Is Divorce Mediation the Practice of Law? A Matter of Perspective

The increased incidence of divorce over the past decade is astounding. Each of the ten years from 1975 through 1984 saw more than one million divorces,¹ affecting no fewer than one million children each year.² Since 1975, the annual number of divorces has been at least forty-five percent of the number of marriages.³ It is estimated that more than half of the civil cases pending in this country are divorce cases, whose dispositions are often delayed as long as three years.⁴

This increased divorce rate, compounded by disillusionment with the traditional adversarial approach to terminating a marriage, has dramatically increased the number of people seeking divorces through mediation.⁵ Divorce mediation is a nonadversarial procedure in which spouses attempt to reach a separation agreement with the help of a third party mediator.⁶ The mediator attempts "to gain the trust of both parties"⁷ and "assist [them] in dissolving a marriage . . . in a non-adversarial

1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986, at 81 (1985 & Supp. 1985) [hereinafter STATISTICAL ABSTRACT].

2. *Id.* at 79 & Supp.; Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 497 (1984) (citing Glick, *Children of Divorced Parents in Demographic Perspective*, J. SOC. ISSUES, No. 4, 1979, at 170); Elias, *Smoothing the Pain of Divorce*, USA Today, May 7, 1984, at 1, col. 4.

3. STATISTICAL ABSTRACT, *supra* note 1, at 79-81 & Supp.; Pearson & Thoennes, *supra* note 2, at 497 (citing Preston, *Estimating the Proportion of American Marriages that End in Divorce*, 4 SOC. METHODS & RES. 435 (1975)); Mathias, *Mediating a Divorce*, Wash. Post, Mar. 11, 1986, at C5, col. 1.

4. Loeb, *Introduction to the Standards of Practice for Family Mediators*, 17 FAM. L.Q. 451 (1984); *see also* Pearson & Thoennes, *supra* note 2, at 497 ("[D]elays of nine to ten months are common for no-fault divorces and contested divorces often have to wait for a year or two to be scheduled.").

5. *See* Bahr, *Mediation is the Answer*, FAM. ADVOC., Spr. 1981, at 32; Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Pearson & Thoennes, *supra* note 2, at 499-500 (noting "a tremendous growth in the popularity of non-adversarial approaches to marital dispute resolution"); Ray, *Domestic Violence Mediation Demands Careful Screening*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 417, 420 (1982) ("[D]ispute mediation has grown from three centers in 1971 to more than 180 in 1982. This growth indicates a significant dissatisfaction with the legal system's adversarial approach"); Rich, *The Role of Lawyers: Beyond Advocacy*, 1980 B.Y.U. L. REV. 767, 770 ("Few areas of the law strain the limits of the judicial system more than domestic relations. Both lawyers and judges agree that courts are ill-equipped to resolve the social and psychological problems that typically arise in divorce and custody disputes."); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 32 (1982).

6. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107, 107 (1982).

7. Maryland State Bar Ass'n Comm. on Ethics and Professional Responsibility, Informal Op. 80-55A (1980), MD. B.J., Jan. 1981, at 8 [hereinafter Maryland Ethics Op.].

decision making process with an objective of reaching a mutual agreement in matters involving division of real and personal property, spousal support, child support, child custody and visitation rights."⁸ The divorce mediator accomplishes this function by "steering [the parties] away from their natural hostility or selfishness and encouraging . . . only the constructive behavior of the parties."⁹

Both lawyers and nonlawyers presently serve as divorce mediators.¹⁰ Because the practice of divorce mediation is relatively new, it is not governed by clearly defined guidelines. As a result, a growing number of courts and ethics committees are being asked to decide whether divorce mediation constitutes the practice of law¹¹ and, if so, whether and under

8. Tennessee Supreme Court Bd. of Prof. Responsibility, Formal Ethics Op. 83-F-39 (1983) [hereinafter Tennessee Ethics Op.], summarized in Law. Man. on Prof. Conduct (ABA/BNA) 801:8107 (1984).

9. Maryland Ethics Op., *supra* note 7, at 8.

10. Mediation comes in a variety of packages. See McGillis, *Minor Dispute Processing: A Review of Recent Developments*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 60, 71 (R. Tomasic & M. Feeley eds. 1982) [hereinafter NEIGHBORHOOD JUSTICE] (describing ways in which mediation techniques vary); Riskin, *supra* note 5, at 35-40 (describing various mediation approaches). As a result, it is necessary to posit a model of divorce mediation for purposes of this Comment.

Because this Comment is primarily concerned with the acts of the individual mediator, its model is that of a single divorce mediator, whether lawyer or layman. Nevertheless, much of what is said about the individual mediator is equally applicable to mediators working in "teams" or "panels." Note, however, that a number of ethical duties apply where the mediation team consists of both lawyers and laymen. Consider, for example, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 (1980), governing a lawyer's obligation to help prevent the unauthorized practice of law; *id.* at Canon 5, governing a lawyer's obligation to exercise independent professional judgment on behalf of a client; and MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.3-5.5 (1983), governing a lawyer's responsibilities regarding nonlawyer assistants, the professional independence of a lawyer, and the unauthorized practice of law.

In this model, the two divorcing parties and the divorce mediator are the only people involved in the mediation. The two parties are engaged in "a voluntary bargaining process in which . . . [they] seek a mutually acceptable resolution" of their dispute in the form of a mutually acceptable divorce agreement. Davis, *Mediation: The Brooklyn Experiment*, in NEIGHBORHOOD JUSTICE, *supra*, at 154, 154. The model does not include programs conducted under judicial supervision because such programs do "not seem subject to ethics challenges." Silberman, *supra* note 6, at 108-09. One reason given is that parties to court-approved mediation are usually represented by their respective lawyers. Other factors may also come into play, such as the belief that court-approved mediation is less likely to involve overreaching by one of the parties or abuses on the part of the mediator.

Because there are a number of different ways to provide divorce mediation, some of the comments of courts or ethics committees cited below may be directed towards mediation forms that vary from this model. Although these cases are often not compelling precedent, the logic and reasoning cited therein are nevertheless applicable to this paradigm.

11. If divorce mediation is the practice of law, nonlawyers may not provide that service, and lawyers may only provide it to the extent it can be done consistent with the applicable code of legal ethics. State Bar v. Cramer, 399 Mich. 116, 134, 249 N.W.2d 1, 7 (1976) ("Laymen are excluded from law practice, whatever law practice may be.") (quoting Oregon State Bar v. Security Escrows, Inc., 233 Or. 80, 87, 377 P.2d 334, 338 (1962)); see State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 235, 140 A.2d 863, 870 (1958) ("The practice of law is not a lawful business except for members of the bar who have complied with all the conditions required by the rules."); Opinion

what conditions divorce mediation can be provided by attorneys without violating the applicable code of legal ethics.

There is little agreement among judges as to the proper test for determining whether a given activity constitutes the practice of law. In fact, courts—and the American Bar Association—have repeatedly professed their inability or unwillingness to formulate a fixed definition of “the practice of law.”¹² Instead, they use several different tests. Courts also disagree about when, if at all, certain tests are proper. And even when they agree on the proper test, they often arrive at conflicting results after applying it. Unfortunately, the lack of a clear definition of “the practice of law” has resulted in a line of decisions “consistent only in their inconsistency.”¹³

In spite of these inconsistencies, courts considering the practice-of-law question generally have expressed concern for very similar values.¹⁴ In light of the difficulties associated with the various judicial tests, this Comment suggests looking to these uniformly held judicial values to determine whether divorce mediation is the practice of law. Part I describes the tests that courts use to determine whether an activity is the practice of law and discusses some of the difficulties associated with them. It also examines how ethics committees have approached this same question. Part II discusses the values that courts identify as

of the Justices, 289 Mass. 607, 613, 194 N.E. 313, 316 (1935) (practice of law by individuals other than members of the bar is forbidden), *see also infra* notes 95 (nonlawyers) and 111 (lawyers).

An exception to the notion that only lawyers can practice law is the pro se exception, allowing a layman to act as his own lawyer. *See Connecticut Bank & Trust*, 145 Conn. at 236, 140 A.2d at 871; *Opinion of the Justices*, 289 Mass. at 614-15, 194 N.E. at 317; *Bryce v. Gillespie*, 160 Va. 137, 144, 168 S.E. 653, 655 (1933); *see also* UNAUTHORIZED PRACTICE HANDBOOK 129-32 (J. Fisher & D. Lachman eds. 1972) [hereinafter UPL HANDBOOK] (citing cases applying the substantial interest theory).

