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Divorce mediation: An alternative approach to marital dissolution

Abstract

Divorce has become a common phenomena in American life. According to The World Almanac Book of Facts, 1983, in 1981 there were approximately 1,219,000 divorces in the United States. Historically, divorce has been viewed in terms of social deviance and as pathological behavior. This negative conceptualization of divorce was considered necessary to maintain familial stability and societal equilibrium. Until modern times, divorce was granted infrequently and was perceived as a punishment for marital misconduct, not as an escape from an unhappy or unsatisfactory marriage.

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DIVORCE MEDIATION:
AN ALTERNATIVE APPROACH TO MARITAL DISSOLUTION

A Research Paper

Presented to

the Department of Educational Administration

and Counseling

University of Northern Iowa

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

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by

Suzanne Diers Strever

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has been approved as meeting the research paper requirement for the Degree of Master of Arts.

Robert T. Lembke

Nov. 28, 1983
Date Approved

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CHAPTER 1

Introduction

Divorce has become a common phenomena in American life. According to The World Almanac Book of Facts, 1983, in 1981 there were approximately 1,219,000 divorces in the United States.

Historically, divorce has been viewed in terms of social deviance and as pathological behavior. This negative conceptualization of divorce was considered necessary to maintain familial stability and societal equilibrium. Until modern times, divorce was granted infrequently and was perceived as a punishment for marital misconduct, not as an escape from an unhappy or unsatisfactory marriage.

In Colonial America this punishment for marital misconduct often included fines, public whippings and imprisonment, generally with only the "innocent" spouse being allowed to remarry. Grounds for divorce during this time included "adultery, bigamy, impotence, (and) malicious desertion" (Eisler, 1977, p. 4), all focusing on the fault of one partner in causing the divorce. Accordingly, a divorce was generally granted only after the introduction of proof of that marital fault in open court. This situation did not change significantly until the passage of no-fault legislation.

With the passage of the Family Law Act in 1969, California became the first state to abolish fault-based divorce and substitute no-fault marital dissolution. Under no-fault legislation, the substantive elements of the divorce can be generally defined as "1. irretrievably broken marriage, 2. irreconcilable differences, (or) 3. incompatibility"

(Haynes, 1981, p. 3). Neither spouse is required to prove fault on the part of the other.

By removing the need for recrimination and blame from the divorce process, no-fault legislation obviated the bitter court battles and animosity required by fault-based legislation. However, the adversarial legal procedures necessitated by the fault system continue to exist as the procedural elements of the no-fault system. When a marriage dissolution is viewed as a major life transition, implying emotional, social, and financial adjustments for the couple, the traditionally adversarial legal process may not be appropriate. Mediation provides an alternative to that adversarial process.

The process of divorce mediation empowers a couple "to negotiate their own divorce settlement outside the legal system in a nonadversarial way" (Haynes, 1981, p. xi). By eliminating the need to place blame or find fault, one spouse need not lose so that the other spouse can win. A win-win outcome becomes possible through the mediation process. The divorcing parties are taught that it is necessary to cooperate with each other, rather than compete through adversarial attorneys, if they wish to be responsible for their own divorce settlement. With the help of the mediator, who acts as a neutral facilitator, each partner works to achieve his own goals in such a way that the other partner can also achieve his. Communication skills and a willingness to compromise are generally considered necessary for successful mediation to occur.

Jessica Pearson, Ph.D., Director of the Denver Divorce Mediation Project argued that,

> ... the adversary system is simply inappropriate for the resolution of many marital disputes. Writers variously accuse it of increasing trauma, escalating conflict, obstructing communication, failing to provide for the

> negotiating and counseling needs of divorcing couples, and ignoring the underlying causes of grievances. Lawyers and judges are accused of being poorly trained to deal with the psychological aspects of divorce. Because lawyers replace rather than assist couples with negotiations, the agreements generated inspire little commitment and fail to enhance the conflict management skills of the parties. Finally, adjudication is faulted for being coercive, formal, costly, and time-consuming (Pearson, 1981, p. 6).

Statement of the Problem

The remnants of the fault system remain in the no-fault system in that the process and proceedings continue to be based on the concept that the parties are, and will continue to be, adversaries. The purpose of this study is to explore an alternative to that traditional adversarial system: divorce mediation. In doing so, the transition of divorce from a fault to a no-fault base, current models of divorce mediation, the ethical considerations of divorce mediation practitioners, and the benefits and liabilities for participants in the mediation process, will be discussed.

CHAPTER 2

Review of Literature

Divorce mediation is a process of marital conflict resolution whereby parties who are in the process of divorce are empowered to identify, negotiate and resolve their own post-divorce settlement issues. In Western society, divorce has traditionally been viewed as pathological conduct and corresponding sanctions have been applied by society and implemented through the legal system.

Historical Background of Divorce

Two major trends can be found in Western civilization which have influenced present attitudes towards marriage and divorce. Rheinstein (1972) identified these two competing ideologies as the Christian-conservative and the eudemonistic-liberal. He defined the Christian-conservative principle as the view that marriage is dissoluble only by death and the opposite principle, eudemonistic-liberal, as the view that a marriage may be terminated at any time by either party.

The latter principle was operative in ancient Rome, where marriage was considered to be a private, social institution. The termination of marriage, therefore, was not under the jurisdiction of the law. No court decree nor any other type of governmental intervention was required to obtain a divorce (Rheinstein, 1972).

The concept of marriage as an indissoluable institution first became prevalent in Western society when jurisdiction over marital matters was assumed by the Roman Catholic Church. Because marital

affairs were determined to be in the sphere of religious law, the Church was able to develop laws regulating marital concerns on its own terms. Until the Reformation in the 16th Century, both the development and the enforcement of marital regulations remained with the Church. Papal doctrine guiding the institution of marriage was relatively straightforward in that marital dissolution was allowable under only two circumstances: (1) dissolution through God--by death, and (2) dissolution through the Church--by annulment (Rheinstein, 1972).

It was the Church's position that the survival of society was best assured by a system in which only marriage legitimatized sexual relations and the resulting offspring. Thus, the indissoluability of marriage was believed to be essential for the individual's morality, and for the stability of society as a whole. The development of repressive and punitive sanctions in relation to divorce became the logical step in maintaining that morality and stability. Morality in this context refers to the rules of acceptable conduct derived from the belief system of that time--Christianity (Halem, 1980).

English law regarding marital dissolution generally followed this Church doctrine until the early 17th Century. As no divorce was available through the Church Courts while one's spouse lived, there developed only one possible recourse for those who wished to marry a second time. This limited alternative involved the expensive and time-consuming procedure of obtaining a grant of special privilege from the "king in Parliament" and was referred to as parliamentary divorce. Because of its restrictively high cost only the wealthy could afford this remedy for unhappy marriages; thus, divorce was rare (Rheinstein, 1972).

Those British attitudes and doctrines concerning divorce were

transported to America via the English settlers. Civil authorities and religious leaders in Colonial America shared the belief that divorce was a "sinful act requiring forceful intervention" (Halem, 1980, p. 11). However, the issue of who was to control the institution of marriage and divorce in the New World created conflict between church and state officials.

