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COMMENT

PROMISE AND PROBLEMS IN DIVORCE MEDIATION

I. INTRODUCTION

In the past two decades, mediation in general has gained increasing acceptance in the legal community.¹ "[T]he search for alternative methods of resolving disputes has burgeoned to 'a movement'."² In the divorce context, particularly, mediation has been seen by some as a more suitable process than the adversary system.³ Proponents of mediation assert that the adversary system involves debilitating expense, frustrating delay,⁴ and fails to address the emotional needs of the parties.⁵ Adversarial tactics often aggravate rather than resolve spousal differences,⁶ though an amicable settlement might be in the best interests of both parties, especially when there are children by the marriage.

Despite this potential for emotional resolution and for forestalling mounting legal expenses, divorce mediation has not attained the scope of implementation its boosters had expected.⁷ Explanations vary. The divorce bar is accused of guarding its turf; mediators have found it difficult attracting clients; some commentators say it is merely that change comes slowly;⁸ other commentators

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1. Mediation is first and foremost a *process* that emphasizes the participants' responsibility for making decisions that affect their lives. It is, thus, a self-empowering process. The process minimally consists of systematically isolating points of agreement and disagreement, developing options, and considering accommodations through the use of a neutral third-party mediator whose role is described as that of a facilitator of communications, a guide toward the definition of issues, and a settlement agent who works toward the definition of issues by assisting the disputants in their own negotiations.

Milne & Folberg, *The Theory and Practice of Divorce Mediation*, DIVORCE MEDIATION 3, 7 (Folberg & Milne eds. 1988).

2. H. DAVIDSON, L. RAY & R. HOROWITZ, *Preface* to ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (1982).

3. Friedman & Anderson, *Divorce Mediation Strengths*. . . , 3 CAL. LAW., July 1983, at 36.

4. *Id.*; Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119-22.

5. Carbonneau, *supra* note 4, at 1130.

6. *Id.* at 1123.

7. *Warring Couples Shun Divorce Mediators and Opt to Battle it out in Court Instead*, Wall St. J., Mar. 27, 1990, § B at 1, col. 4.

8. *Id.*

have pointed to unresolved problems in the mediation process itself.⁹ The qualifications of mediators, the proper role of mediators and the dynamics of the mediation are among the factors under examination.¹⁰ Despite these growing pains, however, divorce mediation will continue to evolve because of the promise it offers to many divorcing couples.

II. BENEFITS OF DIVORCE MEDIATION

Divorce can be financially devastating.¹¹ Mediation is perceived to lower costs associated with an adversarial divorce.¹² When parties tenaciously dispute each issue for optimum advantage and contest each procedural matter painstakingly, both attorney fees and court costs accumulate.¹³ Mediation attempts to avoid this ruinous contentiousness. According to one source, the median cost of a mediated divorce is \$3428 as compared to a median cost of \$4350 for an adversarial divorce.¹⁴ Additionally, when couples successfully work out an agreement themselves, they are much more likely to comply with the agreement, thus avoiding costs of relitigation or modification.¹⁵ This also eases the caseload of the courts, resulting in savings to the public.¹⁶

Divorce mediation may also offer the advantage of being faster than an adversarial divorce.¹⁷ The average time for successful mediation participants is 8.5 months, while the average time for those in the adversarial process is between 10 and 11 months.¹⁸ Curbing the time required to obtain a divorce might allow parties to emotionally recover sooner. Also, as already pointed out, as divorce actions are delayed, legal expenses rise.

A further benefit typically attributed to mediation is that it gives the parties control of their own destinies and allows flexibility in reaching solutions more appropriate to their unique needs.¹⁹ In an adversarial context, clients often feel powerless as responsibility for decision-making is passed to their lawyers.²⁰

9. See generally Gorbein & Bookholder, *Divorce Mediation: What are the Options? Where is it Heading?*, 63 MICH. B.J. 1137 (1984); Erlanger, Chambliss & Malli, *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 590 (1987) [hereinafter Erlanger]; Crouch, *Mediation and Divorce: The Dark Side is Still Unexplored*, 4 FAM. ADVOC. no. 3, 27 (1982).