12. *See, e.g., State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 87, 366 P.2d 1, 8-9 (1961) (“impossible to lay down an exhaustive definition of ‘the practice of law’”), *modified on other grounds*, 91 Ariz. 293, 371 P.2d 1020 (1962); *Cramer*, 399 Mich. at 133, 249 N.W.2d at 7 (“[A]ny attempt to formulate a lasting, all encompassing definition of ‘practice of law’ is doomed to failure.”); *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 439, 575 P.2d 943, 948 (1978) (“We have declined to define what constitutes the practice of law because of the infinite number of fact situations which may be presented, each of which must be judged according to its own circumstances.”) (quoting *State ex rel. Norvell v. Credit Bureau*, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973)); *see also infra* text accompanying note 108.

Similar views are held by ethics committees. *See, e.g., New York State Bar Ass’n Comm. on Professional Ethics*, Formal Op. 557, N.Y. ST. B.J., May 1984, at 55 (“The Code does not specifically define what constitutes the practice of law.”); *Tennessee Ethics Op.*, *supra* note 8; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1980).

13. *Cramer*, 399 Mich. at 133, 249 N.W.2d at 7 (quoting Comment, *Unauthorized Practice of Law—The Full Service Bank That Was: Bank Cashier Enjoined From Preparing Real Estate Mortgages To Secure Bank Loans*, 61 Ky. L.J. 300, 311 (1972)).

14. However, since some of these values are in conflict, the courts are required to balance some concerns against others; the different relative weights accorded each account for the courts’ varying results.

informing their inquiry into whether an activity is the practice of law. In light of these values, Part III asks whether divorce mediation should be considered the practice of law. It concludes that divorce mediation by nonlawyers should not be considered the practice of law, while divorce mediation by lawyers should. Part IV addresses the ethical obligations of lawyers who provide divorce mediation services. It reviews the different ways that the American Bar Association's Model Code of Professional Responsibility has been interpreted and suggests a more accurate reading of the Model Code. It also reviews an alternative to the Model Code, the Model Rules of Professional Conduct. Finally, it discusses the American Bar Association's Standards of Practice for Lawyer Mediators in Family Disputes, proposes changes in those Standards, and recommends that local jurisdictions adopt the modified Standards with coercive effect upon lawyer divorce mediators.

I

DEFINING "THE PRACTICE OF LAW"

A. Tests Used by the Courts

Although presented separately, the following tests are not always invoked separately by the courts. Rather, courts at times commingle elements of these tests, so that it is sometimes difficult to tell where one test ends and another begins.¹⁵ Because there is no uniform definition of the practice of law, courts often employ more than one test in order to cover all bases.

1. The "Commonly Understood" Test and its Variations

Courts that apply the "commonly understood" test define the practice of law as those activities that are "commonly understood to be the practice of law."¹⁶ This broad definition includes those activities that lawyers

perform[] outside of any court and [that] hav[e] no immediate relation to proceedings in court. It embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field. Although such transactions may have no direct connection with court proceedings, they are always subject to subsequent involvement in litigation. . . . No valid distinction can be drawn between the part of the work of the lawyer which involves appearance in court

15. In fact, on occasion the tests take on a hybrid form. See *infra* notes 69 & 76.

16. *Connecticut Bank & Trust*, 145 Conn. at 234, 140 A.2d at 870 (quoting *Grievance Comm. v. Payne*, 128 Conn. 325, 330, 22 A.2d 623, 626 (1941)); see also *Arizona Land Title & Trust*, 90 Ariz. at 87, 366 P.2d at 9 ("[Those activities,] whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries, must constitute 'the practice of law'.").

and the part which involves advice and the drafting of instruments.¹⁷ Once it is determined that a service customarily has been provided by lawyers, nonlawyers are precluded from also providing that service¹⁸—unless the court is one that recognizes exceptions to this rule.

Applying one such exception, some courts permit nonlawyers to perform a service traditionally performed by lawyers if the service is “incidental” to the nonlawyer’s profession.¹⁹ In *Opinion of the Justices*,²⁰ for example, the court recognized that “[t]he occasional drafting of simple deeds and other legal instruments when not conducted as an occupation or yielding substantial income may fall outside the practice of the law.”²¹ This exception is usually justified on the grounds that the exclusion of nonlawyers from so broad a spectrum of activities would too greatly circumscribe the activities of other professionals—including accountants,²² insurance agents, and trust and title company agents²³—

17. *Connecticut Bank & Trust*, 145 Conn. at 234-35, 140 A.2d at 870; *accord* *Opinion of the Justices*, 289 Mass. 607, 613-14, 194 N.E. 313, 317 (1935).

18. *Arizona Land Title & Trust*, 90 Ariz. at 91, 366 P.2d at 12 (nonlawyer prohibited from performing services commonly understood to be the practice of law even though incidental and no difficult question involved).

The test does not require a showing that *only* lawyers have traditionally provided the service. The “commonly understood” test would therefore seem to prohibit laymen from providing services that they traditionally have performed if lawyers have traditionally provided the same service. Lawyers could suddenly declare a shared area of practice off-limits to their nonlawyer competitors. However, this excess is in part ameliorated by the “incidental” exception and by the modifications discussed *infra* that permit nonlawyers to provide the services they have traditionally performed if such services are “incidental” to their profession. The exception would not, however, protect those nonlawyers who have traditionally performed a service that is not incidental to their profession. See Nassau County (N.Y.) Bar Ass’n Professional Ethics Comm., Formal Op. 82-8, 9 Fam. L. Rep. (BNA) 2029 (1982) [hereinafter Nassau County Ethics Op.].

19. See, e.g., *State ex rel. Indiana State Bar Ass’n v. Indiana Real Estate Ass’n*, 244 Ind. 214, 191 N.E.2d 711 (1963); *Opinion of the Justices*, 289 Mass. at 615, 194 N.E. at 317-18; *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 439, 575 P.2d 943, 948 (1978); *In re New York County Lawyers Ass’n*, 273 A.D. 524, 78 N.Y.S.2d 209 (1948), *aff’d*, 299 N.Y. 728, 87 N.E.2d 451 (1949); *R.J. Edwards, Inc. v. Hert*, 504 P.2d 407, 417 (Okla. 1972); see also Silberman, *supra* note 6, at 125; UPL HANDBOOK, *supra* note 11, at 132. The “incidental” exception is not unique to the “traditionally understood” test. See, e.g., *Report on the Unauthorized Practice of Law*, VA. B. NEWS, Aug. 1979, at 12, 31-33 (defining the practice of law as the existence of an attorney-client relationship, and recognizing the “incidental” exception).

20. 289 Mass. 607, 194 N.E. 313 (1935).

21. *Id.* at 615, 194 N.E. at 317; *accord* *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A.2d 800 (Ch. 1947), *aff’d*, 142 N.J. Eq. 484, 59 A.2d 863 (Sup. Ct. 1948).

22. *Agran v. Shapiro*, 127 Cal. App. 2d Supp. 807, 812, 273 P.2d 619, 623 (1954) (“[Q]uestions of law and accounting are frequently inextricably intermingled as a result of which doubt arises as to where the functions of one profession end and those of the other begin.”); *Gardner v. Conway*, 234 Minn. 468, 482-83, 48 N.W.2d 788, 797 (1951).

23. *State Bar v. Cramer*, 399 Mich. 116, 149, 249 N.W.2d 1, 14 (1976) (Levin, J., dissenting) (“In the borderline areas between the professions, it is laymen—accountants, real estate brokers, insurance agents, trust officers—who make a judgment . . . of where the practice of one discipline ends and the practice of law begins and of whether to call in a lawyer.”) (citation omitted); *Auerbacher*, 139 N.J. Eq. at 602, 53 A.2d at 802 (“Bankers, liquor dealers and laymen generally possess rather precise knowledge of the laws touching their particular business or profession. A

and would not serve the public interest.²⁴

A few of those courts that recognize the "incidental" exception limit it to activities that are not merely incidental but also "necessary" to the primary business.²⁵ With the "necessary" test, incidental activities are permissible only to the extent lay services could not otherwise be provided. This more restrictive view is becoming increasingly disfavored.²⁶

Still other courts circumscribe the "incidental" test by requiring that no "difficult question of law" be involved.²⁷ Under the "no difficult question" standard, a nonlawyer may provide services commonly understood to be the practice of law only if those services are incidental *and* no complex or difficult questions of law are involved.²⁸ The court in *Gardner v. Conway*,²⁹ for example, held that an income tax expert who resolved "difficult legal questions" incidental to preparing an income tax return for consideration was engaged in the unauthorized practice of law.³⁰ Courts applying this standard, however, frequently ameliorate the burden that might otherwise result from a broad definition of "a difficult

good example is the architect, who must be familiar with zoning, building and fire prevention codes This is not practicing law."); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 comment (1980) ("claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed by government agencies [are] nonlawyers whose employment requires knowledge of law").