The transition of the concerns pertaining to domestic relations, both marriage and divorce, from the secular powers to the civil authorities was initiated by the Puritans. By 1621, the Puritans had instituted civil marriage ceremonies and had forbidden ministerial involvement in any aspect of the marriage ceremony. The Massachusetts Bay Colony authorized a judicial tribunal to deal with matters pertaining to divorce. Similar tribunals were empowered to handle marital affairs by the Separatists of Plymouth Colony and the residents of the area that later became New Hampshire. In addition, those who settled in the Rhode Island area also made provisions for marital dissolution to be under the jurisdiction of the civil courts (Halem, 1980).

The issue of control between the secular and civil authorities was in dispute until the mid-19th Century when civil control of marital affairs became the accepted mode. Though authorized by civil legislatures and enforced through the courts, the precepts and principles concerning divorce followed the ecclesiastical doctrines of Christianity. Consequently, divorce, per se, continued to be viewed as an immoral act in which the guilty party had wronged the innocent party. It necessarily followed then that the guilty party deserved punishment for his transgressions. Settlement issues such as alimony, child custody, child support, and the right to remarry, continued to represent

"an enforceable set of sanctions based on the determination and "extent of guilt" "(Halem, 1980, p. 12).

Although attempts were made to establish divorce reform, these met with very limited success. For example, a Connecticut law was passed in 1849 which permitted divorce for "any such misconduct as permanently destroys the happiness of the Petitioner and defeats the purpose of the marriage relation" (Rheinstein, 1972, p. 45). This "general misconduct clause" was attacked by clergy of the times who initiated a backlash movement which resulted in the repeal of that law in 1878. It was not until 1969 that any truly revolutionary legislation was passed. In that year, the California legislature removed all moral issues from divorce. In that State, a divorce could thereafter be obtained with no partner being found at fault. The concept of divorce without moral implications is properly referred to as no-fault divorce (Rheinstein, 1972).

The Fault Concept

The concept of fault as being a necessary element for divorce was a fundamental principle in American divorce law until the California legislature took action in 1969. Prior to that legislation, a divorce proceeding followed a procedural path that was similar to other lawsuits. The injured party, or plaintiff, filed an action in which it was alleged that the other spouse, the defendant, was guilty of certain specified acts of marital misconduct. It was that misconduct, if proved, that constituted the legal grounds for the granting of the divorce. At the divorce trial, it was the responsibility of the plaintiff to establish by competent evidence that the allegations stated in the petition were true, thus entitling the plaintiff to the relief requested: a divorce (Eisler, 1977).

This necessity to introduce evidence and prove in open court that the defendant had committed misconduct and that the plaintiff was without fault led to the "uncontested divorce". These "uncontested divorces" totaled about 85% of all divorces in the United States prior to no-fault legislation such as was passed in California (Dunahoo, 1969).

In an "uncontested divorce" the defendant, who was either a willing participant to a divorce proceeding or unable to fight the divorce, agreed not to contest the divorce proceedings--even when the grounds for divorce might be insufficient. The "uncontested divorce" often called for elaborate subterfuge and staged affairs with perjury and collusion the result (Eisler, 1977).

Perjury and collusion also occurred in relation to the Doctrine of Recrimination. When used in divorce actions, the Doctrine of Recrimination meant that if the defendant in such divorce proceedings could prove that the plaintiff was also at fault, the grounds for divorce were invalidated. As an example, if a man sued for divorce on the grounds that his wife had committed adultery, and his wife proved that he had also committed adultery, the request for a divorce would be denied because the plaintiff was not entitled to any relief. In such a situation neither party would be entitled to a decree of divorce because both were guilty of marital misconduct (Eisler, 1977).

If the state's interest is to encourage social stability by promoting the maintenance of marriage, the Doctrine of Recrimination presented an interesting paradox. If not one, but both spouses, are guilty of transgression it could be assumed that a negative, unhealthy relationship would exist. The Doctrine of Recrimination required that

the couple must stay together. The premise that the state had a regulatory interest in the promotion of ordered social relationships ended with the advent of no-fault dissolutions (Dunahoo, 1969).

Legislative Precedent: No-Fault Divorce

As previously stated, a landmark event took place in American legal history in 1969. The state legislature of California made a true break with the past concerning marital dissolution legislation. This break was in the form of the California Family Law Act of 1970--"the first modern divorce act in the nation to eliminate fault as the basis for divorce" (Eisler, 1977, p. 5). Thus, after years of viewing a divorce itself as immoral or sinful, California cut the ties with traditional religious morality making divorce solely a legal act, neither requiring nor involving marital misconduct (Wheeler, 1974).

Under the no-fault approach, the marriage can be dissolved if the Court finds that irreconcilable differences have led to its irremediable breakdown (Wheeler, 1974). Though it continues to be a judge's responsibility to deny a divorce if this test is not met, in reality the California Family Law Act of 1970 made it possible for California residents to end their marriages at will because if at least one of the parties did not desire the dissolution of the marriage, no action would have been started in the first instance.

Following California's lead, forty-seven states now have some form of no-fault divorce, substituting concepts such as irretrievable breakdown or incompatibility (Haynes, 1981). This change represents a shifting of societal attitudes, taking the concept of divorce out of the Christian-based value system, and placing it in a legal system in which an individual is not punished for his need to break his marital contract.

In this way, the ending of a marriage has become a personal problem for the individuals involved; it is not one in which society pursues a regulatory interest (Dunahoo, 1969).

With the enactment of the no-fault legislation, there can be no question that a major shift in societal attitudes about divorce has taken place. The substantive element of fault divorce laws involved and required proof of misconduct. The substantive element of the no-fault laws involves only a proving of a marital breakdown. However, despite the significant changes that have taken place concerning the substantive element of divorce laws, there have been relatively few changes enacted concerning the procedural aspects of a divorce proceeding.

Regardless of whether there is fault or no-fault divorce law, the affairs of the individual and the family that should be addressed are constant. The custody of minor children, child support, alimony, and property settlement are matters that need to be resolved in any divorce proceeding--whether it be fault or no-fault based. These concerns continue to be addressed under the no-fault legislation in much the same way as they were under the previous fault statutes.

In a typical no-fault proceeding, a lawsuit or petition is filed by one party (the petitioner) making allegations of need and desires, and requesting relief from the judge. Generally the services of a licensed attorney are required to facilitate this process. The respondent is then required to file responding court documents, also requiring the services of an attorney. Thereafter, the individual and family concerns are resolved through a negotiation process conducted by their respective attorneys. If the negotiation process should break down, the matter is ultimately resolved by a judge after an evidentiary trial.

Thus, the substantive elements of divorce proceedings have changed from a fault to a no-fault system but the procedural aspects of a divorce have remained an adversarial process. As fault has been removed as the basis for divorce, perhaps mediation could be utilized to resolve family concerns instead of the adversarial legal process.

In the Family Law Reporter, the following statement summarized the benefits of the transition of marital dissolution from the adversarial to non-adversarial method of conflict resolution.

> According to critics, litigation escalates conflict and trauma without addressing the counseling and negotiating needs of most divorcing couples. Because it pits one parent against the other, it undermines the communication and cooperation necessary for effective post-divorce parenting. Finally, it results in stipulations and orders that are frequently resented and all too often violated. Mediation, on the other hand, is believed to address the causes of disputes, reduce the alienation of litigants, inspire consensual agreements that are durable over time, helping divorcing couples resume workable relationships (Freed, 1981, p. 8).

