traditional notions of ethical behavior by attorneys seeking to avoid conflicts of interest.²⁴⁶ For instance, the lawyer may not mediate a dissolution if he has previously represented one of the participants in any matter.²⁴⁷ Nor may he represent a participant in a subsequent adversarial divorce proceeding.²⁴⁸ The lawyer should also disclose any personal or professional biases and any potential conflicts of interest.²⁴⁹

The mediation standards also impose a duty of impartiality.²⁵⁰ An impartial mediator directs the process but does not advocate a particular solution or favor one participant over another. The impartiality concept of the mediation standards is similar to Riskin's concept of neutral lawyering.²⁵¹ Specifically, the AFCC Standard II states the following:

A. Impartiality

The mediator is obligated to maintain impartiality toward all participants. Impartiality means freedom from favoritism or bias either in word or action. Impartiality implies a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement. Impartiality means that a mediator will not play an adversarial role.

The mediator has a responsibility to maintain impartiality while raising questions for the parties to consider as to the fairness, equity, and feasibility of proposed options for settlement.²⁵²

245. Compare ABA STANDARDS, *supra* note 1, Standard III(D) with AFCC STANDARDS, *supra* note 1, Standard II(A).

246. "A lawyer-mediator shall not represent either party during or after the mediation process in any legal matters. In the event the mediator has represented one of the parties beforehand, the mediator shall not undertake the mediation." ABA STANDARDS, *supra* note 1, Standard III(A); *see also* AFCC STANDARDS, *supra* note 1, Standard II(B); Advisory Op. 86-8, *supra* note 164 (using the term impartial instead of neutral when referring to prior or subsequent representation).

247. *See supra* note 245 and accompanying text.

248. *See supra* note 245 and accompanying text.

249. *See* ABA STANDARDS, *supra* note 1, Standard III(C); AFCC STANDARDS, *supra* note 1, Standard I(D)(1); *see also supra* text accompanying notes 151-61.

250. *See* AFCC STANDARDS, *supra* note 1, Standard II(A).

251. *See supra* text accompanying notes 201-08.

252. AFCC STANDARDS, *supra* note 1, Standard II(A).

ABA Standard IV-(C) suggests that the mediator should play a limited role in the substantive discussions between the participants:

C. The mediator who is a lawyer may define the legal issues. The lawyer-mediator *shall not direct the decision of the mediation participants based upon the lawyer-mediator's interpretation of the law as applied to the facts of the situation.* The mediator shall endeavor to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process.²⁵³

A question remains as to how a mediator can judge the fairness of the parties' agreement if he is not allowed to apply his interpretation of the law to the facts. Unfortunately, none of the proposed standards directly informs outside legal advisors of their ethical responsibilities.²⁵⁴

There must be an accommodation between complete impartiality on the one hand and protection from unfairness and unreasonableness on the other. Bishop proposes a recognition of this tension:

[T]he divorce mediator is not truly impartial in all instances. While the mediator should not direct the participants to one result or another, objective fairness is a desirable element of any mediated divorce agreement. There appears to be a conflict between the promises of mediation in this case. In this view, mediation is an empowering process in which the couple has the responsibility and ultimate authority for self-determination. Alternatively, mediation is offered as a process that yields objective fairness and is consistent with the best interests of children.²⁵⁵

The mediation process, therefore, necessarily generates a frame-

253. *Id.* Standard IV(C) (emphasis added).

254. See *infra* text accompanying notes 283-86.

255. Bishop, *supra* note 55, at 10. Bishop suggests that "[t]he mediator who promotes reason is not impartial," particularly when addressing the needs of the participants' children.

work of ethical practice. In attempting to facilitate a dissolution agreement, the "impartial" mediator cannot help being drawn into the tension created by the bargaining between the participants.²⁵⁶ The facilitative mediator is not a passive observer, but instead educates participants on the nature of the process and evaluates the participants' willingness and capacity to engage in mediation. Education and evaluation must include the principles of fairness, maximization and facilitation.²⁵⁷

Lande, in considering the premise that mediation suggests a framework of ethical behavior, describes the mediation process as "an expression of a set of positive values about how people should deal with one another."²⁵⁸ Lande reviews the proposed ABA Standards by applying Thomas Kuhn's "concept of revolutionary paradigm shift" to the adversary system of marital dissolution and to mediation.²⁵⁹ Lande offers this assessment of how ethical behavior in mediation might be conceived in Kuhn's terms:

Mediation is a paradigm that can lead to a peaceful and evolutionary revolution in the way people think and act in general. Kuhn

256. The process and implications of bargaining is discussed in Dibble, *Bargaining in Family Mediation: Ethical Considerations*, 4 *MEDIATION Q.* 75 (1984). In considering whether bargaining over the "common goods" of the marital relationship increases adversarial conflict or promotes a fair resolution of marital dissolution, Dibble notes:

Bargaining would hardly be necessary if mediators were consistently able to reframe issues from conflictual, distributive disputes to cooperative, integrative projects. The problem of how to cut the pie persists, however, even when the pie can be enlarged. The question about bargaining is whether it is an adequate and appropriate means of dealing with the difficult issues of distribution and distributive justice in mediating family conflicts.