10. See *infra* notes 31-55 and accompanying text.

11. See generally Da Silva, *The Dollars and Sense of Settling Cases: The Mounting Costs of Litigation Can Make Clients See the Virtue of Not Going to Trial*, 4 FAM. ADVOC. no. 3, 2 (1982).

12. Carboneau, *supra* note 4, at 1119. But see *infra* notes 56-59 and accompanying text.

13. Carboneau, *supra* note 4, at 1119-22.

14. Wall St. J., Mar. 27, 1990, § B at 1, col. 6.

15. Pearson & Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, 4 FAM. ADVOC. no. 3, 26, 32 (1982).

16. *Id.* at 28-29.

17. *Id.* at 29.

18. *Id.*

19. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982).

20. Friedman & Anderson, *supra* note 3, at 36.

Often the lawyers' adversarial postures escalate tensions, though the parties may not desire this and though it may be counter-productive.²¹ The sense of empowerment which mediation gives the clients can pay dividends. In divorce mediation,

the general form and structure of the process are molded to the specificity of the individual situation. Although the mediator provides pace and guidance, the spouses retain ultimate control over the process. The fact that the final result is the product of personal involvement, and largely self-determined, facilitates initial and continuing compliance with the mediated agreement. These circumstances, in turn, lessen the possibility of reconsideration or litigation.²²

Child custody and visitation are common areas in which mediation's flexibility is applied.²³ The idea is that the parties themselves are in the best position to know what they hope to gain and what they are willing to give up.²⁴

Mediation may also offer the advantage of reducing emotional stress and addressing emotional needs the legal system is not designed to serve.²⁵ Thus, mediation is particularly applicable to the dissolution of marriage. The severance of an intensely intimate relationship such as marriage can create tremendous anxiety which, unaddressed, may later complicate the proceedings. Mediation allows for resolution of emotional issues while preserving mutual respect and avoiding blame.²⁶ For this reason, divorce mediation is preferable to an adversarial contest because it:

acknowledges that the emotions associated with divorce are an integral part of the resolution process and must be recognized. Mediation provides for an airing of emotional issues even if irrelevant to the court proceedings. Therefore these feelings can be managed in mediation so they are not merely suppressed, only to surface later in the form of postdivorce litigation.²⁷

Mediation might also reduce stress by preventing runaway legal costs, reducing incessant delay with its concomitant uncertainty, and averting the escalation of counsels' combativeness beyond the wishes of the parties.

21. *Id.*

22. Carbonneau, *supra* note 4, at 1169.

23. Pearson & Thoennes, *supra* note 15, at 32.

24. Friedman & Anderson, *supra* note 3, at 38.

25. Carbonneau, *supra* note 4, at 1130.

26. Wall St. J., Mar. 27, 1990, § B at 1, col. 4.

27. Milne & Folberg, *supra* note 1, at 8.

III. SHORTCOMINGS OF DIVORCE MEDIATION

Notwithstanding the many praises mediation has received, any movement to supplant the adversary system has stalled.²⁸ The process has not proven to be a panacea.²⁹ Problems exist with divorce mediation that must be resolved if the area is to grow.³⁰

One problem is a shortage of qualified mediators.³¹ Although the field abounds with mediators, many don't have the requisite knowledge and training.³² The majority of mediators at present have backgrounds in social work and psychology.³³ These mediators are unable to competently advise their clients on such things as property division, tax consequences, pensions, alimony and many other legal issues common in divorce.³⁴ Also, mediators without a legal background will not be able to properly conduct the thorough discovery essential to informed negotiating.³⁵ Divorce is a legal process which may result in a final decision.³⁶ Without knowledgeable counsel, clients risk costly mistakes and may unknowingly forfeit legal rights.³⁷

Difficult problems arise defining the lawyer-mediator's proper role as well.³⁸ Traditionally, a lawyer's duty of loyalty has been to his client.³⁹

28. Wall St. J., Mar. 27, 1990, § B at 1, col. 6.

29. For a scathing condemnation of divorce mediation, see *Summers, The Case Against Lay Divorce Mediation*, 57 N.Y. ST. B. J. no. 4, 7 (1985).

30. See generally Crouch, *supra* note 9.

31. Carbonneau, *supra* note 4, at 1171.

32. Gombein & Bookholder, *supra* note 9, at 1137.

33. Carbonneau, *supra* note 4, at 1172.

34. Gombein & Bookholder, *supra* note 9, at 1137.

35. *Id.*

36. *Id.* at 1138.