An Overview of Divorce Mediation

There is no universally accepted model of divorce mediation. The process by which mediation occurs varies with the philosophical orientation of the mediator, the needs of the participating couple, and the individual state law restrictions. Private mediation services are usually offered by lawyers, therapists, or a combination of lawyer-therapist teams. Court-sponsored mediation services are not addressed in this review of literature because they are an element of the adversarial legal system, not an alternative to it.

Despite the wide variance in models, a general theoretical framework for divorce mediation can be constructed which includes elements common to almost all models of divorce mediation. Who will be involved in the mediation process, what the role of the mediator is defined as,

and rudimentary procedural elements are conceptualized similarly in most models.

Mediation requires the voluntary participation of the divorcing couple. In the mediative process, the couple is responsible for identifying their values and needs to determine the settlement issues of their separation and divorce. They must be willing and able to communicate honestly with each other to have effective mediation occur.

The mediator's role is broadly characterized as that of "a neutral third party (who) tries to keep contesting parties talking until they reach a settlement of their differences" (Pearson, 1981, p. 5). It is the mediator's primary responsibility to assist the couple in reaching an agreement that best meets both of the participating individual's needs as well as the needs of the children. Accordingly, the mediator must have the ability to separate the emotional issues from the substantive issues and to clarify the matters that need to be resolved on both levels.

The process by which the agreement is reached can vary extensively from model to model. Sequential steps common to the operating agenda of the majority of mediation experiences are identified by the American Arbitration Association (1982) as follows:

1. Establish a relationship with both parties, defining the mediator's role.
2. Design an agreed upon schedule for the sessions that will be followed to a conclusion.
3. Adopt a method for obtaining whatever information is required to understand the parties' problems.
4. Identify the various areas of agreement.
5. Define the issues that must be resolved.
6. Assist the parties in their negotiations.
7. Formulate a final settlement.
8. Arrange for the terms of the settlement to be transmitted to the attorney for filing in court if necessary (p. 4).

Obviously, much room for individual style and process management exists within this framework. However, some type of structured approach is considered to be necessary for the successful functioning of a mediation experience.

The ability to negotiate is a basic skill necessary to move through the agenda and effect successful conflict resolution between the couple. In the negotiation process, each participant presents his own demands. The mediator assists the couple in reaching mutually acceptable compromises for those demands. Compromising is considered essential to the mediation process, both to reach the desired agreement and to build committment to it. It is believed that the agreement becomes "owned" by the couple when it requires their full participation and willingness to work together to reach a mutually acceptable settlement.

In most models when negotiations are completed, the mediator assists the couple in writing up their settlement agreement and resolves any remaining questions or issues. In this overview of mediation, when there are no remaining issues, the process would then be considered completed.

Couples who have defined their physical and emotional needs, negotiated the compromises necessary to reach an equitable agreement, and developed a sense of committment to the negotiated settlement, will generally have an agreement which identifies and resolves pre-mediation concerns such as financial and custodial issues. This process should facilitate the couples' lifestyle change with the least amount of conflict possible.

As identified, these are elements of mediation that are common to almost all models. To better illustrate the structure, process, and

content of divorce mediation, models designed by two prominent divorce mediation professionals, O.J. Coogler, and John Haynes, will be explored in the following pages.

Structured Mediation

Divorce mediation was first developed in 1975 by O.J. Coogler. Coogler was an attorney whose personal experience of undergoing a painful divorce provided him with the impetus to develop a new method of conflict resolution, a process that he termed Structured Mediation. His model reflects his legal training, and is the basis for the mediation services offered through the Family Mediation Association (FMA). In his book, Structured Mediation in Divorce Settlement, Coogler defined mediation as an agreement made between two people who are having trouble resolving a controversy to turn to a neutral third person who will help them resolve the issue (Coogler, 1978). He differentiated mediation from Structured Mediation in the following statement, "When a husband and wife agree to reach divorce settlement under the Marital Mediation Rules, they are using a new kind of mediation called structured mediation" (Coogler, 1978, p. 2).

The Marital Mediation Rules were derived from state laws in the area of divorce and are the guidelines by which the mediation process occurs. The Mediation Rules form a part of the contract signed by the couple who chooses to participate in Structured Mediation and cover the following areas:

Section 1 Agreement of Parties to Mediate.
Section 2 Mediation of Future Dispute under Contract Provision.
Section 3 Scope of Mediation.
Section 4 Mediation Situations.
Section 5 Administration.
Section 6 Panel of Marital Mediators.
Section 7 Appointment of Mediator.
Section 8 Number of Mediators.

Section 9 Qualifications of Mediators.
Section 10 Vacancies.
Section 11 Appointment of Advisory Attorney.
Section 12 Obligations of Advisory Attorney.
Section 13 Compensation of Mediators.
Section 14 Certification and Supervision of Centers.
Section 15 Mediation Fee Deposit.
Section 16 Refund of Deposit.
Section 17 Communications with Mediators and Advisory Attorney.
Section 18 Cancellation of Appointments.
Section 19 Attendance at Mediation Sessions.
Section 20 Determination of Impasse.
Section 21 Confidentiality of Mediation.
Section 22 Tape Recording of Mediation Sessions.
Section 23 Full Disclosure.
Section 24 Preparation of Budgets.
Section 25 Participation of Children and Others.
Section 26 Third-Party Involvement.
Section 27 Temporary Custody and Support - Arbitration.
Section 28 Transfers of Property.
Section 29 Temporary Court Order.
Section 30 Guidelines for Division of Property.
Section 31 Spousal Maintenance Guidelines.
Section 32 Child Support Guidelines.
Section 33 Child Custody Guidelines.
Section 34 Rights of the Custodial Parent.
Section 35 Rights of the Noncustodial Parent.
Section 36 Rights of Joint Custodial Parents.
Section 37 Controversy Over Custody.
Section 38 Agreement upon Issues during Mediation.
Section 39 Execution of Settlement Agreement.
Section 40 Evaluation of Settlement Agreement.
Section 41 Concurrence of Mediators.
Section 42 Arbitration.
Section 43 Masculine and Feminine Gender.
Section 44 Interpretation and Application of Rules.
Section 45 Amendment of Rules (Coogler, 1978, pp. 117-129).

By looking at marital dissolution in terms of the ending of a partnership, Coogler (1978) identified three issues that the divorce mediation settlement should resolve: "Deciding about Property Division, Terminating Dependency upon the Relationship, (and) Continuing the Ongoing Business Initiated by the Partnership" (p. 1). To deal with these issues specifically four major categories of concerns must be addressed in the settlement document: "Division of Marital Property, Spousal Maintenance (Alimony), Child Support, and Custodial

Arrangements" (p. 12).

Division of Marital Property. In the division of marital property the first assumption is that all property is jointly owned unless otherwise defined. Valuation of the joint property is made by the couple or an outside expert agreed upon by the couple. The disposition of property is then reviewed and defined. The various parcels of property can then be retained by one spouse, held in joint ownership, or sold. Generally the division is based on an equal split with special considerations made for the varying circumstances of the individuals involved. Before movement can be made to the next category, the couple must be in agreement about the division of property.

