# THE LAWYER AS MEDIATOR: A NEW ROLE FOR LAWYERS IN THE PRACTICE OF NONADVERSARIAL DIVORCE

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## 1:1 Introduction

Mediation as a means of resolving disputes between family members is not new. It is rooted in the ancient Confucian ideals of natural harmony in human affairs and is still widely practised today in China through the People's Conciliation Committees.[1] In Japan, where there are more flower arrangers than lawyers, the predominant emphasis is likewise on the informal settlement of inter-personal disputes. In many other lands and cultures, churches, temples, and extended family and kinship circles have, for centuries, been actively involved in the mediation of family disputes. And many ethnic and religious groups, imported these practices with them when they immigrated to North America. The early Quakers, for example, practised both mediation and arbitration to resolve disputes, including commercial disputes, without resort to litigation. The Chinese established the Chinese Benevolent Association and the Jewish community, the Jewish Conciliation Board, to mediate disputes within their own respective communities.

Mediation then is not new. What is new is the popular interest in mediation as a means of resolving the issues of custody, support, and division of property arising on marriage breakdown. Lawyers especially are interested in

mediation as an "extra legal" method of family dispute resolution. And so they should be! In the opinion of this writer, we are witnessing the birth of a new profession which cuts across the traditional boundaries between the legal and the mental health professions. "Family" or "divorce" mediation as it is called, presents exciting new career opportunities for lawyers who are interested in the practice of "non-adversary family law". Lawyers are in a unique position to contribute to the development of this new profession insofar as they already possess much of the substantive knowledge and many skills required for the practice of divorce mediation. With some effort they can learn the relevant behavioural science theories and mediation skills which they now lack. Those willing to make the effort, should seriously consider offering their services as divorce mediators. Otherwise the mediation field will be occupied exclusively by other professions and the public will be limited both in their choice of mediation models and in the providers of mediation services.[2]

1:2 The Adversarial Divorce

The traditional method for processing family disputes has been the adversary system. In recent years, this system has come under increasing attack for exacerbating rather than

alleviating family tensions and conflicts.[3] The main shortcoming of the adversary system is that it requires the separating spouses to adopt battle-like stances, with each attempting to win at the expense of the other. Within the system, the role of the lawyer is to gain as much material advantage as possible for his or her client, and to give away as little as possible to the other side. The reality is that nobody wins family law battles. Unfortunately the main losers are the children who become the prizes to be awarded in custody disputes. The same system which encourages spouses to blame one another for the marriage breakdown and to prove each other unfit as a parent, also fails to take into account the fact that the issues underlying the dispute are often emotional rather than legal ones, and that after their day in court, the parties will generally continue to have an ongoing relationship with one another around child-rearing and financial matters. Even where there is a negotiated rather than an adjudicated resolution, the lawyers may in good faith negotiate too hard, thereby worsening the post-divorce relationship of the spouses and precluding a working rapport between them in future. Again, children suffer when their parents are left unnecessarily embittered.[4]

Criticisms such as the above have led to the development

of alternative, non-adversarial methods for resolving family disputes. One of the most promising of these is divorce mediation.

1:3 The Mediation Alternative

Mediation has been defined by one of its leading exponents as "the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs".[5]

Irving describes it as the "rational alternative" to adversarial divorce in our society. The use of this alternative, he says,"minimizes the likelihood of the children being used as pawns or weapons, reduces the conflict, cuts the cost (financial as well as emotional), and helps prevent the spouses from emerging as poor battle-scarred veterans of the divorce court".[6]

Mediation does offer some definite advantages over traditional adversary dispute processing. It can be less time-consuming and less expensive overall. It also affords participants the opportunity to engage in creative problem-solving that takes nonmaterial needs and interests into account.[7]

Since mediation is not bound by the same strict rules of procedure and substantive law as the adversary process, the parties are free to introduce into their deliberations whatever facts, issues and interests they themselves consider relevant. The law is simply one factor, to be blended with a variety of economic, personal and social considerations, into their final decision-making. In mediation the ultimate authority belongs to the disputants to make the decisions that will affect their lives for years to come. The underlying rationale (supported by research findings),[8] is that a consensual agreement based on a family's own unique needs and preferences, is more likely to be honoured over time, than one imposed by an outside authority.

Mediation has other important advantages. It is also an educational experience for the participants. They learn, through the process, new problem-solving techniques and conflict-management skills which they can use to resolve other disputes in future. Moreover, direct face-to-face discussion may help family members communicate better and so understand each other's feelings. The reduction of hostility which follows, facilitates co-operation and increases the likelihood of their negotiating an equitable settlement. Unlike the adversary system, the emphasis in mediation is not on who is

right or who is wrong, or who wins and who loses, but on working out a mutually acceptable solution that best meets the family's own needs.[9] Mediation is a win/win process.

## 1:4 Mediation Distinguished from other Dispute Resolution Processes

### (1) Mediation and therapy:

Mediation is not therapy although the mediation experience may have a therapeutic effect - i.e. the parents may develop a better understanding of each other and the needs of their children and may learn more functional ways of communicating and solving problems. But the primary goal of mediation is not increased psychological understanding and behavioural change, but a negotiated settlement of the matters in issue. A mediator who has a knowledge of psychodynamics and therapeutic skills may be more able to assist the parties through impasses that develop in their negotiations. Generally speaking, however, a mediator's clients are not emotionally disturbed in the sense that they require psychotherapy. If so, they should be referred for counselling to an appropriate mental health professional.