24. "The court should be very cautious about declaring a *widespread, well-established* method of conducting business unlawful . . ." *Auerbacher*, 139 N.J. Eq. at 603, 53 A.2d at 802 (emphasis added).

On the other hand, some courts take the position that "[a]ny rule which holds that a layman who . . . furnishes . . . services of a legal nature is not practicing law when such services are incidental to another business or profession completely ignores the public welfare." *State Bar v. Arizona Land Title & Trust*, 90 Ariz. 76, 91, 366 P.2d 1, 12 (1961); *accord Agran*, 128 Cal. App. 2d Supp. at 817, 273 P.2d at 625; *Connecticut Bank & Trust*, 145 Conn. at 237, 140 A.2d at 871; *Gardner*, 234 Minn. at 479, 48 N.W.2d at 795. These courts argue that the risk of injury to the public by nonlawyers providing legal services is the same whether those services are provided as primary or incidental services. However, many of the courts that purport to reject the "incidental" test do not, in fact, do so. Rather, they use the incidental test qualified by the "no difficult question" test. *See infra* text accompanying notes 27-31; *see, e.g., Gardner*, 234 Minn. at 480-83, 48 N.W.2d at 796-97 (rejecting the incidental test, but holding that a layman income tax expert is engaged in the unauthorized practice of law because, although incidental, difficult legal questions were involved).

25. *See Arizona Land Title & Trust*, 90 Ariz. at 91, 366 P.2d at 11 ("The testimony of several witnesses indicates that these practices are *not necessary concomitants* to the title insurance business."); *Auerbacher*, 139 N.J. Eq. at 601, 53 A.2d at 801 ("[N]o one handling industrial relations, or acting as a consultant, can render effective service unless he is familiar with such statutes and regulations. . . . [K]nowledge of the law, and . . . use of that knowledge as a factor in determining what measures [to] recommend, do not constitute the practice of law.").

26. *See, e.g., Creekmore v. Izard*, 236 Ark. 558, 367 S.W.2d 419 (1963); *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 575 P.2d 943 (1978).

27. *Agran*, 127 Cal. App. 2d Supp. at 817, 273 P.2d at 626; *Gardner*, 234 Minn. at 468, 48 N.W.2d at 788; *Guardian Abstract & Title*, 91 N.M. at 439, 575 P.2d at 948.

28. 234 Minn. 468, 48 N.W.2d 788 (1951).

29. *Id.* at 482-83, 48 N.W.2d at 797.

30. *Id.* at 481-82, 48 N.W.2d at 796-97; *Guardian Abstract & Title*, 91 N.M. at 439, 575 P.2d at 948.

or doubtful question of law" by holding that such questions are identified by reference to "the understanding thereof which is possessed by a reasonably intelligent layman who is *reasonably familiar with similar transactions*."³¹

Those courts that apply the "incidental" exception or one of its variations generally agree that no *separate* compensation can be received in return for the incidental legal services.³² Courts apparently fear that charging for incidental legal services places undue emphasis on those services, inviting a consumer who pays for incidental legal services to rely upon them.³³

31. *Gardner*, 234 Minn. at 481, 48 N.W.2d at 796 (emphasis added). "[T]he difficult question of law criterion is to be applied in a common-sense way which will protect primarily the interest of the public." *Id.*, 48 N.W.2d at 797 (emphasis omitted). This standard further mitigates the problem mentioned *supra* note 18, that the bar seems empowered to reserve an area of practice to itself even though nonlawyers have also traditionally provided it. When determining whether there are complex legal questions involved, the courts—by using the standard of a layman who is reasonably familiar with *similar transactions*—appear to be asking whether a lawyer's unique knowledge is required. If nonlawyers have also traditionally provided this service, then, arguably, "difficult or doubtful" questions requiring the unique knowledge of a lawyer are not involved.

On the other hand, there are courts that refuse to inquire whether a difficult or doubtful legal question exists on the grounds that the inquiry is irrelevant to the definition of "practice of law." For example, the court in *State Bar Ass'n v. Connecticut Bank & Trust Co.* stated that if "the acts performed were such as are 'commonly understood to be the practice of law,' [a] decision . . . that no uncertain or unclear legal issue is involved, [or] that no controversy is likely to arise . . . would not legalize the performance of [those] acts." 145 Conn. 222, 236, 140 A.2d 863, 871 (1958) (citations omitted) (trust officer who draws up certain instruments may be engaged in the unauthorized practice of law even when no uncertain or unclear legal issue is involved); *see also* *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961).

32. *E.g.*, *Auerbacher v. Wood*, 139 N.J. Eq. 599, 602, 53 A.2d 800, 802 (Ch. 1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (Sup. Ct. 1948):

[S]uppose the architect, asked by his client to omit a fire tower, replies that it is required by the statute. . . . [He is] not [practicing law], provided no separate fee is charged for the legal advice or information, and the legal question is subordinate and incidental to a major non-legal problem.

Although the *Gardner* court purports to reject the "incidental" test, the analysis it undertakes utilizes the "incidental" test, limited by the "difficult question of law" test. The court concludes that not only must the service be incidental, but it must also involve no difficult or complex legal questions. A service is not incidental if compensation is received for it. 234 Minn. at 481, 48 N.W.2d at 796; *see also* UPL HANDBOOK, *supra* note 11, at 140-44; Silberman, *supra* note 6, at 125 ("[n]on-lawyers cannot lawfully charge for . . . 'incidental' legal services"); *Report on the Unauthorized Practice of Law*, *supra* note 19, at 31-33.

33. A nonlawyer cannot charge for incidental legal services "for the reason that it would place emphasis on conveyancing and legal drafting as a business rather than [in this case] on the business of the title company." *Guardian Abstract & Title*, 91 N.M. at 440, 575 P.2d at 949; *see also* *Opinion of the Justices*, 289 Mass. 607, 614, 194 N.E. 313, 317 (1935).

Client reliance as a determinant of the practice of law is discussed *infra* at text accompanying notes 56-59. The use of separate compensation as a *proxy* for consumer reliance seems to assume that a consumer will not rely upon advice for which he has not specifically paid (or will not pay for services upon which he knows he cannot rely). This reasoning is dubious. First, a consumer is likely to consider the "incidental" services as part of the package of services for which he has paid and to rely upon them as such. Second, another possible explanation for this prohibition is that the bar believes laymen would rather discontinue a service than provide it free of charge. If this is the

To determine whether divorce mediation by a nonlawyer constitutes the practice of law under any variation of the "commonly understood" test, one must first identify those services that divorce mediators perform and those services that attorneys traditionally have performed.

A divorce mediator³⁴ is a neutral third party who directs discussion, maintains the balance of power between the parties, and "guide[s] the parties towards resolution of their marital disputes."³⁵ To facilitate this resolution, a mediator will often provide "common information to the parties on applicable legal norms and principles, as well as the probable outcome in court if the case is litigated."³⁶ One commentator has asserted that, in promoting agreements, "[i]t is hard to imagine that a mental health professional can effectively help the couple reach agreement without some understanding of and [giving] advice on the legal issues involved."³⁷ The mediator provides the information, in part, "to reduce the danger that less powerful persons unwittingly will give up legal rights that would be important to them."³⁸ In the event that adequate protection cannot be provided to one or both of the parties, perhaps as a result of intimidation by one of the parties, or because of excessively complex issues beyond the grasp of one or both of the parties, the mediator should withdraw.³⁹

Lawyers' activities encompass much more than courtroom work. "Most lawyers spend more time consulting with clients, negotiating, researching, writing, and planning than they spend in court."⁴⁰ These activities are the "groundwork for future possible contests in courts. [They have a] profound effect on the whole scheme of the administration of justice."⁴¹ Some commentators and ethics committees report that "mediation is a function that attorneys commonly have performed . . .

reason for prohibiting nonlawyers from charging for incidental legal services, then the real motivation behind the prohibition may not be the protection of the public, but a self-interested desire to minimize competition from nonlawyers providing the service.

If the bar is rightfully concerned because laymen's "incidental" legal services are *inadequate*, and therefore people should be protected from relying upon these services, the public interest requires that these services be prohibited altogether.

34. See also *supra* text accompanying notes 6-9.

35. Silberman, *supra* note 6, at 107.

36. Folberg, *Divorce Mediation—A Workable Alternative*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 11, 19 (1982). The parties "must be afforded a way of knowing about the nature of the adversary process and the result it would likely produce." Riskin, *supra* note 5, at 35.