Spousal Maintenance. Spousal maintenance is usually allocated to the spouse who has not exercised or increased his earning power due to performing financially uncompensated work in the home. In determining the amount and duration of spousal maintenance numerous factors need to be taken into account: (1) the needs of the dependent spouse, (2) the resources of the supporting spouse, (3) the marital property each spouse received, (4) the standard of living the couple had developed, (5) the vesting of Social Security benefits, (6) the tax ramifications to each spouse as to the labeling of the support payment, (7) the duration of the marriage, and (8) the ages of the parties (Coogler, 1978). Spousal maintenance is intended, as its name suggests, to be for the shortest period of time necessary to allow for the supported spouse to become financially independent.

Child Support. The current trend in child support is towards shared spousal responsibility. Coogler's model identified the basic

factors to be reviewed by the couple and the mediator before child support decisions are made. These issues involve the financial resources of the child, the financial resources of the custodial parent, the financial resources and needs of the non-custodial parent, the family's standard of living prior to the dissolution, and the physical and emotional condition of the child. By obtaining both spouses' commitment to child support issues, it is the premise of this model that the high default rate on child support payments can be reduced. With the mutual involvement of the spouses in determining the amount of support necessary, the support agreement becomes "owned" by the parties, with corresponding commitments from each spouse: one to live within the stipulated amount, and the other to provide that amount on a consistent basis for the period defined.

Child Custody. In Structured Mediation the issue of child custody is not allowed to become a tactic to control financial disputes as has frequently happened in the adversarial legal system. If custody is unresolved, financial matters must be resolved before the custody issue is addressed. The decision as to who will have child custody is based upon a variety of factors. However, these factors can be reduced to a single criteria: the determination of which partner is best able to meet the children's financial, emotional, social, psychological, and affectional needs. That party would be determined to be the appropriate custodial parent for the child.

The needs of all members of the family can be negotiated into the mediated agreement. Joint custody is explored as an alternative choice, both for the sake of the parents and the children, and visitation as a responsibility and a privilege is addressed. Children are encouraged to

be involved in the mediation process during the discussion of custody and visitation whenever appropriate. The custodial agreement can be negotiated so as to be time-limited, with the stipulation that it will be reviewed after a predetermined period of time has elapsed. The family can then negotiate a change at that point in time.

These four areas are the basic categories of concerns dealt with in the divorce mediation settlement. The process utilized to reach agreement on these concerns will be explored in the following paragraphs.

Coogler's model is very structured relative to process. He believed that there was a great need for structure when working with couples who are experiencing the stress and feelings of hopelessness or confusion attendent to going through a divorce. Coogler (1978) felt that those couples who did not abdicate the power to negotiate their own settlement to adversarial attorneys increased the likelihood of developing a settlement that best met their needs.

The development of a simple, non-threatening, yet effective mediation model was considered by Coogler (1978) to be essential to the acceptance of the concept of structured divorce mediation. During a time of great stress and personal grief it might seem easier for divorcing partners to turn the divorce process over to attorneys who could "solve" their problems for them. To avoid the future dissatisfactions and post-divorce court battles common to the adversarial divorce, mediation must be seen by the divorcing parties as an effective, realistic alternative.

The structured divorce mediation process was developed by Coogler under the auspices of the Family Mediation Association. The Association's goal is "improving the quality of family life" (Coogler, 1978, p. xv).

In the case of unsatisfactory marital relationships it was felt this objective could be best achieved by "cooperative methods of conflict resolution" (Coogler, 1978, p. xv). The Family Mediation Association supports its authorized mediation centers which are structured according to their philosophical views. These centers utilize standard forms, a structured format identifying what will occur in each of the obligatory ten sessions, and mediators trained by the Association who are knowledgeable about the divorce mediation process.

The mediator plays a major role in the Structured Mediation process. It is necessary that he remain a neutral facilitator while helping the couple reach their own agreement. In doing so he performs three major functions.

The mediator's first function is to maintain control of the negotiations. It is agreed upon beforehand by the parties that he has the power to open and close issues. This power allows him to move to less controversial issues when a particular concern cannot be resolved at that time (Coogler, 1978).

Secondly, the mediator is responsible for evaluating the settlement as requested by the couple. This evaluation is thought to be valuable for the mediation process in two ways. First, neither spouse is as likely to try to negotiate an inequitable agreement if there is a likelihood that it will be rejected in the evaluation process. Second, the mediator himself will often be more thorough knowing the agreement will come under continued scrutiny. The mediator is warned to be careful that the process of evaluation does not become a tool that the couple tries to use to make the mediator responsible for their agreement. The operative principle in Structured Mediation is "that the agreement be

one for which each party takes full responsibility" (Coogler, 1978, p. 2).

Finally, the mediator is responsible for approving or not approving the settlement agreement. Though the mediation process is designed so as to place the responsibility for the agreement primarily with the couple, the mediator's role allows him to not concur with the settlement reached by the couple. This nonconcurrence does not invalidate the settlement agreement, but it does allow the mediator and the mediation center the opportunity to disassociate from what may be felt by them to be an unethical, unfair, or illegal settlement (Coogler, 1978).

It is essential that the mediator fulfill his responsibilities in an impartial and unbiased manner. If the mediator loses, or is perceived by the participants to have lost his neutrality, the process cannot work.

The mediation center staff also includes a panel of advisory attorneys. An advisory attorney becomes involved after the settlement agreement is negotiated. The attorney drafts the actual settlement document that incorporates all applicable content area decided upon and agreed to in the mediation with any additional legal provisions that may affect the form but not the substance of the mediated agreement. This final settlement document is reviewed with the couple to assure their concurrence before it is presented to the court (Coogler, 1978).

Coogler (1978) believed that the acceptance of Structured Mediation would be fought by legal professionals who had a vested interest in maintaining exclusive rights to marital dissolution work. Though the legal profession's "long-standing opposition to no-fault divorce was asserted as a concern for family stability...candid statements made at professional meetings revealed a less lofty concern--that reduced controversy in no-fault divorce cases would mean reduced income for

lawyers" (Coogler, 1978, p. 8). He equated the fight for the acceptance of divorce mediation as a viable alternative to adversarial divorce with the difficulty in having no-fault divorce legislation passed.

Coogler (1978) may have best expressed his own attitude towards mediation in this statement, "Whatever may be said in support of the adversarial process for resolving other kinds of controversies, in marital disputes this competitive struggle is frequently more damaging for the marriage partners and their children than everything else that preceded it" (p. 8).

Haynes' Model of Mediation

The second model of divorce mediation to be explored was developed by John Haynes, Ph.D. Haynes' model was influenced by its originator's background as both a labor negotiator and a professor of social welfare. Though less legalistic and more therapeutically-oriented, Haynes' model is similar to Coogler's in its basic approach to marital dissolution. Both models identify the need for an effective alternative to the adversarial system to reduce the animosity and competitiveness between the couple and to promote a productive, mutually acceptable settlement. Haynes, like Coogler, provides sample forms, agreements, and training for those using his model. The two models differ primarily in the role played by the mediator.