Id. at 76-77.

Dibble concludes that bargaining is appropriate for mediation if it "emphasize[s] open, mutual, and relatively prolonged communication," and assists the participants in the "movement toward agreement," and if the "bargainers are equals in a joint decision-making process." *Id.* at 89-90.

257. See *supra* text accompanying notes 196-228.

258. Lande, *supra* note 229, at 19.

259. *Id.* (citing T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970)). Lande proposes a strategy for engaging in a continuing discourse on ethical behavior for mediators. See generally *id.* at 39-46. Lande concludes:

Mediation is the new paradigm that is succeeding the old ideology of adversary advocacy. Because revolutions are not self-executing, we, in the currently amorphous mediation community, must take responsibility for developing the next paradigm consensus according to the values and beliefs of our evolving paradigm. Just as mediation requires active participation of disputants, the development of the mediation movement requires the active participation of movement members to face our challenges, establish our priorities, and make the necessary commitments.

Id. at 42.

defines paradigms as both 'entire constellation(s) of belief, values, techniques and so on shared by the members of a given community' and also 'one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science.' The mediation paradigm is based on affirmative principles designed to fulfill the ideals of the adversary paradigm, [individuality, autonomy, responsibility, and dignity], but which encourages people to act on their best, rather than worst, motivations and thus to provide more satisfying results.²⁶⁰

At least two lessons may be drawn from Lande's work which supplement a critique of the proposed standards. First, the values which form the essence of mediation aid the quest for mediation ethics.²⁶¹ Second, the mediation process provides the solution to the puzzle of impartiality. If the nature of the impartiality puzzle is understood, an understanding of appropriate mediator conduct should follow.

Sidney Bernard, Joseph Folger, Helen Weingarten and Zena Zumeta in their collaborative article, *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, articulate a promising solution to the problem of impartiality, by considering *how* mediators practice their craft.²⁶² The authors posit that there is a range of settlement strategies used by mediators which define the mediator's role and thus the proper level of impartiality.²⁶³ *The Neutral Mediator* suggests the following view of mediation models:

[S]ettlement strategies can be said to differ according to their location along a continuum between two polar positions—neutrality and intervention. A neutralist strategy involves seeking to avoid influencing the outcome of the negotiations between the parties. Any decision the parties freely agree on is seen as acceptable in the extreme neutralist position. An interventionist position, in contrast, finds the mediator actively challenging and possibl[y] even refusing to accept an agreement both parties have accepted. The interventionist mediator who believes an agreement is unfair or unjust is likely to present alternatives designed to achieve the mediator's vision of the parties' best interests.²⁶⁴

260. *Id.* at 19-20 (quoting T. KUHN, *supra* note 258).

261. *See id.* at 23-25.

262. Bernard, Folger, Weingarten & Zumeta, *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MEDIATION Q. 61 (1984) [hereinafter *The Neutral Mediator*].

263. *Id.* at 62.

264. *Id.*

The purely neutral mediator, then, helps the process happen, but lets the participants freely craft their own settlement agreement.²⁶⁵ As long as the process works, the mediator should demonstrate pure impartiality and not attempt to sway the outcome or interject his viewpoint.²⁶⁶ Quite obviously, the interventionist mediator would not be reluctant to employ a hands on approach guided by his professional experience and personal views.²⁶⁷ The interventionist mediator "can shape the process or the outcome depending on how it is presented by the mediator or interpreted by the parties."²⁶⁸

Between these two extremes is a mid-range strategy favored by *The Neutral Mediator*.²⁶⁹

[There] are such alternatives as option-enhancing and empowerment-through-information strategies. In the option-enhancing strategy, the mediator directly suggests alternatives to the solutions proposed by the parties. In the empowerment strategy, the mediator provides various information, legal requirements, child development needs, and the experience of others in the divorce and divorce adjustment process; this information can increase the knowledge of the participants, suggest to them alternative settlements, and may even balance the power between the parties.²⁷⁰

265. *Id.* at 65-66.