### (2) Mediation and Negotiation:

While negotiation techniques are used in mediation,

there is a significant difference in process between a lawyer-negotiated and a mediated settlement. In the traditional lawyer-negotiated model, the lawyers bargain with one another on behalf of and usually in the absence of their respective clients. Each attempts to obtain the best possible settlement for his or her client, generally at the expense of the other. Since clients often defer to the advice of their solicitors, it is not uncommon for the negotiated agreement to reflect the values and preferences of the lawyers, rather than those of the actual disputants. Adversarial negotiation thus fosters dependency and helplessness, by depriving the parties of an opportunity to learn how to problem-solve for themselves. By contrast, mediation is an empowering and educational process. The participants negotiate directly with one another with the assistance of the mediator who keeps them "on track" and helps them through impasses in the negotiations. The spouses take control of their own decision-making and learn problem-solving techniques which can be used to resolve future disputes.[10]

(3 ) Mediation and Arbitration:

Like mediation, arbitration is an intervention by a neutral third party in an effort to resolve a dispute. But in arbitration, as in adjudication, the third party decides the issues for the parties - whereas in mediation, the mediator

assists the parties to arrive at their own consensus - based agreement. If the mediation does not result in a consensual agreement, the mediator does not make a judgment on behalf of the parties but may, if the mediation is "open" and the parties so agree, make a recommendation to a judge. In most cases, however, the mediation is "closed" so that no report or recommendation is made. The ultimate goals of both mediation and arbitration are the same, (namely settlement of the issues without the necessity of litigation) but the roles of the mediator and arbitrator are quite different. The mediator is a facilitator; the arbitrator, a decision-maker.

(4 ) Mediation and Conciliation:

The terms mediation and conciliation are often used synonymously, to refer to the form of negotiations in which disputants attempt to settle their differences with the aid of a third party who has no power to impose an outcome. The term "conciliation" is generally applied to court-connected mediation services, whereas "mediation" is more often used to describe such services in the private sector. In actual fact, however, the word "conciliation" may be somewhat broader, to also encompass "reconciliation" counselling with spouses who have not yet made a firm decision to separate permanently. Mediation as described above, is a goal-focussed, task-oriented and time-limited process to assist separating spouses to resolve the custody, support and property issues arising on the breakdown

of their marriage. It does not include counselling these same persons with respect to the emotional issues arising on separation, with a view to their possible reconciliation.

(5 ) Mediation and Assessments

The assessment or child custody evaluation is intended primarily as an aid to the judge in child custody litigation, but frequently operates in such a way as to promote a settlement between the parties. Like a mediator, the impartial expert who conducts an assessment has no power to make a final and binding decision on the matters in issue, but unlike a mediator, the assessor is expected to make a recommendation to the court, which is subject to cross-examination by the opposing counsel. While some assessors may use mediation techniques, the roles of mediator and assessor are dramatically different. The mediator acts primarily as a facilitator to help parents fashion their own custody arrangements, which are acceptable to them both. The assessor, on the other hand, gathers information in order to make a recommendation as to what, in his or her expert opinion, is the most appropriate custodial arrangement. The assessor does this by evaluating each spouse's assets and liabilities as a parent and then comparing the two parents overall. In many cases, the parties

do settle on the basis of the assessor's recommendation, without proceeding on to court. But such settlements are often more "coerced" than "consensual", and are therefore less likely to endure over time.

(6 ) Mediation and the Law

Lastly, mediation is not the practice of law although both legal and financial knowledge is needed to help parties reach a negotiated settlement of all the issues arising on marriage breakdown. The mediator needs this knowledge to recognize legal or income tax issues as they arise during mediation and which should appropriately be referred to an outside expert for consultation. While the mediator may give legal information as required, he or she does not "represent" the clients as an advocate and should never (even if a lawyer), give legal advice. To do so, would be contrary to the idea of the mediator as a neutral and impartial facilitator.

1:5 The Skills and Role of the Mediator

A mediator must possess skills in the areas of human dynamics, interpersonal relationships and conflict management, and must also be knowledgeable about finances, income taxes and the laws relating to separation and divorce. But mediation is not just a simple combination of legal and mental health skills. To act as a divorce mediator one must perform a role distinct from that of either lawyer or therapist. As noted above, a mediator is not a therapist, although he or she must

be able to understand and respond to the feelings and behaviour of his or her clients. Nor is the mediator a legal advisor or representative, although he or she should be knowledgeable about the law and related matters. Rather, the mediator is a facilitator whose role is to assist the parties to reach a workable agreement that best meets their unique needs. Accordingly, the mediator does not make decisions for the divorcing couple - they make all of their own decisions. The mediator is present to provide a supportive atmosphere, facilitate discussion (including discussion of feelings where appropriate), identify relevant issues, clarify areas of conflict, help generate options, and examine the likely consequences of alternatives. Even though the mediator does not personally provide counselling services or give legal advice, he or she encourages consultation outside the mediation process with professionals who offer these services.

## THE LAWYER AS MEDIATOR

At the present time, very few lawyers are directly involved in the provision of mediation services, although many are referring their own clients for mediation, especially of custody and access disputes. This is so despite a growing dissatisfaction with the adversarial system as a means of

resolving family disputes and an increasing interest in family mediation as a viable alternative. In consequence, most of the practising mediators to-day are drawn from the behavioural sciences and professions such as social work, psychology, and psychiatry. Initially, these non-legal mediators restricted their practices to the resolution of custody and access disputes. However, as the public demand mounted for the comprehensive mediation of all issues arising on marriage breakdown, and in the absence of lawyers offering their services as divorce mediators, some have moved into the mediation of property and support issues as well. There is no doubt that non-lawyer mediators can master the necessary procedural and substantive knowledge required to help separating couples explore options and make choices to settle all of the matters in issue. However, there is a danger that in so doing they risk being accused of the unauthorized practice of law. As one writer has put it: "in conducting the mediation, the mental health professional walks a tightrope between talking the couple through the issues and giving them legal advice".[11] There is also a danger that their clients may make agreements without being fully informed as to their legal rights and the income tax implications of the bargains they strike. To protect against these possibilities,

lawyers should be involved in every case to give the parties independent legal advice and to draft the separation agreement which incorporates the mediated terms. At the same time, it is precisely in the resolution of property and support issues that lawyers could make a significant contribution as mediators. Lawyers already possess the substantive knowledge of the law and income tax consequences needed to mediate these issues. They also have many of the other skills required in mediation because of their experience in listening, clarifying, negotiating and problem-solving.[12] With additional training in family mediation techniques and knowledge of the psychological needs of divorcing families, lawyers could make outstanding mediators. One attorney/mediator in the United States encourages others as follows:

> Divorce mediation is a new field; therefore it must call on the existing professions. It appears to me that no better skills can be brought to bear on divorce mediation than those learned by the attorney. The combination of logical thinking, negotiation technique, long-range foresight, result orientation and language skills that attorneys possess cannot be beat. Moreover, constant experience with the human condition and its emotional ramifications at a time of crisis, with decision making, and with deal making is unique to the legal field.[13]

Of course not all lawyers will make good mediators, just as not all divorcing couples are suitable for mediation.