The mediator in Coogler's model performs one primary function--mediation, and is employed in a clinical setting--the divorce mediation center. In Haynes' model, the mediator is a therapist who sees divorce mediation as another professional service he can utilize to better meet the needs of his client. The counselor, or therapist, in this model is typically already seeing the marital couple in a therapy situation. If

the clients reach the decision to separate or divorce, mediation can be used to assist them in making this transition in the least painful and most healthful way possible (Haynes, 1981).

Haynes (1981) saw the role of the divorce mediator as similar to that of a labor mediator. The labor mediator's function is to assist the disputing parties in reaching a settlement. He must have no allegiance or obligation to either party. In a labor dispute, neither the company, nor the union, hired the mediator. The government generally provides the mediator to avoid allegations of partiality that might result if hired by one side or the other. In the case of divorce mediation, the mediator is to be hired by the couple jointly--not by either party individually. In this way, both spouses share the responsibility for, and the control over, the settlement agreement and the mediator's impartiality cannot be questioned.

In this model, the mediator is referred to as the professional to reflect his dual functions as both therapist and mediator for the couple. In the therapist's role, the professional works with the couple who is having marital difficulties to help them to deal with and resolve their problems. When there is no longer a possibility that the marital relationship can be maintained and divorce is inevitable, the professional, as the therapist, "has an ethical responsibility to complete the uncoupling process. Divorce mediation is the most efficient way of accomplishing this" (Haynes, 1981, p. 4). The therapist's goal then changes from maintenance and reclamation of the marriage to the facilitation of a less painful separation.

The mediator's goal is to have the couple reach a fair settlement. This is accomplished primarily by separating the emotional issues from

the economic ones. The mediator continues to maintain his original role of therapist or counselor throughout this process. After the couple has determined that divorce is the best alternative for them, and the therapist feels the couple is ready to start the mediative process, the mediator first meets with each party separately. During these first assessment sessions, the individual lists what the family expenses have been in the last year. A statement of the net worth of each partner is then drawn up. Using the information supplied by both parties, an economic statement is then developed. This combined economic statement must be agreed upon by both parties before settlement negotiations can begin.

Haynes (1981) felt that, "Many of the emotional hurts and feelings of guilt involved in divorce are displayed during the struggle for an economic settlement...When a couple attempts to settle the emotional issues of the separation by engaging in economic war, neither party can win" (p. 7). To deal effectively with both the emotional and economic issues the professional must exhibit both counseling and mediation skills. If the couple cannot work through the emotional issues, the mediator may call a "time-out" from the mediation and assume the role of therapist for a specified number of sessions. When their emotional concerns have been resolved, the therapist can resume the role of mediator, refocusing on unresolved economic issues (Haynes, 1981).

The couple is ready for the negotiation of the settlement to begin when they have agreed upon a data base of their assets, including figures for current and future earnings of each spouse. The mediator uses this information to develop boundaries for the agreement. As in a labor mediation model, the divorce mediator identifies areas of common

agreement so that they can be removed from the discussion. The mediator also identifies the symbolic issues, attempting to then have only the substantive areas of disagreement "on the table". These issues are measured against the figures the couple reported individually during the assessment period. Typically, it is at this point in time that the financial implications of the divorce become clear to the couple. With this insight into each other's future financial situation--and limitations, it is less likely that one spouse will feel cheated or taken advantage of by the other (Haynes, 1981).

While these joint economic negotiations are taking place, the mediator is also seeing each party separately. These individual sessions allow either party to try out an idea with the mediator without losing face. The mediator can broach that idea to the second party and if he is receptive to the idea, the first party can be brought in to "strike a deal" (Haynes, 1981).

One basic premise in this model of divorce mediation is that by learning to work together, mutual respect will be regained by the couple, enabling them to deal on an adult level with each other. Theoretically, the couple could then stop turning emotional needs into economic issues and could deal with emotional needs directly. With this growth, a settlement that is mutually acceptable becomes possible. The parties' children also benefit indirectly through the process. By dealing honestly and concretely with each individual's needs, the couple is less likely to use the children as bargaining tools.

The importance of the professional having both counseling skills and mediation skills is stressed in this model. The mediator must earn the couples' trust and respect before successful mediation can occur.

The mediator's counseling training helps enable him to better understand the individuals' behavior, and the actual problems rather than only the identified problems. Thus the mediator is able to promote the successful closure of the relationship by resolving past issues, while dealing with current and future issues in the settlement agreement. The couple is free to utilize the services of an attorney to review the settlement agreement and obtain the divorce decree.

The divorce mediation process offers a couple the chance to reach a joint settlement that meets their own individual needs. The mediator neutralizes situations that the couple cannot deal with at that time, while maintaining a role of neutrality in the process. The mediator helps the clients not only to develop, but also to own, their settlement agreement. He encourages the couple's perspective to change from anger and despair about their past to hope and confidence in their individual futures.

In Divorce Mediation Haynes (1983) listed the following eight factors as being necessary to the successful completion of a mediation experience:

1. there has been full disclosure of all the economic assets of the marriage,
2. the economic division of the assets and the necessary support payments are essentially equitable and designed to meet the joint needs of the family and the individual needs of each member,
3. there are no victims as a result of the agreement,
4. the channels of communication between the ex-spouses are open and direct; the mediator will have helped the couple organize a direct way to make decisions about the children,
5. the couple relate to their children as parents, not as spouses, through the acceptance of the permanence of their parental roles in the context of the ending of their spousal roles,

6. the children are able to develop and maintain an ongoing relationship with both parents; thus the agreement must provide for direct communications with both parents along with appropriate range of access options regarding both parents,
7. the couple are empowered to make decisions and given the skills during mediation to continue the decision-making process in their respective futures,
8. the extended families, particularly blood relatives, are protected in their relationships with the children, and the children enjoy the same open access to them as to their parents (pp. 127-128).

Haynes' mediation model has as its focus not only the final settlement agreement, but also the therapeutic process by which that agreement is reached. Through this process, "...the mediator turns the couple's focus away from past anger and recriminations. By being nonjudgmental s/he works with the couple so that they reach a settlement that permits them both to concentrate on the future and the potential it holds" (Haynes, 1980, p. 14).

Ethical Considerations for Divorce Mediation Practitioners

Currently, the laws of every state are such that a marriage can be dissolved only by legal proceedings that conclude with an adjudication by an authorized judge. In addition, state laws generally are such that only licensed lawyers are allowed to represent others in official judicial proceedings, or provide advice concerning legal rights or responsibilities. As an extension of these laws there exists the question of whether a person is engaging in the unauthorized practice of law when that person is involved in any aspect of judicial proceedings. Accordingly, the ethical considerations involved in the practice of law--which include the unauthorized practice of law--must be addressed and resolved.

The legal profession is guided by the Code of Professional Responsibility which includes Canons, Ethical Considerations and Disciplinary Rules. The nine Canons are principles of conduct for attorneys. Following each Canon are a varying number of Ethical Considerations, which are standards the legal practitioner can refer to for guidance, and Disciplinary Rules, which are mandatory directions of attorney conduct. Punitive actions, including disbarrment, can result from violations of the Disciplinary Rules. In reviewing the following divorce mediation delivery systems, the potential for conflict with the Code of Professional Responsibility will be outlined. The source for all references to Canons, Ethical Considerations, and Disciplinary Rules will be the Iowa Code of Professional Responsibility for Lawyers (1983).