266. *Id.* The mediator may recommend a different settlement or observe unequal bargaining power. If the mediator does not intervene, "[h]is basic position is that the mediator's job is to make the parties realize that their best interests will be served only if they achieve a negotiated settlement. His goal is to make 'the lion-lamb relationship clear to the lamb.'" *Id.* (citing H. BELLMAN, *MEDIATION AS AN APPROACH TO RESOLVING ENVIRONMENTAL DISPUTES*, Proceedings of the Environment Conflict Management Practitioners Workshop 3-4 (1982)).

267. "A divorce mediator who urges the parties to rethink the directions or the terms of a settlement has adopted an interventionist settlement strategy. The mediator may draw on a professional knowledge base or a personal value stance to justify asking the parties to reshape a settlement." *Id.* at 63.

268. *Id.* at 66. This role of interventionist may be particularly evident in the lawyer-mediator who is steeped in the adversary system. See generally Lande, *supra* note 229, at 20-23. Chang suggests that "[t]he core of the problem is professionalism; the lawyer is the expert who serves the client's needs, but often as the lawyer sees them, not as the client sees them." Chang, *supra* note 48, at 120.

269. *The Neutral Mediator*, *supra* note 262, at 66; see also *The Carrot Instead of the Stick*, *supra* note 52, at 3029. Chang also favors the mid-range strategy. She suggests that mediation works best if, "[e]ach client must justify his goals to the other, with the mediator as a facilitator, an impartial guide to the negotiation, a balancer of power, and a provider of perspective." Chang, *supra* note 48, at 128.

270. *The Neutral Mediator*, *supra* note 262, at 65.

Herein lies one possible solution to the impartiality puzzle. A deeper look at the proposed mediation standards reveals option-enhancing and empowering strategies. For example, the proposed standards emphasize the importance of encouraging participants to seek the advice of outside counsel.²⁷¹ Additionally, the proposed standards require the mediator to ensure that the participants have sufficient legal and factual information.²⁷² Furthermore, it is implicit in the proposed standards that in describing how the mediation process operates, the mediator should let the participants know in advance that at different times during the mediation varying levels of intervention may be required.²⁷³

Knowing where one stands on the intervention continuum, and thus how impartial the mediator must be is largely a question of the personal values of the mediator,²⁷⁴ and his awareness of current practice in the mediation profession.²⁷⁵ However, the option-enhancement and empowering process can best be accomplished if the participants take full advantage of the lawyer-mediator's training, experience and wisdom. The mediator should empower the

271. *See id.* at 66.

272. *Id.* at 65.

273. *Id.* *The Neutral Mediator* provides an excellent example of how intervention was used to enhance the options of one mediation participant who had agreed to a property settlement granting him 20% of the property and his spouse 80%. The property was a radio station which the wife managed and which employed the husband. The authors describe the intervention of the husband:

The mediator felt strongly that the agreement giving the wife 80 percent of the property was unfair to the husband. The mediator, a lawyer, knew that the law in the couple's state mandated equitable distribution of property and that the courts would assume a fifty-fifty division of assets. Since the wife had custody of the children and had inherited part of the assets, she could receive more than 50 percent from a litigated disposition, but 80 percent was highly unlikely. The mediator asked the husband to hire an attorney to gain some advice, but the husband refused. The husband insisted that the settlement was satisfactory to him. The mediator was aware of the importance to him of not alienating his wife and maintaining some dependency on her.

Id. at 63-64.

In this example, after continued insistence by the mediator and the wife's encouragement, the husband obtained independent counsel. The couple settled on a split of 65% for the wife, and 35% for the husband. *Id.* at 64.

274. *See id.* at 67-70. *But see* Lande, *supra* note 229, at 39-41 (suggesting that the proposed *ABA Standards* actually discourage the expression of the mediator's personal values).

275. *See The Neutral Mediator*, *supra* note 262, at 70-71; Lande, *supra* note 229, at 41-46.

participants' quest for self-determination by laying out a legal analysis of their factual situation.

Impartiality implies an important, active role for the mediator. The mediator has the ethical duty to guarantee fairness and reasonableness.

Fairness is always an issue in property distribution. For example, generally a retirement pension will be classified as marital property subject to distribution.²⁷⁶ Even though the pension itself is not presently available for distribution, courts recognize that the acquisition of the pension was a valuable contractual right earned by the employee-spouse during marriage.²⁷⁷ How does one compensate the non-working spouse who had an expectation of sharing in this marital asset at retirement? Should he or she be compensated at all? It is the mediator's responsibility to resolve this issue fairly.²⁷⁸

Reasonableness is always an issue in setting child custody arrangements. ABA Standard III limits impartiality by requiring the participants and the mediator to consider the interest of children.²⁷⁹ For example, is joint custody a viable alternative?²⁸⁰ What is the likelihood that each parent will accommodate the other parent in maintaining access to the children?²⁸¹ Clearly, a custodial arrangement which mandates transferring physical custody of the children on alternating weeks may not be reasonable for all parents. The mediator's responsibility in this case would be to help design a more workable solution, considering, among other factors, the domiciles of both parties and their personal inclinations.²⁸²

D. *The Ethics of the Outside Legal Advisor*

The proposed standards impose a continuing duty on the mediator "to advise each of the mediation participants to obtain legal

276. See *Diffenderfer v. Diffenderfer*, 491 So. 2d 265 (Fla. 1986); see also *Pension Evaluation*, *supra* note 226, at 3001.