But the basic skills of the mediator i.e. definition, clarification and negotiation, should be in every lawyer's "bag of tricks". Ideally, the personal qualifications, i.e. understanding, ability to listen, compassion and tolerance, should be there too.[14]

If the above is true, then lawyers should be embracing the field of divorce/mediation, not avoiding it.

## LAWYER RESISTANCE TO MEDIATION

### 2:1 Adequacy of Counselling Skills

There appear to be at least three major reasons why lawyers are reluctant to become involved directly in mediation. The first is a belief that he or she lacks sufficient counselling skills to handle such potentially volatile encounters. True, our traditional legal education does not generally equip lawyers to deal with highly charged emotional situations. At the same time, however, the reality is that family lawyers are frequently called upon in their daily practice to deal with problems that have little or nothing to do with the law. Divorce is as much an emotional as a legal process. As one eminent legal scholar has put it:

> "There is some law here of course, but the problems are essentially ones of human relations in their most intense and complex form."[15]

Research studies have confirmed that divorce lawyers

spend significant amounts of their time supporting and counselling clients, and further, that they see these "caregiver" functions as an important part of their role.[16] Thus family lawyers may already have considerable "counselling" experience on which they can draw for the practice of divorce mediation. This should not of course be equated with the counselling skill of a trained psychotherapist but it may be sufficient for purposes of mediating financial disputes. Morever, lawyers should not overemphasize the psychological problems of those who choose to mediate. Divorce is not always traumatic, and the client's problems are not always emotional.

> Many disagreements in divorce are as much products of reduced financial circumstances and the complexity of the very practical arrangements that need to be negotiated as they are of underlying psychological problems.[17]

The lawyer may need to remind himself or herself that the mediation client is not sick, just broke.[18] Even if the lawyer's counselling skills are weak, it is not impossible to remedy this deficiency. The lawyer can always enroll in experiential training programs, work under the supervision of an experienced mediator, or co-mediate with a skilled mental health professional. There will always be some cases where the clients are so psychologically enmeshed, even around their financial matters, that they are beyond the

competence of a lawyer mediator. In such cases the lawyer must recognize his or her limitations and refer the matter to others with special training or expertise. Attendance at a peer supervision group with other mediators might also be useful in helping the lawyer mediator identify process problems in the mediation and possible ways of dealing with these.

## 2:2 Ethical Problems

The second major factor inhibiting direct involvement by lawyers in mediation relates to ethical considerations. Of these the most significant are those posed by the conflict of interest provisions contained in the ethical Codes of Conduct for lawyers.

### (1) Conflict of Interest

One of the first issues to be addressed is whether mediation creates a conflict of interest for the lawyer/mediator who works with both parties involved in a matrimonial dispute. If so, this could be a violation of the lawyer's ethical code of conduct which prohibits representation of multiple clients whose interests are adverse. "Dual" representation is permitted in limited circumstances, where full disclosure of the potential conflict is made and the parties consent to be

so represented. But the exception does not generally apply in matrimonial matters where the parties are presumed to be so adverse in interest that they could not even give an informed consent to representation by only one solicitor. Thus, the lawyer who contemplates adding divorce mediation to his or her practice of law faces possible misconduct charges and disciplinary action by his or her professional bar association.

In order to get around the conflict of interest problems, some theorists have stated that they represent the "child" or the"family" in mediation, or even that they are counsel for the "situation".[19] But the family is an abstraction that is incapable of being a client and the children do not pay the mediator's fees. It must be presumed that at least some divided loyalties would exist if the interests of the children and the paying adult(s) began to diverge. "Situation" ethics is also fraught with possibilities for conflict.

The better answer to this dilemma is that the lawyer serving as a divorce mediator does not represent either party to the dispute or their children, if any. The mediator is not a legal representative at all. Rather, he or she serves to facilitate the parties' negotiations with one another. There is no question of divided loyalties because the mediator does not have a "legal" client in the first place.[20]

One U.S. attorney writes:

> What is this nonsense about 'representation'? Representation, as conceived by the legal profession as well as the English language, is something far removed from what goes on in mediation. The lawyer who plays mediator is more like an impartial umpire and discussion leader, and is certainly not "representing the interests" of one person against the other as an advocate.[21]

A consensus is now beginning to emerge that mediation does not involve a question of legal representation and therefore, that it is ethically permissible for lawyers to act as divorce mediators. Bar ethics opinions in several of the United States[22] and Family Law Mediation Ruling 12 of the Law Society of British Columbia, allow lawyer mediation on the basis that the lawyer does not "represent" or "act as legal counsel" for either spouse.[23] At the same time, these opinions anticipate and indeed, even expect, that the lawyer/mediator will give the parties legal advice, somewhat confusing the roles of lawyer and mediator. Bar opinions in the few jurisdictions that actually prohibit lawyers from serving as mediators seem to assume that a lawyer/mediator must represent all of the participants[24] in the "legal" sense. These opinions completely misconceive the role of a mediator and fail to appreciate that lawyers can ever function in roles other than

the traditional ones of legal advisor and advocate. Moreover, they are short-sighted in not seeing that lawyers have much to contribute to this emerging profession. If lawyers do not act as mediators of property and financial disputes, their places will be filled by others, perhaps with less expertise , and society will be the loser.