37. However, attempts to provide each party with independent counsel within the mediation will not only increase costs, but may defeat the purpose of mediation by injecting an adversarial element.

38. The ABA has attempted to address this by adopting the following rule:

(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.

However, in divorce mediation, the lawyer-mediator might be representing both or neither of the parties, thus obscuring where his loyalty must lie.⁴⁰ Various legal organizations have struggled to define the lawyer-mediator's role in this situation.⁴¹ The "common representation" method allows the mediator to render legal advice to the parties, but lessens the mediator's effectiveness because the mediator may be preoccupied with conflict of interest concerns.⁴² The "non-representation" method does not allow representation of either party, but has the advantage of freeing the mediator to focus on facilitating settlement.⁴³ Because of confusion in roles, many lawyers are not receptive to mediation.⁴⁴

Another shortcoming of mediation is the potential for exploitation of one party due to unequal bargaining power.⁴⁵ The same flexibility and party control that makes mediation an advantage can be a detriment when one party uses it to manipulate the other.⁴⁶ Thus, when neither party has counsel, as is typically the case,⁴⁷ the party with superior negotiating skill may dominate the mediation session.⁴⁸

Unequal bargaining power may also result from having insufficient financial resources to fully pursue the divorce.⁴⁹ As financial pressures build, a settlement may not be conceived by mutual agreement, but rather imposed by fiat by the more secure party.⁵⁰ In one case, a woman was forced to sign a mediated settlement when her husband withheld support payments: "I had to say that I was signing this freely, which of course was a lie because at this point my mortgage payment was six days past due, and [his] lawyer was standing there with the check in his pocket saying 'Sign or you don't get the money.'"⁵¹ Although this coercion could occur in an adversarial divorce as well, this example illustrates that

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

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983).

39. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1990).

40. Comment, *Model Rule 2.2 and Divorce Mediation: Ethics Guideline or Ethics Gap?*, 65 WASH. U.L.Q. 223 (1987).

41. See generally Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984).

42. *Id.* at 342-43.

43. *Id.*

44. Riskin, *Mediation and Lawyers*, *supra* note 19, at 41.

45. Erlanger, *supra* note 9, at 597.

46. *Id.*

47. Wall St. J., Mar. 27, 1990, § B at 1, col. 5.

48. Diamond & Simborg, . . . and *Weaknesses [of Divorce Mediation]*, 3 CAL. LAW. 37 (1983).

49. Erlanger, *supra* note 9, at 592.

50. *Id.*

51. *Id.* at 593.

the assumption that mediation produces mutually acceptable agreements is not accurate in all scenarios.

Emotional vulnerability is another form of unequal bargaining power.⁵² Though the intimate nature of marriage is supposed to make divorce ideal for mediation, it may actually impede a fair agreement.⁵³ The decision to divorce may not be mutual; the rejected partner may be too agreeable in hopes of winning back the spouse, or the divorcing spouse may be too generous due to feelings of guilt.⁵⁴ Alternatively, the rejected partner may seek vengeance.⁵⁵

Unequal bargaining power may also occur due to the impatience of one party to settle.⁵⁶ This impatience might be attributable to a desire to pursue another relationship, a desire to sever contact with the spouse, or simply a desire for a return to normalcy.⁵⁷ Whatever the reason, the opposing spouse can manipulate this desire to wring additional concessions at mediation. Many mediation proponents agree that for mediation to work, the parties must have roughly equal bargaining power.⁵⁸ If one party is at a disadvantage, whether it be emotionally, financially, or otherwise, the mediation will likely not achieve its purposes. Instances of spouse abuse, for example, should not be submitted to mediation.⁵⁹

Another criticism of divorce mediation is that actual experience has cast doubt on the assumption that mediation would necessarily save parties time and money. Studies by Jessica Pearson and Nancy Thoennes conclude that "mediation does not initially result in substantial or consistent savings to the clients."⁶⁰ In fact, mediation proved to be more expensive when the parties were subsequently unable to reach an agreement.⁶¹ "The average legal fee paid by successful mediation-group respondents was \$1324. For unsuccessful mediation-group respondents, it was \$1544. And for [those who rejected mediation], it was \$1296."⁶² Additionally, whereas successful mediation saved the most time, unsuccessful mediation took longer to resolve than a purely adversarial proceeding; the adversarial proceeding took between 10 and 11 months, but unsuccessful mediation averaged 14.2 months to complete.⁶³ Thus, if success could be predicted, mediation would result in savings of time and money, but absent such foresight, the parties risk costlier, lengthier proceedings. It should be noted, though, that the instances of relitigation, and thus subsequent expense, were less

52. *Id.*

53. *Id.*

54. Diamond & Simborg, *supra* note 48.

55. *See infra* note 68 and accompanying text.