At the present time divorce mediation is generally practiced by lawyers or therapists utilizing one of four mediation delivery systems: (1) Single Lawyer, (2) Lawyer-Therapist Team, (3) Mediator-Advisory Attorney, and (4) Single Therapist. This section will examine each of the four delivery systems in terms of the ethical considerations their practice engenders.

Single Lawyer Delivery System. In this system, the attorney usually in private practice, expands his services to include the offering of divorce mediation services. Generally, he both mediates the settlement agreement with the couple seeking dissolution of their marriage and structures the dissolution settlement to incorporate the financial and custodial issues resolved in the mediative process.

The lawyer who attempts to practice divorce mediation faces conflicts being in conflict with Canon 5, which states that,

"A Lawyer Should Exercise Independent Professional Judgment on Behalf of His Client" (p. 110). Because the representation of both marriage partners in a dissolution action is considered to be intrinsically prejudicial, dual representation has been traditionally prohibited. The following Ethical Considerations (EC) and Disciplinary Rules (DR) under Canon 5 could each be considered applicable to the single lawyer practicing mediation:

> 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 (p. 110).
> EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant (p. 113).
> EC 5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved (p. 114).
> DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
> (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests (p. 115).
> DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
> (A) In no event shall a lawyer represent both parties in dissolution of marriage proceedings whether or not contested or involving custody of children, alimony, child support or property settlement.
> (B) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment, except to the extent permitted under DR 5-105(D).

> (C) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(D).
> (D) In the situations covered by DR 5-105(B) and (C), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each (pp. 116-117).

If divorce mediation is considered to be a non-adversarial process between spouses, facilitated by a neutral third party--the mediator--then by definition the attorney-as-mediator appears to be exercising professional judgment on behalf of two clients.

Canon 9, which stated, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety" (p. 133) could also be applicable to the single lawyer practicing divorce mediation. Ethical Consideration 9-2 held that:

> EC 9-2 Public confidence in law and lawyers may be eroded by improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession (p. 134).

Disciplinary Rule 9-101, "Avoiding Even the Appearance of Impropriety" (p. 134), when read with the aforementioned Ethical Consideration 9-2, would seem to be directed particularly at the lawyer practicing divorce mediation. Because the questions concerning

the appropriateness and allowability of the attorney/mediator have not been resolved at this point in time, accusations of the appearance of impropriety would be possible.

Doubts have been expressed by the legal community as to whether the lawyer-client privilege can be extended to include the mediator-client relationship when the mediator is an attorney. Until the issues involved in the privileged communication status of the lawyer/mediator are resolved, the following Canons, Ethical Considerations, and Disciplinary Rule could affect the attorney/mediator in his relationship with his clients because of his inability to guarantee confidentiality in the mediation process.

> Canon 4 A Lawyer Should Preserve the Confidences and Secrets of a Client (p. 108).
> EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance (pp. 108-109).
> EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client (p. 109).

> EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure (p. 109).
> EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets (p. 109).
> DR 4-101 Preservation of Confidences and Secrets of a Client.
> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure (p. 110).

Galante (1982) in the National Law Journal, reviewed the issue of confidentiality for the mediator/lawyer:

> The question of whether lawyers can assure couples that statements made in the mediation session will remain secret posses another dilemma. The trend is to safeguard confidentiality by contract. Couples are required to agree that what is said will not be used outside the mediation session, and that they will not call the mediator as a witness in later proceedings if talks break down.
>
> There is as yet no ruling on whether such agreements are enforceable, and most authorities caution that the usual attorney-client privilege might not extend to such sessions (p. 11).

The lawyer who attempts to assume the role of mediator in the divorce mediation process faces a number of potential violations of the ethics of his profession. The divorce process as it presently exists

clearly contemplates the lawyer as an adversary for one party, not as a mediator for both.

Lawyer-Therapist Team Delivery System. In this divorce mediation delivery system, the lawyer and mediator work together with the same couple. Typically, the mediator will assist the couple to work through those issues which may be blocking their ability to agree upon a settlement. Once agreement is reached on the disposition of property and the custody issues resolved, the attorney is called upon to draft the settlement agreement and complete the necessary legal procedures. The lawyer-therapist team approach would seem to offer a separated couple the opportunity to deal with and resolve their emotional and legal problems.

However, the attorney's role in this mediation delivery system involves the same ethical concerns as those outlined in the Single Lawyer Delivery System, encompassing questions of the attorney's ability to represent two clients simultaneously, his ability to invoke the attorney-client privilege, and his possible appearance of impropriety. Also, "the New York City Bar Committee expressed concern that a lawyer working with mental health professionals, in either a mediating or advisory attorney capacity might be relied upon to recognize and protect the individual interest of the client" (Silberman, 1982, p. 128).

In addition to the potential conflicts raised by and under Canons 5, 9, and 4, the Lawyer-Therapist Team Delivery System faces the prohibitions of Canon 3:

> Canon 3 A Lawyer Should Assist in Preventing the Unauthorized Practice of Law (p. 105).

EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession. Therefore, the legal profession shall actively discourage the practice of law by non-lawyers; and lawyers, acting either individually or collectively in their bar associations, shall seek injunctive relief from a court of competent jurisdiction, whenever necessary to prevent the unauthorized practice of law [Court Order July 30, 1981] (p. 105).

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. However, the practice of law includes, but is not limited to, representing another before the courts; giving of legal advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, nonlawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required (pp. 105-106).

EC 3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law (p. 107).

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice (p. 107).

DR 3-101 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a nonlawyer in the unauthorized practice of law (p. 107).

DR 3-102 Dividing Legal Fees with a Nonlawyer.

(A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons (p. 107).

DR 3-103 Forming a Partnership with a Nonlawyer.

(A) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law (p. 108).

DR 3-104 Nonlawyer Personnel.

(A) A lawyer or law firm may employ nonlawyer personnel to perform delegated functions under the direct supervision of a licensed attorney, but shall not permit such nonlawyer personnel to (i) counsel clients about legal matters, (ii) appear in court or in proceedings which are a part of the judicial process (except as permitted by court rule 120 or rules of this or other courts or agencies), or (iii) otherwise engage in the unauthorized practice of law* (p. 108).

*Interpretive Memorandum

Any time judicial action is taken, it constitutes a proceeding which is a part of the judicial process. Therefore, the presentation of orders in probate or other proceedings constitutes a court appearance which a lawyer or law firm may not permit a nonlawyer employee to perform [Issued by the Supreme Court of Iowa, June 15, 1982.] (p. 108).

In summary, "...if a lawyer works with a mental health professional he may be seen as guilty of fee-splitting with a non-attorney, and of being in a partnership with one who is unauthorized to practice law.

Both activities run afoul of local as well as American Bar Association ethical standards" (Galante, 1982, p. 10).

A final ethical consideration for the Lawyer-Therapist Team Delivery System of mediation services lies in the joint employment of lawyers and therapists (non-lawyers) by mediation centers. The Canon 2 statement that, "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available" (p. 85) would not appear to be a source of potential conflict; however, Disciplinary Rule 2-103 under that Canon prohibits lawyer association with laymen, extending to a lawyer working for a lay agency.