(2) Confidentiality and Privilege

Another issue of concern is the confidentiality of the communications made in the mediation process. Since the lawyer/mediator is not functioning in the role of a solicitor, it is very doubtful that the solicitor/client privilege would apply. Further, in the absence of a statutory mediator's privilege, it is possible that the lawyer/mediator could be called to court to testify as to what was said and done in mediation. In order to protect against this eventuality, it is recommended that the parties to closed mediation sign a written agreement stating that all matters discussed in mediation are confidential and that the lawyer/mediator will not be subpoenaed by either of them to testify in any subsequent legal proceeding. This waiver could then be introduced, if necessary, as evidence that the parties intended the mediation to be confidential. The parties should be warned, however, that their voluntary agreement may be overridden by

a court desirous of hearing all available evidence relating to the best interests of a child. Disclosures made in the course of mediation may then be used against them.

However, a decision of an Ontario Unified Family Court has made this possibility less likely. In Porter v. Porter[25] the Honourable Judge Gravely ruled that a mediator's report, prepared "only for the private purposes of the parties and their solicitors" and "not to be used in any court proceeding", was inadmissible on an application for interim custody - both under the "Wigmore test" and on the fact that it arose out of "without prejudice" negotiations for the settlement of litigation.

At present, Ontario is the only Canadian province that has a statutory protection for mediation[26] under certain circumstances. The Federal Divorce Bill C.47, while endorsing the mediation of both custody and support disputes does not contain a privilege for mediation similar to that for reconciliation counselling in the present Act.[27]

(3) Legal Information and Legal Advice

One of the reasons persons will wish to use the services of a lawyer/mediator is the lawyer's knowledge of the law relating to the matters in issue. Even if the lawyer/mediator follows a policy of giving no legal advice, he or she can make practical suggestions based on his or her legal back-

ground and experience with the adversary system. It mades sense then, that the lawyer/mediator be permitted to dispense relevant legal information just as non-lawyer/mediators proffer psychological information to mediating clients. Such legal information could include the statutory definitions and criteria for support and the division of property, the grounds for divorce, and court procedures. Resource materials on the substantive provisions of the applicable provincial statutes and tax consequences of separation and divorce could also be made available in the mediator's office.[28] The provision of such information is to be distinguished from the giving of legal advice which requires the application of the relevant law to the facts of the case and the rendering of a legal opinion thereon.

At the same time, there is a danger that clients may perceive the lawyer/mediator in his or her traditional role and rely inappropriately upon him or her for legal advice and protection of their individual interests. Thus, it is essential that the lawyer/mediator clarify his or her role before mediation begins, preferably in the form of a written contract which expressly states that the mediator is not acting in a legal capacity for either party. The mediator's role may need to be clarified again during the actual mediation

process.

As noted above, several bar ethics opinions contemplate the lawyer/mediator as giving "impartial"legal advice in the presence of both spouses.[29] The B.C. Law Society goes even further in allowing the lawyer/mediator to advise the spouses "of a court's probable disposition of the issue and to give "any other legal advice".[30] There is no requirement that the advice be given in the presence of both spouses. On the other hand, it is the stated duty of the mediator to actively encourage each spouse to obtain independent legal advice before executing the agreement.

It is submitted that the better practice for the lawyer/mediator is to refrain from giving legal "advice" altogether and to insist that all mediation clients obtain <u>independent</u> legal advice. This will avoid any potential conflict of interest problems, ensure mediator neutrality, and keep separate the roles of lawyer and mediator. Such advice should ideally be obtained prior to the commencement of mediation in order that the spouses may bargain with each other in a fully informed manner. Independent lawyers may also be useful as "coaches" at critical points during the mediation, and again, at the end of the process to review the financial disclosure of each spouse and the draft separation agreement.

The role of the reviewing lawyer has been described as follows:

> The reviewing attorneys serve as a check to assure that all necessary items have been considered by the participants and that the proposed agreement accurately states their understanding. The reviewing attorneys might inform the individual participants of any other alternatives to the suggested terms and whether the points of agreement fall within acceptable legal norms. These norms are often raised in the context of the likely range of court decisions if agreement is not reached. The likelihood of a different court outcome than the proposed agreement must then be weighed against the costs in time, money and emotional stress that may result from further negotiations, mediation or litigation. The basic purpose of this independent legal review is to determine whether the agreement is "fair enough" not to take it back to the drawing board and if all necessary items have been covered.[31]

Independent counsel thus act as a valuable safety check for all parties to the mediation and ensure that the spouses' decisions are based on informed consent.

One mediation model, i.e. structured mediation, uses an "impartial advisory attorney" to provide legal advice and to draft the separation agreement for both parties.[32] This model is not recommended because of possible conflict problems. It has been approved, however, in at least two U.S. jurisdictions as long as the single attorney makes it clear he or she is not representing either or both spouses and obtains their informed

consent.[33] Three other U.S. states have rejected the "impartial advisory attorney" concept as dangerously unworkable.[34]

(4) Drafting Documents

Again, as a practical matter, it makes sense for the lawyer/mediator to draft the separation agreement which flows from the mediation sessions. The mediator possesses the requisite drafting skills and is in the best position to record the terms of the proposed agreement. In contrast to the lay mediator, the lawyer/mediator can identify a myriad of issues that need to be addressed in any final agreement, assist the parties to reach consensus on these and draft a final document which is much less vulnerable to upending by outside lawyers than one prepared by a non-lawyer.[35] In this instance, the lawyer/mediator acts as a mere "scrivener" or notary who records in written form the spouses common intentions regarding an agreement.[36] To require independent counsel to draft the initial agreement would risk introducing a competitive and/ adversarial atmosphere into the spouses' heretofore co-operative deliberations. It would also require additional lawyer time in familiarization with the terms to be incorporated in the agreement, and thus add to the overall expense.