37. Silberman, *supra* note 6, at 123.

38. Riskin, *supra* note 5, at 35.

39. N.Y. City Bar Ass'n Comm. on Professional and Judicial Ethics, Op. 80-23 (1981) [hereinafter N.Y. City Ethics Op.], reprinted in DIVORCE MEDIATION: READINGS 309-27 (1985); Rich, *supra* note 5, at 774.

40. Comment, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 986 (1985) (citing Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 77-130 (1967)).

41. Opinion of the Justices, 289 Mass. 607, 614, 194 N.E. 313, 317 (1935).

when differences between the parties involved were acute and intense."⁴²

In the context of divorce mediation, the "commonly understood" test has several problems. First, there is no apparent standard for establishing how specifically or generally to define a lawyer's traditional activities. One could say that lawyers traditionally "consult," "negotiate," and "research";⁴³ but one could also say more generally that lawyers traditionally "represent with zeal" the interests of their clients.⁴⁴

Second, even if one could determine the correct level of specificity at which to characterize what lawyers and mediators do, no standard has been enunciated for determining at what point the activities become too similar.⁴⁵

Third, the test is ambiguous and susceptible of unprincipled manipulation. A court could merely state that "mediation is a function that attorneys commonly have performed" without enunciating any general standards for concluding that an act is the practice of law. In *State Bar v. Arizona Land Title and Trust Co.*,⁴⁶ for example, the court stated that "*it is obvious to anyone familiar with the work of attorneys that most of the activities engaged in by appellees . . . traditionally have been and presently are conducted in the regular course of their practice by members of the bar.*"⁴⁷ This bald assertion does not explain how the court reached the conclusion that the appellees' activities traditionally have been conducted by lawyers, but implies that questioning the court's con-

42. Connecticut Bar Ass'n Comm. on Professional Ethics, Informal Op. 83-1 (1982) [hereinafter Connecticut Informal Op.], summarized in Law. Man. on Prof. Conduct (ABA/BNA) 801:2058 (1984). "Some attorneys have always encouraged their respective clients to compromise and work towards an amicable settlement. Further, most marital disputes are currently handled, by attorneys, in just such a fashion." Maryland Ethics Op., *supra* note 7, at 11; see also Ray, *supra* note 5, at 423-24; Rich, *supra* note 5, at 775.

43. Comment, *supra* note 40, at 986.

44. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

45. In *Auerbacher v. Wood*, for example, the court permitted a nonlawyer industrial-relations consultant to represent an employer in collective bargaining. The court recognized that "the handling of industrial relations is growing into a recognized profession," separate from law. 139 N.J. Eq. 599, 603, 53 A.2d 800, 802 (Ch. 1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (Sup. Ct. 1948). It is not clear why the court asked only whether the defendant was performing "industrial relations" work and did not inquire into the acts he performed in representing his client. Under the law articulated by that court, if those services were those "customarily reserved to members of the bar," the fact that they were "a minor feature of his work" would have been irrelevant. *Id.* at 603, 53 A.2d at 803. By describing his activities in a general way, the court avoided confronting an overlap with the practice of law.

Similarly, where a divorce mediator informs the parties of applicable laws or of the range of probable outcomes in court, one could argue equally well that the lawyer divorce mediator is or is not engaged in the practice of law. The problem arises from a lack of consensus about where to draw the line of demarcation. See *infra* text accompanying notes 71-72.

46. 90 Ariz. 76, 366 P.2d 1 (1961), *modified on other grounds*, 91 Ariz. 293, 371 P.2d 1020 (1962).

47. *Id.* at 87, 366 P.2d at 9 (emphasis added).

clusion merely demonstrates that the questioner is "unfamiliar with the work of attorneys."

It is unclear what constitutes "traditional practice." To which jurisdiction does one look to find tradition—all common law jurisdictions, or the United States, or one particular state? Nor is it clear how much time must pass before a practice becomes traditional—since Independence, or the turn of the century, or the last fifty years? And even if courts did delineate exact standards, it would be difficult to explain why those standards would constitute the correct parameters.

Finally, the definition is tautological: The practice of law consists of those things that have traditionally been the practice of law.⁴⁸ It is not readily obvious why "tradition" is the relevant factor in defining the practice of law.⁴⁹

Under the guise of this ill-defined test, courts rely on their subjective perceptions to identify the parameters of the practice of law. As a result, the reasoning at times appears unprincipled. One court defined "practice of law" as those activities that "lawyers customarily have carried on from day to day through the centuries."⁵⁰ Yet in response to the claim that title companies were handling ninety percent of all real estate closings at the time of the trial and that the bar had known of this practice for sixteen years and had taken no action, the court said that this claim was

tantamount to saying "We have been driving through red lights for so many years without a serious mishap that it is now lawful to do so." The fact that these practices have continued for many years and have been acquiesced in by the bar does not make such activities any less the practice of law.⁵¹

The court offered no basis on which to distinguish between the compelling weight of tradition in the one instance and its utter irrelevance in the other.⁵²

Similarly, the court in *State Bar v. Cramer*⁵³ refused to formulate a lasting, all-encompassing definition of the practice of law because "under our system of jurisprudence such practice must necessarily change with

48. Silberman, *supra* note 6, at 124.

49. This aspect of the "commonly understood" test, defining the practice of law by reference to "tradition," might serve purposes similar to those of the "client reliance" test, *see infra* text accompanying notes 56-59, namely to protect the consumer's expectations.

50. *Arizona Land Title & Trust*, 90 Ariz. at 87, 366 P.2d at 9.

51. *Id.* at 93, 366 P.2d at 13.

52. A layman may not "under the guise of long-established custom . . . engage in the practice of law." *Id.* at 94, 366 P.2d at 13-14 (emphasis added). The court indicates that its decision would be the same even if the "unauthorized" practice had been engaged in for 50 or even 100 years! *Id.*

53. 399 Mich. 116, 249 N.W.2d 1 (1976).

the everchanging business and social order.”⁵⁴ Yet the court concluded that a personalized divorce kit constituted the unauthorized practice of law because the accompanying conference resembled the traditional attorney-client relationship.⁵⁵ This reasoning seems to contradict the notion that the practice of law is defined in reference to “the ever-changing business and social order.”

2. The “Client Reliance” Test

A second test focuses on whether a client believes that he is receiving legal services. Under this standard, an individual is engaged in the practice of law if he is “perceived by the parties as performing the traditional role of advice giving.”⁵⁶ The reason given for labelling such services the practice of law is the likelihood that consumers will rely on them as qualified legal services.⁵⁷ Similarly, as mentioned above, courts often find that a nonlawyer who charges for incidental legal services has engaged in the practice of law because the consumer is likely to rely upon legal services for which he has paid.⁵⁸ However, some courts have refused to use compensation as a proxy for reliance. The court in *Arizona Land Title & Trust*, for example, stated that to argue that the failure to charge for such services removes them from the field of the practice of law . . . is specious since receipt of compensation is not the feature which determines whether a given act is the practice of law. . . . Reliance by the client on advice or services rendered, rather than the fact that compensation is received, is more pertinent in determining whether certain conduct is the purported or actual practice of law.⁵⁹

The “client reliance” test is not in itself sufficient to determine whether divorce mediation constitutes the practice of law but must be used in conjunction with some other test. Before analyzing whether the consumer is likely to rely upon the services he receives, one must determine whether those services approximate the practice of law. If they do not, reliance alone will not make them the practice of law. For example, reliance alone could not turn mere bookkeeping services into the practice of law.

Furthermore, those activities that clearly are the practice of law continue to be the practice of law even in the absence of client reliance.

54. *Id.* at 133, 249 N.W.2d at 7 (quoting *Grand Rapids Bar Ass’n v. Denkema*, 290 Mich. 56, 64, 287 N.W. 377, 380 (1939)).

55. *Id.* at 137, 249 N.W.2d at 9; *see also Oregon State Bar v. Gilchrist*, 272 Or. 552, 563-64, 538 P.2d 913, 919 (1975).

56. Wisconsin State Bar Standing Comm. on Professional Ethics, Formal Op. E-79-2 (1979), WIS. B. BULL., Jan. 1980, at 61 [hereinafter Wisconsin Ethics Op.]; *see also Arizona Land Title & Trust*, 90 Ariz. at 87, 366 P.2d at 9 (client reliance is key to attorney-client relationship).

57. Comment, *supra* note 40, at 995, 1002.

58. *See supra* note 33 and accompanying text.