Disciplinary Rule 2-103, "Recommendation of Professional Employment" (p. 98) specified that:

> (C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner...(p. 98).
> (D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm...(p. 98).
> (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this disciplinary rule (p. 99).

It would appear that the attorney who accepts employment with an agency whose purpose is the mediation of marital disputes, could be considered in conflict with this prohibition because of his provision of legal services to the agency's client.

The Lawyer-Therapist Team Delivery System faces all the same prohibitions as the Single Lawyer System, as well as prohibitions against working with those persons or agencies not sanctioned to practice law.

Mediator-Advisory Attorney Mediation Delivery System. In this delivery system the mediator and advisory attorney function within the guidelines of Coogler's Structured Mediation process. This delivery system varies from the Lawyer-Therapist Team Delivery System in that the role of both the mediator/counselor and advisory attorney is more defined. The counselor is generally a family therapist who has undergone specialized mediation training through the Family Mediation Association. Training incorporates a formal rule structure regarding the processes involved with mediation, as well as a set of private law rules derived from current marital dissolution law. The mediator, advisory attorney, and clients are all bound by the Marital Mediation Rules, outlined in Coogler's Structured Mediation model.

In addition to the formalized rule structure, the involvement of an impartial, advisory attorney is required in this delivery system. The divorcing couple moves through the mediation process with the therapist/mediator until substantial agreement on the settlement issues has been reached. At this point in time, the attorney provided by the mediation center "is brought in to answer any legal questions that have been raised to 'finalize' the tentative agreement that has been reached, and to draft the formal settlement agreement" (Silberman, 1982, p. 135).

Ethical considerations arising from this delivery system are similar to those for both the Single Lawyer Delivery System and the Lawyer-Therapist Team Delivery System. Canon 5's prohibition against representing conflicting interests, Canon 3's prohibitions against assisting in the unauthorized practice of law, and Canon 9's prohibition against the appearance of impropriety could be interpreted against the advisory attorney in this system.

Several states have addressed issues in reference to the Mediator-Advisory Attorney Mediation Delivery System. A 1980 decision by the Maryland State Bar Association stated that a mediator or family mediation center could be involved "in the unauthorized practice of law by applying general legal principles to the specific problems of clients" (Silberman, 1982, p. 135). "The Maryland Bar also added that the impartial advisory attorney in such a system could violate Disciplinary Rule 3-101 (A) by aiding nonlawyers in unauthorized practice" (Silberman, 1982, p. 136). Finally, it stated that the lawyer who mediated jointly with the therapist could run afoul of Ethical Consideration 3-8, that is, the prohibition against a lawyer from practicing law in association with a layman (Silberman, 1982). The Minnesota State Bar Association found Canon 5's prohibition against the representing "persons with conflicting, or potentially differing interests, may be applicable to the panel attorney" (Silberman, 1982, p. 136). The Virginia Bar went a step further finding that the potential conflict in jointly representing the two parties in a divorce would have to be discussed with that couple, and that the advisory attorney could not later represent either party against the other in a subsequent divorce action (Silberman, 1982).

Several ethical consideration issues are unique to mediation practitioners in the Mediator-Advisory Attorney Mediation Delivery System. First, it advocates the lawyer as representing the family unit, and not the individual partners of the couple. Because the family would not be considered an entity, Canon 5 restrictions on representing two or more clients who have differing interests would apply.

The second ethical problem of this system involves the promotion

of the advisory attorney to third persons. The necessity to perform under the standardized Marital Mediation Rules, inherent to the functioning of this model, involves the mandate that the mediation center will select the lawyer if the couple is unable to come to agreement of this selection by themselves. This procedure would appear to violate Disciplinary Rule 2-103 (C), "Recommendation of Professional Employment" which stated that "A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm as a private practitioner...(p. 98).

Third, in this Mediator-Advisory Attorney Delivery System, the concept of the mediation center acting as the organizational entity for the mediation process is central to the functioning of Structured Mediation. Disciplinary Rule 2-103 (D) stated that, "A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner..." (p. 98).

Finally, due to the sensitive nature of the attorney's role in this system, Canon 9 restrictions on the appearance of professional impropriety could be violated.

In summary, the Mediator-Advisory Attorney Delivery System (Coogler model) would appear to have all of the same ethical problems of both the Single Lawyer Delivery System and the Lawyer-Therapist Team Delivery System. In addition, the practitioner in this system faces the issue of the prohibitions against client solicitation for an attorney.

Single Therapist Delivery System. The previously explored divorce mediation delivery systems all included a lawyer as a professional participant in the mediation process. As referenced in the preceding pages, the lawyer involved in divorce mediation is bound by the Code of Professional Responsibility. However, the mediator who is a non-lawyer is not covered by its Canons, Ethical Considerations and Disciplinary Rules. As stated by Silberman (1982), in the Family Law Quarterly, "the mental health professional walks a tightrope between talking the couple through the issues and giving them legal advice. In the latter role, the solo non-lawyer mediator runs the risk of engaging in the unauthorized practice of law, thus subjecting him(her)self to misdemeanor or contempt charges" (p. 123).

Though the Iowa Code of Professional Responsibility for Lawyers does not assume to regulate the professional behavior of therapists, it does identify what constitutes the practice of law and those who may practice law. Under Canon 3, Ethical Considerations 3-1, 3-3, and 3-5 identify prohibitions against the unauthorized practice of law.

> EC 3-1 ...The legal profession shall actively discourage the practice of law by non-lawyers...(p. 105).
> EC 3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence...(p. 105).
> EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. However, the practice of law includes, but is not limited to, representing another before the courts; giving of legal advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding (p. 105).

In light of these statements the practice of law would seem to include mediation and exclude participation by the layman.

As previously stated, the dissolution of a marital contract is generally considered to be a legal matter. The counselor or therapist whose practice is based on helping spouses end their marital relationship through mediation would almost undoubtedly need to deal with financial and custodial issues in the process. Whether assisting the divorcing couple resolve their conflict intrudes on the boundaries of the practice of law is the primary issue in determining the mediator's legal right to be involved in the dissolution process. Accordingly, the mediator in the Single Therapist Delivery System must concern himself not only with his ability to assist the divorcing couple and the degree of success in the mediation process; in addition, he must also be concerned about whether he is prohibited from being involved in the mediation process at all.

As discussed, those who practice divorce mediation as a professional skill face a variety of ethical considerations and professional responsibility issues which have not yet been resolved. For those who wish to avail themselves of divorce mediation services through one of the aforementioned delivery systems there are both potential benefits and liabilities.

Divorce Mediation: The Benefits

There appear to be several benefits for those divorcing couples willing to participate in the divorce mediation process.

First, couples who are divorcing are generally angry, afraid, and unable to communicate effectively with each other. One function of the mediator in the mediation process is to establish ground rules to which the couple is required to adhere in their communications with each other. This structure generally facilitates the cooperative

communication necessary to arrive at a negotiated settlement agreement.

Second, the mediative process is considered to be less stressful to the divorcing couple because of its cooperative nature. The couple is encouraged to be both open in their demands and willing to make concessions to reach an equitable agreement. The tension created by trying to anticipate the "opposing" party's demands is alleviated by the open and honest communication implicit in the mediative process and modeled by the mediator.