On the other hand, it may be as difficult to draft

"neutrally" as it is to give "impartial" legal advice. The Maryland Bar Ethics' opinion found that the responsibility placed on the lawyer/mediator to draw up the settlement for the parties was troublesome:

> If the preparation of a Property Settlement Agreement in mediation can be equated to filling in blanks on forms, then the services of an attorney are probably not necessary. If the preparation of such an agreement requires the independent judgment of an attorney - to choose what language best expresses the intent of the parties, to allocate the burdens of performance and the risks of non-performance and to advise whether the agreement as a whole promotes the best interests of both clients and not just some interests of one client and some interests of the other - then such preparation is likely to place the attorney in a position where he senses a conflict of interest.[37]

This opinion again appears to confuse the roles of lawyer and mediator, does not consider that it is the parties themselves who decide what will happen if their agreement is breached, and ignores the fact that the draft agreement will be reviewed and modified, if necessary, by independent lawyers.

In one of the most thoughtful analyses to date of the lawyer/mediator's role, the New York City Bar Association concluded that the lawyer/mediator could reduce a mediated agreement to writing, but only when the lawyer outlines the pertinent considerations and consequences of choosing the

agreed-upon resolution.[38]

In order to protect against possible role confusion, it is recommended that the lawyer/mediator draft the separation agreement for review by each of the spouses' independent counsel. In particular, the independent lawyers should be asked to advise their clients with respect to the effect of the agreement upon their legal rights and future entitlements (i.e. to explain the effect of the various release clauses). Revisions can then be made through their respective solicitors, or in further mediation sessions, if substantial. The final agreement, together with an affidavit of independent legal advice, should be executed in the offices of their independent solicitors to avoid any appearance of coercion on the part of the mediator.

Other drafting issues such as the preparation of consent orders and uncontested Petitions for Divorce, will be discussed below in the context of post-agreement representation.

(5) Post Agreement Representation

There is no question that a lawyer/mediator or impartial advisory attorney who has participated in any phase of the mediation or common advice process should not represent

either spouse in the event that mediation breaks down. The issue, rather, is whether post-agreement common representation should be permitted, absent breakdown, for those who have worked out a common agreement (for example, in order to obtain a court order, on consent, implementing the terms of the agreement, or to obtain an uncontested divorce). This would also include the drafting of the legal documents required in these proceedings.

The authorities appear to be radically divided on this issue. The Boston Bar opinion contemplates an attorney-mediator drafting the separation agreement but not being allowed to represent either party in court, and the New York and Oregon opinions prohibit the lawyer/mediator from representing either party. The B.C. Law Society also forbids any lawyer who has acted as a family mediator (and also any member of his or her firm) from acting in a solicitor and client relationship for either spouse against the other.[39] On the other hand, the Virginia and Ohio opinions authorize the common attorney to represent one party in presenting the agreement and divorce pleadings to the court, while the other goes unrepresented. The Ontario Association for Family

Mediation proscribes the lawyer/mediator and any partner or associate) from representing either party during or after the mediation process in any "contested" legal matters arising out of the issues discussed in the mediation. This leaves the door open for common representation on an uncontested divorce, or representation on other legal matters not related to the issues mediated.

Typically, lawyers are prohibited from representing both sides of a matrimonial dispute by their professional Codes of Conduct. For example, Rule 5 of the Professional Code of Conduct of the Law Society of Upper Canada reads as follows:

> The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned he should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.[40]

A "conflicting interest" is defined as:

> one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.[41]

Note that an exception to the general rule is

contemplated where full disclosure is made, the clients consent, and the lawyer advises them that he or she cannot continue to act for both or all of them if a conflict develops and may have to withdraw altogether.[42] However this exception is generally held not to apply in matrimonial disputes where the potential conflict of interests is seen as inherently so great, that the lawyer cannot ethically represent both spouses, no matter how much they consent. The rationale is that spouses who ask one solicitor to act on their mutual behalf cannot really comprehend the far-reaching and complicated nature of the waiver which they are expected to make. Therefore, a truly "informed" consent may be impossible to obtain. As one writer puts it:

> ...it is hard to see how the client can fully, or even adequately, understand the subtle forces involved in this conflict of interest without at least having had three years of law school, if not several years of law practice.[43]

The above view assumes that the divorce process must necessarily be an adversarial one. Yet the goals of divorcing persons may not be as disparate as thought, or the conflicts of interest as real as imagined. Perhaps it is time to re-examine our basic assumptions about divorcing spouses and consider whether the exception to the rule may now safely be applied - at least in the case of those who have successfully mediated a consensual agreement, been

advised by independent counsel, and who then desire their lawyer/mediator to represent them both on an uncontested divorce.

In the United States, several bar associations have recently relaxed their stands against dual representation in matrimonial matters. For example, the Arizona State Bar has approved dual representation in divorce cases where there are few assets, no children, and the divorce is uncontested.[44] The Colorado Bar allows both spouses to be represented by a single attorney as long as no conflict of interest exists.[45] The most forthright approval of dual representation to date comes from California Appellate Court.[46] In the case of Klemm v. Superior Court, a husband and wife of modest means sought and obtained a writ of mandamus compelling the trial court to allow them to be jointly represented on their uncontested divorce. In permitting such representation in limited circumstances, the court acknowledged that dual representation is consonant with the philosophy of the California family statute, "the purpose of which was to discard the concept of fault in dissolution of marriage actions, to minimize the adversary nature of such proceeding, and to eliminate conflicts created only to secure a divorce."[47] It is said that this case hints at a permissible dual representation in divorce court for those who have worked out an agreement with the help of their common solicitor.[48] This could logically be extended to include the lawyer/mediator.

The down side of post-agreement representation by the lawyer/mediator is, once again, that it confuses the mediator and lawyer roles. However, at this final stage, when the mediation has been concluded, an explicit shift in roles may not be all that disturbing. On the contrary, it may appear to be a logical progression in the process. On the other hand, if the spouses have not been advised by independent solicitors, the performance of this additional function would seem to concentrate too much power in the hands of the lawyer/mediator. He or she would then be the sole architect of the spouses' entire divorce settlement - with the danger that he or she might be tempted to minimize or ignore difficulties, having so much at stake.

(6) Mediator Liability

In addition to possible ethics codes violations, the lawyer/mediator faces potential lawsuits by disgruntled consumers of his or her mediation services. If the mediation role is seen as distinct from the practice of law (as it should be), then the lawyer's errors and omissions insurance would not likely cover his or her mediation practice.