59. 90 Ariz. at 87, 366 P.2d at 9 (citations omitted).

There are, for example, provisions in the Model Code and the Model Rules preventing a lawyer from engaging in certain conduct even where a client wants to contract with the lawyer for a service that the client knows does not conform to the ethical standards.⁶⁰ Although the client would not rely upon the service to conform to the standards of law practice, the lawyer is nevertheless prevented from providing such services because he would still be engaged in the practice of law. If client reliance were the talisman of the practice of law, such services would not be the practice of law where a client does not rely on them. The practice of law thus cannot be defined solely on the basis of client reliance.

3. *The "Relating Law to Specific Facts" Test*

Another test identifies the practice of law as "relat[ing] the general body and philosophy of law to a specific legal problem of a client."⁶¹ The court in *Oregon State Bar v. Gilchrist*⁶² used this test to determine whether the sale of divorce kits constitutes the unauthorized practice of law. *Gilchrist* held that "defendants cannot be enjoined from merely publishing or selling their divorce kits so long as the defendants have no personal contact with their customers,"⁶³ such as "consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used."⁶⁴ The court followed the reasoning adopted by the New York Court of Appeals in *New York County Lawyers' Association v. Dacey*:⁶⁵

[T]he essential of legal practice [is] the representation and the advising of a particular person in a particular situation. . . . [T]he book . . . offer[s] general advice on common problems, and does not purport to give personal advice on a specific problem peculiar to a designated or readily identified person.⁶⁶

60. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1980) (lawyer shall not handle a legal matter he is not competent to handle); *id.* at DR 6-102 (lawyer shall not attempt to limit by contract his liability for his own malpractice).

61. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1980); see also Maryland Ethics Op., *supra* note 7, at 8 ("[I]t is possible for a mediator . . . to engage in the practice of law by applying general legal principles to the specific problems of his clients.").

62. 272 Or. 552, 538 P.2d 913 (1975).

63. *Id.* at 558, 538 P.2d at 916.

64. *Id.* at 563, 538 P.2d at 919. Such "consultation" would be the practice of law, and was "strictly enjoined." *Id.* at 564, 538 P.2d at 919.

65. 21 N.Y.2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 (mem.), *rev'g* 28 A.D.2d 161, 283 N.Y.S.2d 984 (1967) (book joining legal forms with advice on filling them out does not constitute the unauthorized practice of law).

66. *Gilchrist*, 272 Or. at 559, 538 P.2d at 917 (quoting *Dacey*, 28 A.D.2d at 174, 283 N.Y.S.2d at 998 (Stevens, J., dissenting)). Judge Stevens' dissent in the Appellate Division was adopted by the Court of Appeals. 21 N.Y.2d at 695, 287 N.Y.S.2d at 423, 234 N.E.2d at 459.

In contrast, the court in *Florida Bar v. Stupica*⁶⁷ expressly declined to follow the *Dacey* rationale.⁶⁸ *Stupica* held that the written "advice" provided in a divorce kit was "comprehensive and specific" and "parallel[ed] much of what an attorney would customarily advise his clients who seek dissolution of marriage."⁶⁹ The court concluded that the defendants could supply legal forms, provided that those forms were not accompanied by "instructions on how to fill out such forms or how they are to be used, for this would constitute legal advice."⁷⁰

These three courts applied the "relating law to specific facts" test to similar situations in three different ways. The *Dacey* court focused on whether the information provided the consumer was *general* or *tailored* to a particular individual in his or her particular situation. In *Gilchrist*, the court enjoined *personal contact* between employees of the divorce kit company and consumers because, with personal contact, the general advice became specific. In *Stupica*, the court enjoined the sale of the divorce kits altogether because the selecting of the proper forms was itself deemed "comprehensive and specific" legal advice.⁷¹

Under the *Dacey* approach divorce mediation would be the practice of law if the legal information provided by the mediator is tailored to the "particular situation" of the mediating parties. Yet it is arguable that divorce mediators do not apply law to particular facts so much as provide the parties with general legal information. While *Dacey* held that the selection of legal forms for sale to the public was only general legal information, *Stupica* deemed that very same activity comprehensive and specific legal advice. The reasoning underlying *Stupica* was that even the mere choice of forms requires a legal assessment about the particular situation of the consumer. Using this approach, the process of selecting general but relevant information, such as the law regarding pensions in a community property state, would constitute the provision of specific legal advice. The general information that *Dacey* would permit a nonlawyer to provide, *Stupica* would label the unauthorized practice of law. The prob-

67. 300 So. 2d 683 (Fla. 1974), *limited by* Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). *Brumbaugh* does not appear to dispute the rationale underlying *Stupica*, namely that "legal advice is inextricably involved" in selecting and explaining how to use legal forms. *Brumbaugh*, 355 So. 2d at 1191. Rather, *Brumbaugh* seems to limit *Stupica* only to the extent that *Stupica* was read as prohibiting the sale of sample legal forms explaining general "legal practice and procedure." *Id.* at 1194. Although admittedly ambiguous, this encroachment upon *Stupica* falls short of permitting "instructions on how to fill out such forms or how they are to be used." *Id.* at 1193.

68. *Stupica*, 300 So. 2d at 685.

69. *Id.* at 686. *Stupica* is another example of how these tests are not always distinctly applied by courts. In this instance the court found the practice of law because the defendants gave legal advice to clients *relating to the clients' specific facts* in a way an attorney *customarily* would.

70. *Id.* (quoting Florida Bar v. American Legal & Business Forms, Inc., 274 So. 2d 225, 227 (Fla. 1973)).

71. Although the defendants were enjoined from selling divorce kits, the court distinguished the kits from a "mere collection" of forms. *Id.*

lem arises in part because it is difficult to identify the point at which general legal information becomes particular-situation legal information sufficient to constitute the practice of law.

Under the *Gilchrist* approach, general legal information may become particular-situation information when there is personal contact. Under this standard, divorce mediation would probably be considered the practice of law. However, underlying the *Gilchrist* court's test of personal contact remains the notion of general versus particular legal information,⁷² and a court might determine that divorce mediators often provide only general legal information, in spite of the personal contact.

4. The "Affecting Legal Rights" Test

A fourth test identifies services as the practice of law when they affect legal rights. The court in *Baron v. City of Los Angeles*⁷³ held that one is engaged in the practice of law if he furnishes "legal advice and counsel and prepar[es] . . . legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court."⁷⁴ The court in *State Bar v. Guardian Abstract & Title Co.*⁷⁵ stated that "'rendering a service that requires the use of legal knowledge' or 'preparing instruments and contracts by which legal rights are secured' " indicates the practice of law.⁷⁶ Applying this standard, the court in *Palmer v. Unauthorized Practice Committee*⁷⁷ held that "[t]he exercise of judgment in the . . . selecting of the proper form of instrument, necessarily affects important legal rights. The reasonable protection of those rights . . . requires that the persons providing such services be licensed members of the legal profession."⁷⁸

72. *Gilchrist*, 272 Or. at 563, 538 P.2d at 919.

73. 2 Cal. 3d 535, 469 P.2d 353, 86 Cal. Rptr. 673 (1970).

74. *Id.* at 542, 469 P.2d at 357, 86 Cal. Rptr. at 677 (quoting *People v. Merchants' Protective Corp.*, 189 Cal. 531, 535, 209 P. 363, 365 (1922) (quoting *Eley v. Miller*, 7 Ind. App. 529, 535, 34 N.E. 836, 837-38 (1893)); see also *Agran v. Shapiro*, 127 Cal. App. 2d Supp. 807, 811, 273 P.2d 619, 622 (1954).

75. 91 N.M. 434, 575 P.2d 943 (1978).

76. *Id.* at 439, 575 P.2d at 948 (quoting *State ex rel. Norvell v. Credit Bureau*, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973)); see also *People v. Sipper*, 61 Cal. App. 2d Supp. 844, 846, 142 P.2d 960, 962 (1943); *People v. Ring*, 26 Cal. App. 2d Supp. 768, 771, 70 P.2d 281, 283 (1937).

The *Guardian* court here applies the "incidental" and "difficult question of law" exceptions to the "affecting legal rights" test. The court reasons that, although *legal rights were affected* by the filling in of blanks in real estate legal instruments, such action was not the practice of law since *no difficult question of law* was involved.

77. 438 S.W.2d 374 (Tex. Civ. App. 1969).

78. *Id.* at 377 (quoting *Cape May County Bar Ass'n v. Ludlam*, 45 N.J. 121, 126, 211 A.2d 780, 782 (1965)); see also *Clark v. Rearden*, 231 Mo. App. 666, 104 S.W.2d 407 (1937).