277. *Diffenderfer*, 491 So. 2d at 265.

278. Courts have the power to treat the pension as a marital asset which can be distributed as lump sum alimony. The courts may use the future receipt of pension payments to assess the ability of that spouse to pay permanent, periodic or rehabilitative alimony to a financially needy spouse. *Id.* at 268.

279. See ABA STANDARDS, *supra* note 1, Standard III(E).

280. See FLA. STAT. ANN. § 61.13 (West 1987).

281. See *McIntyre v. McIntyre*, 452 So. 2d 14 (Fla. Dist. Ct. App. 1984).

282. See generally GARDNER, *supra* note 26.

review prior to reaching any agreement."²⁸³ Bishop suggests that, "[w]hile most mediation participants choose this route to avoid the acrimony, anxiety, and dehumanizing aspects of litigation, most are nevertheless interested in protecting themselves and in being fair to themselves and their former spouses."²⁸⁴

It is unclear, however, how the mediator should interact with the mediation process. Bishop argues that the advisor should offer legal advice which will enhance the mediation process. He says:

In marital dissolution, legal entitlements are highly particularized. While legal counsel is ostensibly objective, it can result only from the presentation of each spouse's perspective on the marriage. The term *advice*, in this regard, is sometimes misunderstood to mean gladiatorial exhortation. It is used here to mean, instead, particularized information. There is no place in the mediation process for the lawyer who would pressure the mediation participant to draw a particular conclusion. It is important for the lawyer who, after evaluating the client's information, can give that person an understanding of his or her entitlements and jeopardies.²⁸⁵

This is consistent with the facilitative approach. The role of the outside counsel should not be adversarial. His ethical responsibilities are well directed by Rule 2.1, Advisor, of the *Rules Regulating the Florida Bar*: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."²⁸⁶

VIII. CONCLUSION

The principle task of the divorce process and the divorce lawyer should be to facilitate the establishment of financial, social and emotional security for the parties to the greatest extent practicable. The present codes of conduct do not allow attorneys to employ a facilitative approach to practice. If the law is designed to facilitate the discharge of familial obligations, the lawyer's skills should

283. ABA STANDARDS, *supra* note 1, Standard VI; *see also* AFCC STANDARDS, *supra* note 1, Standard VII.

284. Bishop, *supra* note 55, at 10; *see also* Bishop, *supra* note 103, at 464.

285. Bishop, *supra* note 55, at 8.

286. RULES REGULATING THE FLORIDA BAR, Rule 4-2.1 (West Supp. 1987).

be used to facilitate these duties also. However, the lawyer is still faced with many ethical dilemmas, guidance for which is in an embryonic state.

The principles discussed above create an ethical framework for the lawyer who practices mediation. Facilitative ethics call for open, informed communications between parties guided by the positive involvement of the lawyer-mediator. The lawyer should not tolerate antagonism and should be fully supported in this by the family court. In the absence of critical reasons such as a social report of parental unfitness or fraud in property procurement, litigation should be the last resort—especially to the party maliciously initiating continued legal strife. Through mediation the divorce process then becomes one of reconciliation.²⁸⁷ The participants strive to heal the wounds of individuals “rent asunder” and the wounds inflicted on society by the breakup of society’s fundamental unit.²⁸⁸ The participants in mediation leave the marital relationship empowered to fulfill the primary legal obligations imposed by the state.²⁸⁹

287. See generally Weaver, *Therapeutic Implications of Divorce Mediation*, 12 *MEDIATION Q.* 75 (1986).

288. See generally Saunders, *The Social Consequences of Divorce: Implications for Family Policy*, 6 *J. DIVORCE* 1 (1983).

289. Indeed we wish to make a subtle plea for the serious consideration of the use of mediation, but more importantly we wish to encourage the cooperation between separating and divorcing spouses, which inevitably means each making a number of concessions that benefit the other in order that they reach realistic compromises that can bear the test of time.

The Carrot Instead of the Stick, *supra* note 52, at 3038.