The potential liability of the mediator may arise from several sources including fraud, false advertising,

breach of contract, defamation, breach of fiduciary duty and professional negligence or malpractice. Of these the most likely causes of action are breach of contract and negligence.

A mediator must therefore be cautious not to make any express or implied representations that mediation will be cheaper, faster, or in some way better than other forms of dispute resolution, such as litigation. Rather than risk an implied contract, the mediator should use a written contract to limit liability. The written contract should describe the mediation process, the role of the mediator, the risks and limitations of mediation, the obligations of the participants, the basis for determining costs and responsibility for payment, the need for independent legal advice and the agreement with respect to the confidentiality of the mediation sessions.

The greater risk of mediator liability flows from the mediator's duty to provide competent mediation services. This includes an obligation on the part of the mediator to raise all issues necessary for a complete and fair settlement. Examples of such issues might include the circumstances under which support payments will terminate or be varied, possible indexing of support to the cost of living, life insurance

protection for support payments, and the valuation and possible division of pension rights and interests in a business or professional practice etc. The potential litigant, however, would face significant problems in proving that he or she had suffered measureable damages which would not have occurred but for the negligence of the mediator. Moreover, at the present time there are no universally accepted standards of practice for mediators in general or for lawyers who act as mediators (although there are several draft codes now in existence).[49] Nonetheless the lawyer/mediator would be wise to limit his or her liability for malpractice by making explicit the possible risks of mediation (i.e. delay in pursuing other alternatives, status quo situation developing with respect to custody), having a written contract, and encouraging clients to consult with independent advisors outside the mediation process.

To date there have been very few claims against mediators and no reported case in either Canada or the United States where a mediator has been sued successfully for damages. In the only reported case in which a lawyer/mediator has been sued for malpractice,[50] a wife claimed that a settlement agreement mediated by an attorney/friend, and pending before

a judge for approval, was inadequate. She based her claim upon the fact that she later sought independent counsel and obtained a more favourable settlement (after ten months of intense litigation). The wife argued that the lawyer/mediator was negligent in that he failed to: (1) inquire further into the financial worth of the husband; (2) negotiate a better settlement for her; (3) advise her that she could get more if she litigated the matter; and (4) fully and fairly advise her regarding her rights to marital property, maintenance, and custody. The lawyer/mediator admitted that he had not performed these tasks but argued that they were not the appropriate functions of a mediator. The Missouri Court of Appeals, in overturning a jury verdict against the mediator in the amount of $74,000, assumed that the mediator had breached a duty owed to the wife, but ruled that she could not prove her economic damages were caused by the alleged negligence of the mediator. There was no evidence that the husband would have settled at the higher figure if the mediator had done the things he was charged with not doing, without the wife's recourse to litigation. Unfortunately, the court offered no guidance with respect to the appropriate functions of a lawyer/mediator.

Lawyer/mediators therefore would be well advised

to obtain separate liability insurance to protect them against claims made against them in their capacity as mediators. Such insurance is now available privately. It is hoped that group policies will be available shortly through the various provincial mediation associations or Family Mediation Canada.

## 2:3 Economic Considerations

A final explanation for lawyers' perceived resistance to mediation is rooted in economic factors. Some lawyers view mediation as an economic threat, wrongly perceiving that it will remove matrimonial cases not only from the adversary system but also from the hands of lawyers altogether. Many may also fear the loss of power or control over clients who choose to negotiate directly rather than have lawyers negotiate on their behalf.

It is true that a lawyer who introduces mediation into a case that would otherwise be handled in an adversarial manner, may earn less than usual on that particular case. He or she may also earn less in future as the parties learn to handle their own problems and become less dependent upon the lawyer. Moreover, if the lawyer serves as a mediator, he or she may be barred from representing either party in future on a legal matter related to the mediation.

On the other hand, the increased consumer demand

for mediation services will not necessarily reduce lawyers' incomes. Disputants will still require independent legal advice at many points throughout the mediation process, in order that they can bargain and make decisions in a fully-informed manner. Lawyers can act as"mediation coaches". Moreover, there will always be a need for lawyers to draft and review mediated agreements. Thus, if significant numbers of couples begin to use mediation, the number of persons who consult lawyers could actually increase. Although the number of hours spent by lawyers negotiating settlements on behalf of clients would decrease, the time spent in performing truly legal services (i.e. drafting the mediated decisions into proper legal form, providing tax planning advice, etc.) would increase. Moreover, there will be increased monetary rewards for lawyers who mediate themselves or give independent legal advice to the clients of other mediators, because other lawyers and mediators will tend to refer such work to those who understand and support the mediation process.

As long as mediation is perceived as an alternative rather than as a complement to legal representation, it will be resisted by members of the bar. However mediation is not incompatible with the professional interests of the legal profession. When properly understood and utilized, it should significantly enhance the practice of family law.[51]

## 3:1 THE FUTURE OF MEDIATION FOR LAWYERS

Family mediation is clearly an important potential field for lawyers. As the above analysis shows, mediation can be done ethically and effectively by those who wish to develop the expertise. Yet there has not yet been any significant move in this direction by the legal profession. Mediation requires a shift in orientation, a change in the system - and such changes are often resisted, at first.

If mediation is to be used to its full potential, two developments are necessary. First, lawyers must come to understand mediation and when it can be helpful. This is essential because lawyers are usually the first persons consulted in a matrimonial dispute and therefore play a critical role in determining how the dispute will be processed. Unless a lawyer is familiar with mediation, he or she will not recommend it to his or her clients and may even undermine a mediation which is already in progress. If lawyers are more adequately informed, they will make more appropriate referrals to mediation, because of its potential benefits - especially if they know they will continue to be needed to provide "legal" services.

But increased knowledge about mediation is not enough. Lawyers need to sharpen their counselling skills, master the

theory and techniques of mediation and begin to offer their services as divorce mediators. Only if a number of lawyers begin to function explicitly as mediators, will mediation be accepted as a legitimate alternative to the traditional adversarial system. And only then will mediation services be made more accessible to those who are separating and divorcing.