Similar language is found in *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 88, 366 P.2d 1, 10 (1961) ("The title company employee, in 'filling in a form', obviously exercises his own discretion as to what forms should be used. . . . This kind of quasi-legal counseling [has been] condemned."), *modified on other grounds*, 97 Ariz. 293, 371 P.2d 1020 (1962).

The "affecting legal rights" test is also flawed. The practice of law—for example, the drafting of contracts—often does affect legal rights, but it *need* not affect legal rights. For example, a person who gives advice on legal issues is usually practicing law regardless of whether or not that advice is actually taken. If the advice is not followed, it has no impact on one's legal rights, but remains the practice of law. Furthermore, the "affects legal rights" test is overbroad: If the mere selection of forms affects legal rights, then just about any activity from investment counseling ("sell the stocks this week") to religious counseling ("turn the other cheek") may be said to affect one's legal rights.

5. The "Attorney-Client Relationship" Test

A fifth test focuses on the mediator's relationship with the client.⁷⁹ In holding that the mere sale of a legal self-help kit does not constitute the practice of law, the *Dacey* court mentioned the lack of "that relation of confidence and trust so necessary to the status of attorney and client [that] is the essential of legal practice."⁸⁰ *Cramer* picked up this theme, stating that the defendant in *Dacey* was not engaged in the unauthorized practice of law because "there [was] no personal contact or relationship with a particular individual."⁸¹ The *Cramer* court also observed that *Gilchrist* had prohibited personalized assistance in filling out forms "because the relationship which developed between the parties was tantamount to that of attorney and client."⁸²

The "attorney-client relationship" test is circular. How does one know whether a relationship is "tantamount to that of attorney and client" without first determining that one of the parties is practicing law? The concept of "the practice of law" is logically prior to the concept of "the attorney-client relationship."

B. Tests Proposed by Ethics Committees

The large number of tests that courts use to identify the practice of law, the many flaws in those tests, the judicial disagreement about whether certain tests should be used at all, and the conflicting results that

79. See VA. RULES OF COURT 6:I, 216 Va. 941, 1062 (1976) (defining the practice of law in terms of the relation between attorney and client).

80. New York County Lawyer's Ass'n v. *Dacey*, 28 A.D.2d 161, 174, 283 N.Y.S.2d 984, 998, rev'd, 21 N.Y.2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 (1967) (mem.).

81. State Bar v. *Cramer*, 399 Mich. 116, 137, 249 N.W.2d 1, 9 (1976) (quoting *Dacey*, 28 A.D.2d at 171, 283 N.Y.S.2d at 998).

82. 399 Mich. at 136, 249 N.W.2d at 8 (citing Oregon State Bar v. *Gilchrist*, 272 Or. 552, 538 P.2d 913 (1975)).

It is ironic that the court in *Arizona Land Title & Trust* held that title company employees who filled out legal forms for clients were engaged in the unauthorized practice of law, in part because "[t]he relationship between title company employees and company customers bears none of the characteristics of the attorney-client relationship." 90 Ariz. at 88, 366 P.2d at 9.

different courts reach using the same test on similar facts—these problems demonstrate the great difficulty involved in determining whether divorce mediation constitutes the practice of law on the basis of the existing judicial tests.

The opinions of the numerous state bar ethics committees that have confronted divorce mediation are similarly ambiguous. Most of the committees that have had the opportunity to address this issue have not done so. Many have ignored the issue altogether and have assumed that the mediation practice under review constitutes the practice of law.⁸³ Although this assumption may ultimately be justifiable,⁸⁴ some people do in fact assert that divorce mediation by lawyers is not the practice of law.⁸⁵ In any event, the ethics committee opinions do not provide an independent means for determining whether divorce mediation is the practice of law.

The few ethics committee opinions that have addressed this question fall generally into one of three groups. The first group recognizes the need to determine whether divorce mediation constitutes the practice of law, but declines to do so on the ground that "[w]hat constitutes the practice of law is a legal question outside the jurisdiction of the committee."⁸⁶ The Maryland ethics committee acknowledged that "there are those who deny that mediators ever engage in the practice of law," but deferred the question "to the attorney general or some other appropriate authority."⁸⁷

The second group applies the "affecting legal rights" test⁸⁸ in such a way that divorce mediation necessarily constitutes the practice of law. The Boston ethics committee, for example, approved the practice of mediation by attorneys, but severely restricted the participation of nonlawyers: "If the parties are to be advised as to the legal aspects by a person not engaging in the improper practice of law, that advice must be given by an attorney."⁸⁹ Since one of the primary goals of divorce medi-

83. See, e.g., Connecticut Bar Ass'n Comm. on Professional Ethics, Formal Op. 35, 56 CONN. B.J. 498, 498-99 (1982) [hereinafter Connecticut Formal Op.]; see also Comment, *supra* note 40, at 987 n.8 (citing decisions that have assumed that the lawyer mediator was practicing law). On many occasions, the committees consider divorce mediation services that include the actual drafting of legal documents by the divorce mediator. To that extent, a committee's assumption that the mediator is engaged in the practice of law is not unreasonable. These committees then find it unnecessary to review the other services provided by the divorce mediator.

84. See *infra* note 145; see also *infra* note 135 (the "incidental" exception is unavailable to lawyers).

85. See *infra* note 259.

86. Los Angeles County Bar Ass'n Comm. on Legal Ethics, Formal Op. 372 (1978).

87. Maryland Ethics Op., *supra* note 7, at 8.

88. See *supra* text accompanying notes 73-78.

89. Boston Bar Ass'n Comm. of Professional Responsibility, Formal Op. 78-1, B.B.J., June 1979, at 14 [hereinafter Boston Ethics Op.], reprinted in DIVORCE MEDIATION: READINGS 329-34 (1985).

ation is to terminate a legal relationship, it is difficult to imagine many instances in which divorce mediation could be provided without addressing at least some of the "legal aspects" of the process. Only in those infrequent and easily identifiable instances where divorce mediation does not require discussion of legal concerns would it not constitute the practice of law. The committee does not explain why divorce mediators who wish to avoid the unauthorized practice of law must confine their activities to such a limited domain, in contrast to accountants and other professionals whose practice may overlap with legal practice.⁹⁰ The committee's definition of "practice of law" is so broad that when presented with divorce mediation, except in those few cases where no legal questions are discussed, the committee can safely determine that divorce mediation is the practice of law without engaging in a detailed review.

The third group uses the "relating law to specific facts" test.⁹¹ The Tennessee Supreme Court's Board of Professional Responsibility, for example, decided that a nonpracticing lawyer who provided divorce mediation services was engaged in the practice of law, even though "he was not representing" either of the mediating parties and advised both of them that he would not provide legal advice.⁹² The Board defined the practice of law as relating "the general body and philosophy of law to a specific legal problem of a client."⁹³

II

UNDERLYING VALUES

When asking whether divorce mediation is the practice of law, one must consider the values at stake in the inquiry. Only after understanding why the question is important can we arrive at a sound conclusion.

When we are deciding whether some rule should govern a dispute, especially if the dispute is thought to be a borderline case, a familiar and sound injunction is that before venturing an answer, we should first know what the basic purposes are behind the rule. . . . Without knowing what we are trying to achieve by a particular rule, we cannot sensibly proceed to offer an intelligent opinion about which facts . . . are important and which irrelevant . . . and about how the various elements of the problem ought finally to be resolved in a judgment⁹⁴

90. See *supra* notes 22-24 and accompanying text.

91. See *supra* text accompanying notes 61-72.

92. Tennessee Ethics Op., *supra* note 8, at 801:8107.

93. *Id.*; see also Maryland Ethics Op., *supra* note 7, at 8; Oregon State Bar Comm. on Legal Ethics, Formal Op. 488 (1983), reprinted in *DIVORCE MEDIATION: READINGS* 335-39 (1985) [hereinafter Oregon Ethics Op.].

94. L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 43 (1986).

Rather than struggle with the problematic tests discussed above, we should inquire into their underlying values. The soundness of this approach is confirmed by the observation that courts—regardless of the tests they apply—generally identify and rely on similar values as the bases for their decisions. Even when two courts employ different tests, disavow the test used by the other, and reach disparate results, they usually base their decisions upon the same values.

The set of values that guides the inquiry into whether any given conduct on the part of nonlawyers constitutes the practice of law differs from the set of values that guides the inquiry into whether that same conduct is the practice of law when engaged in by lawyers. The first inquiry is driven by a concern to protect the public from inadequate service and exploitation by persons who are presumptively unqualified to practice law. By contrast, the second inquiry is driven by the value of obliging lawyers who are engaged in the practice of law to conform their professional conduct to the applicable code of legal ethics. This Part examines these two sets of values independently.