Third, the necessity for both spouses' participation in the negotiation of the settlement agreement increases their direct involvement in the process. The agreement can then reflect their needs--not the lawyers' perceptions of their needs. Because the agreement issues are decided upon by the couple themselves, there is an increased chance that they will see it as "theirs" and more readily "own" it. This process is thought to enhance their committment to fulfilling their responsibilities as defined in their settlement agreement.

Fourth, the couples' intimate knowledge of their current personal and financial affairs, and their future goals, increases the likelihood that the settlement agreement will reflect the actual needs of the couple. This settlement agreement, "tailored" to meet the unique needs of the couple, can then help to reduce the need for future litigation.

Fifth, several studies have shown that mediation is less expensive than the traditionally lawyer-negotiated divorce. Rates vary, but generally mediators charge $35.00 to $40.00 per hour; while lawyers charge $50.00 to $75.00 per hour. Mediation services offered through a pioneer mediation project in Denver, Colorado, showed an average cost

of $135.00 to $270.00 per case. These amounts are typically exceeded in any adversarial divorce (Pearson, 1981).

Sixth, in that Denver project, it was also found that:

> Mediation makes a difference in the kind of custody arrangements couples decide on. While mediation couples opt for joint custody arrangements, control group couples and couples who reject mediation arrive at more conventional mother-only awards (Pearson, 1981, p. 9).

If joint custody of children is considered to be preferable to single-parent custody, then it appears from this statement that mediation increases the likelihood of that outcome.

Finally, in terms of the public's benefit, the use of mediation services can relieve the overcrowded court system's schedule and reduce the public costs expended in divorce and child custody litigation (Pearson, 1982). Because the mediated agreement is negotiated, reviewed, and accepted jointly by both parties before a court appearance, the time a couple must spend "before the bench" can be much reduced. The judge becomes primarily responsible for reviewing the agreement, rather than determining it, a much less time-consuming process.

Divorce Mediation: The Liabilities

The legal system itself has traditionally promoted the maintenance of the status quo in practices and procedures. As quoted in Divorce Reform, Supreme Court Justice Warren Burger said:

> ...the law responds rather than anticipates...it lags behind the most advanced thinking in every area. It must wait until theologians, moral leaders, and events have created some common ground, some plateau of opinion shared by the majority (Halem, 1980, p. 8).

Attorneys whose practices are centered around divorce work are understandably threatened by a possible shift in control from adversarial

to non-adversarial divorce processes. Other members of the legal community are concerned with questions of ethics. As reviewed in Chapter Two of this paper, ethical considerations affect every divorce mediation delivery system. No broadly accepted ruling on these ethical consideration issues yet exists, leaving both lawyers involved in mediation, and their clients, unprotected.

Three concerns were expressed in attorney Richard Crouch's article "The Dark Side is Still Unexplored" in the Family Advocate (1982).

First, in exploring the belief that mediation is a cost-saving measure for the divorcing couple, Crouch (1982) countered:

> I have seen fairly expensive mediation services added as an extra layer to the already long and costly process of negotiating a separation agreement. In some cases, I think two adversary lawyers would hash out an agreement by means of traditional divorce negotiation--with the ever-present threat of litigation as a backdrop--in a fairly short time (p. 33).

Second, Crouch (1982) argued against mediation as a less stressful alternative to the divorcing couple:

> ...sometimes the traditional method, which keeps parties apart, is not only quicker and cheaper, but less stressful. Sometimes I suspect that the people who want to continue intense hostile involvement and personal stress, and who aren't interested in saving money or time, are just the ones that mediation gets. And those who go in seeking reduced costs and less stress and end up with neither will feel that lawyers have swindled them once again (p. 33).

Third, Crouch (1982) raised the concern that mediation facilitates the exploitation of one party over the other:

> I also wonder about the mediators who unwittingly facilitate the exploitation of one party. In trying to preserve the mediation climate, a lawyer has to make some very subtle judgments about when to alert the other party to overreaching... Both lawyers and mediation centers have an interest in seeing "successful" mediation proceed...Therefore, producing a compromise

> that is not entirely fair may appear the preferable alternative in some close cases (p. 33).

A final liability regarding the process of divorce mediation involves the current lack of any regulatory guidelines for its practice and practitioners. The possibility of mediation participants obtaining the services of an incompetent or unethical mediator is increased by the absence of standardized, professional controls.

Despite the advantages of mediation as an alternative method of marital dissolution, until these liabilities and concerns are resolved, the widespread availability and acceptance of mediation is unlikely.

CHAPTER 3

Summary

The experience of divorce is usually a difficult one, combining the pain of ending once-significant relationships with anxiety about the way in which the emotional and financial changes resulting from the divorce will impact on the future. The traditional divorce process, involving the adversarial legal-system approach, does little to facilitate its participants' lifestyle transition. Typically, it aggravates negative feelings between the divorcing parties, often creating additional hostility and animosity.

Historically, marriage was viewed as a civil contract that could not be dissolved at the pleasure of the parties; it was the responsibility of one party to prove fault on the part of the other to obtain a divorce decree. This fault-based system required the services of two adversarial attorneys, representing one spouse against the other in litigating the fault issue.

With the transition of divorce laws from a fault to a no-fault basis, the state no longer required one of the parties to be proven to be at fault. Accordingly, it would seem that the need for adversarial attorneys would be reduced or eliminated. However, the legal processes necessary to obtain a divorce in the fault-based system have remained the same despite the passage of no-fault legislation.

The logical outcome of the transition to a no-fault basis for divorce would be an alternative method of settlement resolution for those couples wishing to terminate their marital contract in a

non-adversarial manner. Divorce mediation, as a cooperative method of conflict resolution is one such alternative. Through divorce mediation the participants are encouraged to develop a new perception of their relationship not based in anger and hostility. Each partner is encouraged to presently openly and honestly his needs and be willing to compromise to reach a settlement agreement that is equitable. The mediation process empowers the couple to define and resolve their own separation issues.

The way in which the mediator facilitates the divorce mediation process varies with the type of mediation delivery system utilized and the individual philosophy of the mediator. Regardless of which system or model is used, one goal is common to all models of divorce mediation. That goal is the enabling of the couple to define a settlement agreement that meets their current and future needs and to be in concurrence with each other as to the responsibilities defined in the agreement. It is hoped that through mediation both parties of the couple can begin their new lives in the healthiest and least painful way possible.

Conclusion

It is the opinion of this writer that divorce mediation is a practical and viable alternative to the current legal system's adversarial approach to the resolution of the problems and concerns created by a divorce. However, until the State, as the legal third party to the marriage contract, revises its position concerning the ethical considerations applied to those who practice divorce mediation, no widespread acceptance of divorce mediation can be possible.

While an adversarial system, including the opportunity for a trial over contested issues, will probably always need to be available for those who are unwilling or unable to resolve their marriage termination amicably, it is submitted that the adversarial process is not required by all divorcing couples. If it is a legitimate objective of society to resolve marital conflicts in the most healthful manner possible, an alternative to continued adversarial action should be available. Accordingly, the divorce mediation process, while not totally supplanting the adversarial process, should be permitted to supplement that process in the appropriate circumstances.

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