If, however, lawyers are to provide divorce mediation services as part of their existing law practices, then guidelines are urgently required to govern their conduct as lawyer/mediators. Otherwise,they may face charges of professional misconduct and possible disciplinary action for breach of their professional codes of conduct. The problems with the existing codes is that they assume the spouses are adversaries and that the lawyer must be an "advocate" for only one of them. They do not envisage the lawyer/mediator as a neutral "facilitator" who does not "represent" anyone in the traditional sense. Nor do they recognize that spouses may have a common interest in achieving a win/win solution, because of a need to maintain ongoing relationships with one another in future. In fact, most of the "ethical" problems posed by divorce mediation result from the application to the mediation context of rules which were designed to restrict adversarial lawyering.[52] What is needed are new rules which contemplate lawyers performing

new roles within the context of separation and divorce.

> There is no question as to the need for a new rule, because the rationalizations of dual representation of divorcing parties that now exist are quite ineffective. That is, they do not honestly and rationally answer the ethical objections posed by existing codes . . . The business, if legitimate, should proceed under a rule addressing it, and not on the fringes of legality as it does now.[53]

In the meantime, it is suggested that the lawyer/mediator will not violate the existing Canons of Ethics if he or she observes the following guidelines:

1. The lawyer/mediator must inform the parties that he or she will be functionning solely as a mediator and not as a lawyer. The differences between the two roles should be carefully explained and the parties told that no solicitor/client relationship will exist between the mediator and the clients at any time. Accordingly, the mediator will not give any legal advice or represent either or both spouses in any subsequent legal proceedings (including an uncontested divorce).

2. The spouses should be encouraged and even expected to obtain independent legal advisors, preferably before the mediation commences, but definitely before the final agreement is executed. The independent counsel should be asked to advise each spouse separately with respect to his or her legal

rights and entitlements, give a legal opinion as to the range of probable dispositions by a court if the matters were litigated, to act as coaches for each party throughout the mediation process, to review and advise with respect to the adequacy of the financial disclosure of each spouse, swear their client's own financial disclosure, and finally, to review and advise regarding the draft separation agreement and the effect of the release clauses. The spouses should be informed of the risks of proceeding without separate counsel.

3. An agreement should be obtained in the initial mediation session with respect to the confidentiality of the mediation sessions, including whether or not the mediator will be expected to produce a report or testify in court if negotiations fail. If the mediation is closed, the parties should be warned that no mediator privilege exists and that the mediator may be required to testify despite their voluntary agreement to the contrary.

4. The spouses should further agree to make full financial disclosure to one another during the mediation, and undertake not to dispose of any assets, change any beneficiaries of life insurance policies, or take any further steps in legal proceedings while the mediation is in progress. They should

also be informed of and asked to acknowledge the risks of mediation, such as the development of a status quo with respect to custody, or the establishment of a standard for the level of support.

5. All of the above consents, waivers, undertakings and acknowledgements should be contained in a written mediation contract, signed by both spouses and the mediator. The contract should also contain a statement as to what issues are to be mediated, the conduct of the sessions, the terms and responsibility for payment, and the circumstances for termination. A copy of the mediation contract should be given to each spouse.

6. During the mediation sessions, the lawyer/mediator should impart legal information only and refer the parties to their independent solicitors for legal advice as necessary. Pamphlets and brochures on the relevant legislation and income tax consequences of separation and divorce may be made available in the mediator's office, if desired. The mediator should be available as a resource for other experts who may be required in the course of the mediation process. (i.e. tax accountants, appraisers, etc.)

7. The lawyer/mediator should stay within his or her own

area of competence and should not attempt child custody mediation without additional knowledge of the behavioural sciences and training in counselling. Even the mediator with counselling skills should not undertake to do personal therapy with the participants but should refer them to appropriate mental health personnel, as required.

8. The mediator should exercise the right to terminate mediation if at any time he or she believes that the conditions for mediation have been breached or if, in the opinion of the mediator, one or more of the participants is being harmed, or seriously prejudiced by the process.

9. The lawyer/mediator may draft a final separation agreement but should refrain from discussing its legal effects with the clients. This should be done with their independent solicitors. The agreement, if acceptable to all, should be executed in the offices of the independent counsel to avoid any appearance of coercion on the part of the mediator. An affidavit of independent legal advice and execution should be attached.

10. Finally, to avoid any confusion in the minds of clients between the lawyer and mediator roles, the lawyer/ mediator should consider having separate letterhead, account

paper and business cards for his or her legal and mediation practices.

CONCLUSION

Divorce mediation is a new and exciting career option for lawyers interested in the practice of nonadversarial divorce. Because of their special knowledge of the legal and financial aspects of divorce, and their skills in negotiating and problem-solving, lawyers are ideally suited to perform this task. Consequently, they can and should be taking steps to acquire the additional knowledge and skills required in order to offer their services as effective mediators. Otherwise, other disciplines will move in to fill the void in this emerging profession and a valuable choice of service providers will be lost to consumers.

Lawyers, however, have been somewhat reluctant to take this step for many reasons, not the least of which are concerns over possible ethics codes violations. This writer has argued that divorce mediation by lawyers is not only desirable, but also ethically permissible under the existing ethics codes. But lawyer/mediators meed to be vigilant to keep their two roles separate, especially under the present state of uncertainty. What are needed are new rules by bar associations to guide and encourage lawyers to offer their services as divorce mediators. Mediation is an option in which the benefits generally outweigh the costs - for

all participants, including the mediator. It is an option definitely worth pursuing by lawyers interested in nonadversarial law.

## FOOTNOTES

1. Jay Folberg and Allison Taylor. Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation. San Francisco: Jossey-Bass Pubs, 1984, at page 1.

2. Jay Folberg. "Divorce Mediation - A Workable Alternative". Alternative Means of Family Dispute Resolution , H. Davidson, L. Ray and R. Horowitz, (eds). Washington,D.C.: American Bar Association, 1982, at page 39.