56. Erlanger, *supra* note 9, at 594.

57. *Id.*

58. Carbonneau, *supra* note 4, at 1176.

59. *Id.*

60. Pearson & Thoennes, *supra* note 15, at 26.

61. *Id.* at 28.

62. *Id.*

63. *Id.* at 29.

with the successful mediation.⁶⁴ Research statistics indicate that 21% of those who had successfully mediated returned to court for modifications or enforcement and only 6% returned to court twice, whereas among the adversarial couples, 36% returned to court once and 13% returned twice.⁶⁵

Perhaps the largest obstacle to divorce mediation is the attitude of the consuming public.⁶⁶ First, couples must have a good-faith willingness to settle in order for mediation to work.⁶⁷ During the emotional tribulations of divorce, many people cannot react rationally. A vengeful spouse can compromise the fairness of mediation⁶⁸ and this might ultimately remove the emotional healing and voluntary compliance benefits of mediation. Second, although mediation is now accepted by many in the legal community, most divorcing couples respond more traditionally.⁶⁹ For example, in Los Angeles, "fully half the disputants . . . who were offered free mediation services to resolve contested child custody and visitation matters rejected the offer."⁷⁰ Indeed, "the divorce mediation programs with the highest participation rates are compulsory services housed in courts."⁷¹

"The problem is getting clients," says Robert Coulson, president of the American Arbitration Association. "Not many family mediators are making a substantial living from it." He says that despite a burgeoning professional interest, his organization hasn't found a ready way to weave divorce into its marketing efforts

Some of the public resistance became clear early on. In doing a marketing survey on divorce mediation some seven years ago, Joel Shawn, a San Francisco divorce mediator and attorney, found "the general response was 'It's a terrific idea. It's needed. It's wonderful.'" But when the same people were asked what they would do if divorcing, "They said, 'I'd get the meanest person in the valley to rip his throat out.'"⁷²

64. *Id.* at 26.

65. Pearson & Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 471 (1985).

66. Carbonneau, *supra* note 4, at 1175.

67. *Id.* at 1171.

68. Diamond & Simborg, *supra* note 48, at 37.

69. Typically those who are receptive to divorce mediation are "younger, well-educated, usually professional and materially comfortable." Carbonneau, *supra* note 4, at 1176.

70. Pearson & Thoennes, *supra* note 65, at 454.

71. *Id.*

72. Wall St. J., Mar. 27, 1990, § B at 9, col. 1.

IV: HARMONIZING MEDIATION WITH THE ADVERSARIAL PROCESS

Divorce mediation should be made fully available for those who want it, but it should be recognized that mediation is not appropriate in all cases.⁷³ The public should be educated as to its availability. "[S]ays John Haynes, a New York mediator, 'It will take another 10 years for people to think of mediation as a first choice'"⁷⁴

Ironically, though public reluctance to accept divorce mediation is a large factor in its present lull, many of those who have participated in the process are pleased with the results.⁷⁵ According to a study by Pearson and Thoennes, 70% of the individuals who successfully mediated were "highly satisfied" with the process, 92% would recommend it to a friend and 93% would be willing to mediate again.⁷⁶ Perhaps more remarkable, of the individuals whose mediation was not successful, 64% would be willing to mediate again and 81% would recommend the process to a friend.⁷⁷ A majority of the successful mediation participants reported that the process had improved communication and cooperation with their ex-spouse and had reduced their own anger.⁷⁸ This, in turn, increases voluntary compliance with the agreement and reduces subsequent litigation.⁷⁹

Many of the problems with mediation might be averted if the public is educated. For example, mediation can actually be more expensive and time-consuming when it proves to be unsuccessful,⁸⁰ but when parties are knowledgeable about mediation, they can evaluate for themselves whether they are likely candidates for the process. Additionally, many of the problems with mediation are not peculiar to that process, but rather also exist in the adversarial process. Impatience to settle, for example, can result in an unfavorable disposition in the adversary system as well as in mediation. Educated couples would be better able to weigh these factors.