A. Values Underlying the Governance of Nonlawyer Divorce Mediation

A judicial finding that an activity constitutes the practice of law prohibits nonlawyers from engaging in that activity. Most courts identify the protection of the public as the purpose of confining law practice to a licensed bar.⁹⁵ Courts consistently recognize that identification of the public interest requires consideration of four values: (1) ensuring the adequate ability of the practitioner; (2) ensuring the morally sound character of the practitioner; (3) guaranteeing the opportunity for responsible supervision over the process;⁹⁶ and (4) maximizing the availability to the

95. See, e.g., *State Bar v. Cramer*, 399 Mich. 116, 134, 249 N.W.2d 1, 7 (1976) ("It is this purpose of public protection which must dictate the construction we put on the 'unauthorized practice of law.'"); *Gardner v. Conway*, 234 Minn. 468, 478, 48 N.W.2d 788, 795 (1951) (although "ancient . . . in origin," public protection is "of vital importance today"); see also Hunter & Klonoff, *A Dialogue on the Unauthorized Practice of Law*, 25 VILL. L. REV. 6, 6-7 (1979) (quoting ABA Standing Comm. on Unauthorized Practice of Law, *Report*, 66 A.B.A. REP. 268 (1941) ("The public, far more than the lawyers, suffers injury from the unauthorized practice of law. The fight to stop it is the public's fight. . . . [E]very man is entitled to receive legal advice from men skilled in law, qualified by character, . . . [and] not motivated or controlled by a divided outside allegiance.")); Silberman, *supra* note 6, at 124 ("The policy behind the unauthorized practice prohibition is obviously protection of the public; there is concern that no matter how well a layman knows his or her specialty, the legal issues involved require legal experience.").

96. See, e.g., *State Bar Ass'n v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 235, 140 A.2d 863, 870 (1985) ("It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill and of sound moral character, acting at all times under the heavy trust obligation to clients which rests upon all attorneys."); *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 438, 575 P.2d 943, 947 (1978) ("The prime purpose of licensing attorneys . . . is to protect the public from the evils occasioned by unqualified persons performing legal services."); *Opinion of the Justices*, 289 Mass.

public of efficient services.⁹⁷

In the case of nonlawyer divorce mediation, the first three values cut in favor of an expansive definition of the practice of law, with the result that nonlawyers would be prevented from providing divorce mediation services, at least to the extent divorce mediation involves legal issues. This result protects the public from receiving divorce mediation services (with a legal component) from practitioners who have not been shown to have adequate legal skills, morally sound character, and responsible supervision.⁹⁸

The fourth value, by contrast, supports a less expansive definition of the practice of law in the case of nonlawyer divorce mediation. Finding that divorce mediation is not the practice of law would make it less costly, less cumbersome, and more widely available.⁹⁹ Most commentators agree that divorce mediation, when properly utilized, offers increased efficiency over traditional approaches.¹⁰⁰ Divorce mediation

607, 613, 194 N.E. 313, 316 (1935) (practice of law only open to individuals possessing "adequate special qualifications as to learning in the law" and "of good moral character").

97. See *Cramer*, 399 Mich. at 133, 249 N.W.2d at 7 ("It cannot be urged, with reason, that a lawyer must preside over every transaction where written legal forms must be selected and used by an agent for one of the parties. Such a restriction could so paralyze business activities that very few transactions would be expeditiously consummated.") (quoting *State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n*, 244 Ind. 214, 191 N.E.2d 711 (1963)); *Guardian Abstract & Title*, 91 N.M. at 440, 575 P.2d at 949 (where title companies fill in printed forms incidental to real estate closings as they have done for the last 20 years, where the process is faster, more efficient, and less expensive for the parties than using attorneys to fill in the blanks, and where no adverse effects are apparent, the court permitted the title companies to continue in that practice because "it would be a burden on the public for us to now decree that such acts constitute the unauthorized practice of law"); see also *Creekmore v. Izard*, 367 S.W.2d 419, 422 (Ark. 1963) (noting that attorneys are unavailable in a number of Arkansas towns).

When evaluating efficiency, courts may consider the possible effects of their ultimate decision upon the cost, speed, effectiveness (often referred to as the satisfaction of the parties, or the permanence of the results), and other variables which affect the overall efficiency, in this case, of dispute resolution.

"Efficiency" as used here excludes those efficiency considerations accounted for under the first three values. The "ability of the practitioner," for example, clearly has an efficiency aspect to it; there is nothing efficient about divorce mediation services provided by an inept practitioner. This concern, however, is already considered in the balance under the "ability of the practitioner" value.

98. The extent to which the first three values favor labeling nonlawyer divorce mediation the practice of law depends, of course, on the state of divorce mediation at the time the issue is addressed. If, for example, nonlawyer divorce mediators are adequately supervised by a responsible body, the supervision value does not seem to be much advanced, if at all, by the outcome of the practice of law issue. Similarly, if there exists a means of ensuring the practitioner's sound moral character, this concern is satisfied.

99. Recognizing similar interests, the *Guardian Abstract & Title* court held that title companies handling real estate closings were not engaged in the practice of law. 91 N.M. at 441, 575 P.2d at 950.

100. See, e.g., Riskin, *supra* note 5, at 33-34. Some commentators dispute the efficiency claims of divorce mediation. See, e.g., Edwards, *supra* note 5, at 668-69; Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE, *supra* note 10, at 215, 222-42.

tends to cost less than obtaining a divorce through traditional means,¹⁰¹ reduces hostilities between the parties,¹⁰² increases effectiveness through increased satisfaction of the parties,¹⁰³ reduces recidivism rates,¹⁰⁴ and ameliorates judicial congestion.¹⁰⁵ Even the possibility that divorce mediation will *eventually* offer such advantages argues in favor of encouraging the development of the practice.¹⁰⁶ Thus, in the case of divorce

101. Bahr, *supra* note 5, at 33-34; Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U.L. REV. 181, 188-89 (1981); Pearson & Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, FAM. ADVOC., Winter 1982, at 26, 32; Silas, *McJustice: Mediation Franchising Begins*, 72 A.B.A. J. 17 (1986); Zumeta, *Mediation as an Alternative to Litigation in Divorce*, 62 MICH. B.J. 434 (1983).

On the other hand, some scholars argue that the cost savings are minimal and that the benefits are illusory. *E.g.*, Crouch, *Mediation and Divorce: The Dark Side Is Still Unexplored*, FAM. ADVOC., Winter 1982, at 27, 33; *see also* Nassau County Ethics Op., *supra* note 18 (claim "that divorce mediation is 'quicker . . . less expensive and . . . far less painful' than representation by separate counsel is not only misleading but is a claim which cannot be measured or verified").

Cost considerations include (1) impact on the parties (of retaining one rather than two lawyers and of additional expenses on those occasions when mediation has to be abandoned); (2) impact on the judicial system (resulting from the effect of mediation on the number of cases brought into court); and (3) impact on society as a whole (of taking such cases out of the "system," thereby hampering the regulation of separation agreements or of not having a nonadversarial alternative available).

102. Felstiner, *Influences of Social Organization on Dispute Processing*, in NEIGHBORHOOD JUSTICE, *supra* note 10, at 45, 49 ("The psychological consequence [of adjudication] is frequently to alienate the loser from the adjudicative process. . . . One would, therefore, expect that loser compliance with adjudicative decisions is produced not by their merits, but by the coercive power which they command."); Rich, *supra* note 5, at 782 ("possibility of reducing hostility . . . provides substantial impetus" for non-adversarial dispute resolution").

103. *See, e.g.*, Bahr, *supra* note 5 at 34 ("Those who used mediation were clearly more satisfied with the results than those who did not."); McGillis, *supra* note 10, at 67 ("[M]ediation clients are significantly more satisfied with their case's processing than court clients."); Merry, *Defining "Success" in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE, *supra* note 10, at 172, 185 (surveys show rates of satisfaction to be "impressively high").

Contra Crouch, *supra* note 101, at 33 (the weaker or less informed party is subject to exploitation at the hands of the stronger party). *But see* McGillis, *supra* note 10, at 66 ("[M]ost projects are hesitant to process disputes between disputants varying greatly in power.").

104. McGillis, *supra* note 10, at 67 ("Mediated settlements are more likely to be carried out than are adjudicated settlements."); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956-57 (1979) ("[A] consensual solution is by definition more likely to be consistent with the preferences of each spouse, and acceptable over time, than would a result imposed by a court."); Pearson & Thoennes, *supra* note 101, at 32 ("Successful mediation clients are less likely to report problems with their court orders and are more likely to report that their spouses are in total compliance.").