3. Elizabeth J. Smith. "Non-judicial Resolution of Custody and Visition Disputes", 12 U.C.Davis Law Jo. 582, at page 586.

4. Serena Stier and Nina Hamilton. "Teaching Divorce Mediation: Creating a Better Fit Between Family Systems and the Legal System", 48 Albany Law Review 693, at page 696.

5. Supra, footnote 1, at page 7.

6. Howard H. Irving. Divorce Mediation: The Rational Alternative. Toronto: Personal Library Publishers, 1980, at page 22.

7. Leonard L. Riskin. "Mediation and Lawyers", (1982) 43 Ohio State Law Journal 29, at page 34.

8. Jessica Pearson and Nancy Thoennes. "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation", (1984) 17 Family Law Quarterly 497.

9. Supra, foot note 2, at page 16.

10. Supra, foot note 1.

11. Linda J. Silberman. "Professional Responsibility Problems of Divorce Mediation". Alternative Means of Family Dispute Resolution, H. Davidson, L. Ray and R. Horowitz, (eds). Washington, D.C.: American Bar Association,1982, at page 39.

12. Bennett Wolff. "The Best Interests of the Divorcing Family - Mediation not Litigation". (1983) 29 Loyola Law Review 55, at page 82.

13. Adriane G. Berg. "The Attorney as Divorce Mediator". In Successful Techniques for Mediating Family Breakup. John A. Lemmon, ed. San Francisco: Jossey-Bass , 1983, at page 21.

14. Patricia L. Winks. "Divorce Mediation: A Non-Adversary Procedure for the No Fault Divorce", (1980) 19 Journal of Family Law 615,

15. Wolff, Supra, footnote 12, at page 72.

16. Robert D. Felner, Judith Primavera, Stephanie S. Farber, and Thomas A. Bishop, "Attorneys as Care Givers During Divorce", (1982) 52 American Journal of Orthopschiatry 323, at page 332.

17. Kressel, Lopez-Morillis, Weinglass and Deutsch, "Professional Intervention in Divorce: A Summary of the Views of Lawyers, Psychotherapists, and Clergy", (1978) 2 Journal of Divorce 119, at page 136.

18. Winks, Supra, footnote 14, at page 645.

19. Richard E. Crouch "Divorce Mediation and Legal Ethics", (1982) 16 Family Law Quarterly 219, at page 227.

20. Stier, Supra, footnote 4, at page 714.

21. Richard E. Crouch. "Mediation and Divorce: The Dark Side is Still Unexplored", (1982) 4 Family Advocate 27, at page 33.

22. See Boston Bar Association Committee on Ethics, opinions Number 78-1(1978), and New York City Bar Association Committee on Professional and Judicial Ethics, Number 83-23 (Feb. 27, 1981). Also an opinion of the Connecticut Bar Association.

23. The Law Society of British Columbia, Professional Conduct Hand Book, Ruling 12, Family Law Mediation, S.2.

24. New Hampshire State Bar Association Ethics Committee proposed opinion dated Aptil 21, 1981 and Wisconsin State Bar Association Committee on Professional Ethics, opinions E-79-2 (Jan. 1980).

25. Porter v Porter (1983) 32 RFL (2d) 413 (Ont UFC).

26. Children's Law Reform Act, R.S.O. 1980, c.68, s.31.

27. The Divorce Act, R.S.C. 1970, c.D-8, s.21

28. Available through the Provincial Ministries of the Attorney General and the Department of National Revenue.

29. Supra, footnote

30. B.C. Law Society, Supra footnote 23, s. 2(c).

31. Folberg, Supra, footnote 1, at page 248.

32. O.J. Coogler. Structured Mediation in the Divorce Settlement: A Hand Book for Marital Mediators. Lexington, Mass.: Lexington Books, 1978.

33. See Oregon and Boston Bar Ethics Opinions referred to by Catherine G. Crockett, "Legal Considerations for Mental Health Professional Mediators" in Divorce and Family Mediation, James C. Hansen, and Sarah Childs Grebe, (eds) Rockville, Maryland: Aspen Pubs, 1985.

34. See Bar Ethics Opinions of Maryland, Virginia and Minnesota, referred to by Crouch, Supra footnote 19 at page 230-1.

35. Risken, Supra footnote 7, at page 41.

36. Crouch, Supra footnote 19, at page 229.

37. Maryland State Bar Association Committee of Ethics, No. 80-55a (Aug. 20, 1980).

38. New York City Bar Association Committee on Professional and Judicial Ethics, No. 80-23 (Feb. 27, 1981).

39. B.C. Law Society, Supra footnote 23 , Ruling 12, Section 4(b).

40. The Law Society of Upper Canada , Professional Conduct Hand-Book, Toronto: Osgoode Hall, 1978, Rule 5, at page 11.

41. Ibid.

42. Ibid. See commentary 4 to Rule 5, at page 12.

43. Crouch, Supra, footnote 19, at page 238.

44. Arizona State Bar Association Committee on Legal Ethics, Opinions No. 76-25 (Nov. 25, 1976).

45. Colorado State Bar Association, Legal Opinion No. 47 (Feb. 26, 1972).

46. Klemm v Superior Court 75 Cal. App 3d 893, 142 Cal. Reporter Rptr 509, 4 Fam. L. Rep. 2185, (1977).

47. Ibid. 75 Cal. Ap 3d at 900, 142 Cal. Rptr at 513.

48. Crouch, Supra footnote 19, at page 231.

49. See for example the American Bar Association Standards for Family Mediators (1984), The Association of Family and Conciliation Courts Model Standards for Practice: Family and Divorce Mediation (1983), The Ontario Association for Family Mediation Draft Code for Professional Conduct (1985).

50. Lange v Marshall 7 Fam. L. Rptr. 2583 (MO Court. App. 1981)

51. W. Richard Evarts and Frances H. Goodwin, "The Mediation and Ajudication of Divorce and Custody from Contrasting Premises to Complementary Processess", (1984) 20 Idaho Law Review 277, at page 294.

52. Wolff, Supra footnote 12, at page 86.

53. Crouch, Supra footnote 19, at page 222.

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