Commentators have debated what factors are best able to predict success for mediation.⁸¹ Some have focused on the mediator's style and role, whereas

73. For example, mediation is not appropriate in cases of physical abuse of one spouse by another.

74. Wall St. J., Mar. 27, 1990, § B at 1, col. 4.

75. See notes 66-71 and accompanying text.

76. Pearson & Thoennes, *supra* note 15, at 33.

77. *Id.*

78. *Id.*

79. See *supra* notes 15, 64-65 and accompanying text.

80. See *supra* notes 60-63 and accompanying text.

81. See generally Kressel, Jaffee, Tuchman, Watson & Deutsch, *A Typology of Divorcing Couples: Implications for Mediation and the Divorce Process*, 19 FAM. PROCESS 101 (1980); Kochan & Jick, *The Public Sector Mediation Process: A Theory and Empirical Examination*, 22 J. CONFLICT RESOLUTION 209, 219 (1978); W. Felstiner & L. Williams, *Community Mediation in Dorchester, MA: Final Report* (Soc. Sci. Research Inst., Univ. of S. Cal., 1979-80).

others have examined the preexisting characteristics of the disputants.⁸² One study found the important factors to include the mediator's ability to facilitate communication, the disputants' perception of the mediator, the duration and magnitude of the dispute, and the relationship between the disputants.⁸³ Though the study gives some insight into preexisting characteristics which might aid in screening couples for mediation, the study concludes "that mediators' actions play a key role in determining the success of the process [and] underscore the need for mediator training and experience rather than case screening."⁸⁴

Mediation education is also needed for lawyers if the field is to thrive.⁸⁵ Interdisciplinary training in both the legal and mental health fields would give the lawyer-mediator a wider array of tools with which to serve clients.⁸⁶ With education, lawyer-mediators could better compensate for unequal bargaining power in a session.⁸⁷ Educated lawyers who are not mediators could more competently make referrals for appropriate couples. Such education programs have increased⁸⁸ and likely will continue to increase.⁸⁹

It has become clear that divorce mediation is not a panacea. For some couples it offers cheaper, faster, and more satisfactory divorce settlements, but this does not occur in all cases.⁹⁰ Rather than displacing the adversary system, mediation is best seen as a supplement to it. Couples may still desire the option of an adjudicated divorce.⁹¹ "The real challenge . . . is to synthesize the strengths of each model into a broader view of the possibilities for resolving conflict. Lawyers and lawyer-mediators can neither rely exclusively on their old skills nor abandon them."⁹²

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82. Pearson & Thoennes, *supra* note 65, at 459.

83. *Id.* at 460.

84. *Id.* at 461.

85. One article asserts that trial lawyers are a natural choice to become mediators because of their legal knowledge and their ability to objectively assess a case, to "size up" a witness, to elicit information from a recalcitrant witness, and to generally orchestrate the proceedings. Gaughan, *How to Avoid Cutting up the Cake: Why Trial Lawyers Make Good Mediators*, 24 TRIAL 16 (1988).

86. For a discussion of such a program which has been implemented at the University of Iowa, see Stier & Hamilton, *Teaching Divorce Mediation: Creating a Better Fit Between Family Systems and the Legal Systems*, 48 ALB. L. REV. 693 (1984).

87. See Haynes, *Mediating with a Powerful Competitive Couple: Michael and Debbie*, 1987 MO. J. DISP. RESOL. 27. This article presents specific strategies which the mediator can use to facilitate communication and concessions between difficult parties. Although the article primarily focuses on the competitive couple scenario, many of the techniques could be adapted for other types of couples, such as a couple with significantly unequal bargaining positions.

88. Riskin, *supra* note 19, at 49.

89. *Id.* at 51.

90. See *supra* notes 69-71 and accompanying text.

91. Carbonneau, *supra* note 4, at 1171.

92. Friedman & Anderson, *supra* note 3, at 38.