Contra Tomasic, *supra* note 100, at 239-42 (statements about the likelihood of the settlement being carried out ignore questions of recidivism).

105. Nassau County Ethics Op., *supra* note 18; Friedman, *supra* note 101, at 188-89; Mnookin & Kornhauser, *supra* note 104, at 956 and n.28. *Contra* Merry, *supra* note 103, at 183 ("It is not clear whether mediation programs are having any significant impact on the caseloads of the courts. . . . No research has determined whether the cases . . . would all have been handled by the courts or whether they represent a group of disputes which would otherwise simply have been endured, avoided, or 'lumped' . . .").

106. Even if it were conceded that some of the alleged benefits of divorce mediation are at this time illusory, divorce mediation should still be supported in order to give the public the opportunity

mediation, the efficiency value conflicts with the first three values described above.

Because the efficiency value often conflicts with these first three values, courts must balance these concerns against each other on a case-by-case basis. This fact-dependency in part accounts for the refusal to acknowledge a single definition of the practice of law.¹⁰⁷ As a result, not only the factual posture of the case, but also the court's subjective assignment of weight to the competing values, will determine whether an activity is the practice of law.¹⁰⁸

Once we recognize that courts must perform a balancing of conflicting values, the "commonly understood" test can be rationalized: Its very ambiguity and subjectivity may make it valuable to the courts.¹⁰⁹ Perhaps by examining how the practice has been handled in the past, courts get a "feel" for how onerous it would be to exclude nonlawyers from performing that service, and how risky it would be (in light of the first three values) not to do so. If the first three values indicate that too great a risk is involved, the fact that nonlawyers have performed the service in the past may be irrelevant. "Tradition" thus remains undefined because, for these purposes, tradition over the last fifteen years may be as important as tradition over the last one hundred. In short, courts can manipulate "tradition" to suit their assessment of the case in light of the relevant values.

When viewed in light of these values, *Arizona Land Title & Trust* no longer seems unprincipled.¹¹⁰ The court probably gave little weight to the fact that title companies had been handling ninety percent of real estate closings for the last sixteen years because it felt that the risk to the public of permitting the practice by nonlawyers outweighed the benefits to be achieved.

to get acquainted with this new resource. Merry, *supra* note 103, at 191 ("The poor showings on measures of caseloads and costs must be stacked against the need for a long trial period to test the acceptability of a radically different mode of dispute settlement to the American public.").

107. See *supra* note 12.

108. Compare *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 440, 575 P.2d 943, 949 (1978) (where the court avoided "burdening" the public) with *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 93, 366 P.2d 1, 13 (1961) ("[N]either the public blissful acquiescence nor the bar's confessed lethargy can clothe the activities with validity."), *modified on other grounds*, 97 Ariz. 293, 371 P.2d 1020 (1962). Although the same values were applied, the two courts arrived at entirely different conclusions.

109. However, this same ambiguity and subjectivity provides little guidance to those who wish to know if and how they can provide divorce mediation service without engaging in the practice of law. One result of the lack of clear standards may be a substantial chilling effect on divorce mediation and similar services.

110. See *supra* text accompanying notes 50-52.

B. Values Underlying the Governance of Lawyer Divorce Mediation

A different set of values drives the inquiry into whether a lawyer is engaged in the practice of law. Courts and ethics committees do so not to determine whether the lawyer has engaged in the unauthorized practice of law, but rather to determine whether his activities must conform to the applicable code of legal ethics.¹¹¹ Although courts continue to be concerned with the supervision of the actor in order to protect the public, their reasons are different from those emphasized in a nonlawyer context.¹¹² With respect to nonlawyer mediation, supervision protects the public from inadequate service and from exploitation and injury by individuals who are presumptively unqualified in areas relating to law.¹¹³ With respect to lawyer mediation, supervision primarily shelters the public from the risk that the *practice* of mediation will inadequately protect the interests of the participants, regardless of who the mediator is.

More significantly, supervision of lawyers also protects the reputation of the local bar and the legal profession.¹¹⁴ Since their reputations are at stake, local bar associations have an interest in being the supervising bodies.¹¹⁵ These concerns, which have no analogue in the nonlawyer setting, favor an expansive definition of the practice of law because the bar cannot supervise conduct that is not the practice of law.

Often weighing against these values is the same efficiency value present in the nonlawyer context.¹¹⁶ However, the efficiency value is weaker here than in a nonlawyer setting because a finding that divorce mediation constitutes the practice of law will not prevent the lawyer from engaging

111. An attorney licensed by the appropriate state body is, by definition, authorized to engage in the practice of law. Therefore, charges of unauthorized practice of law would not be brought against an attorney. Rather, where a lawyer provides legal services which he knows he is not qualified to perform, the inquiry is one to determine whether that attorney has violated ethical obligations owed to his client. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1), EC 6-3 (1980).

112. Lawyers, unlike nonlawyers, are presumed to be educated in the law, and are screened and supervised by the local bar association under the authority of the supreme court of the state. Every state has established requirements one must meet before being admitted to practice law in that state. Most states require bar applicants to be of a certain age, to have graduated from an accredited law school, to have passed the state's bar examination, and to have good moral character. See *supra* note 96.

113. Miller, *Lay Divorce Firms and the Unauthorized Practice of Law*, 6 U. MICH. J.L. REFORM 423, 429 (1973) ("The prohibition against the unauthorized practice of law is founded on the premise that the public is entitled to protection from unskilled and unscrupulous practitioners.").

114. *In re Themelis*, 117 Vt. 19, 24, 83 A.2d 507, 510 (1951) ("honor and purity of the profession" is an important value); Miller, *supra* note 113, at 441-42; Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 337-38 (1984).

115. Although it is conceivable that a lay organization has an interest in supervising all people who provide the service it monitors, even when those people are lawyers, it is unlikely that courts would weigh this claim against the bars' interest in supervising lawyers.

116. See *supra* notes 99-106 and accompanying text.

in that activity,¹¹⁷ nor will it necessarily prevent nonlawyers from providing that service.¹¹⁸ Therefore, the resulting limitation on the public's options is less burdensome here than in a nonlawyer setting.

When considering whether a lawyer's activity is the practice of law, the relevant values are (1) the need for responsible supervision to protect the public, (2) the need for supervision by the local bar association to protect the reputation of the local bar and the legal profession, and (3) a concern for efficiency values, albeit weaker in the lawyer context than in the nonlawyer one.

III

SHOULD DIVORCE MEDIATION BE THE PRACTICE OF LAW?

Since different values are at stake in characterizing nonlawyer divorce mediation and lawyer divorce mediation, this inquiry must be bifurcated, and the questions asked independently with respect to nonlawyers and lawyers.

A. Is Nonlawyer Divorce Mediation the Practice of Law?

The purpose of finding an activity to be the unauthorized practice of law is to protect the public interest. If nonlawyers are prohibited from offering divorce mediation, the public interest will be unnecessarily injured by the reduction in efficiency benefits since methods other than outright prohibition of nonlawyer divorce mediation are available to protect the public interest.

Several arguments can be made in favor of permitting nonlawyers to provide divorce mediation services. In regard to the soundness of the mediator's character, lawyers have not cornered the market on morality and there are more efficient means of ensuring that mediators will be of sound moral character than by excluding all nonlawyers. Nor does concern for the mediator's qualifications require that mediation be reserved for attorneys. In fact, because the mediation process is nonadversarial, in some respects nonlawyers may actually be more qualified than lawyers to fill the role of mediator.¹¹⁹ Furthermore, it is likely that the public would

117. See *supra* note 111 and accompanying text. Nevertheless, it will result in certain constraints being imposed upon lawyer mediators that might threaten the efficiency concerns.

118. If a nonlawyer who provides divorce mediation is held to be engaged in the (unauthorized) practice of law, it is likely that a lawyer providing the same service would also be engaged in the practice of law. It would be anomalous to hold that an activity is more like the practice of law when performed by a nonlawyer than when performed by a lawyer. However, a determination that a service is the practice of law when provided by a lawyer does *not* require that it be the practice of law when provided by a nonlawyer.

119. See Edwards, *supra* note 5, at 670 ("[T]oo many lawyers view the suggestion of compromise as an admission of weakness."); Gaughan, *Divorce Mediation: An Important New Role for Lawyers*, VA. B.A. J., Summer 1986, at 8, 9 ("[M]ost lawyers have avoided divorce mediation. It

be deprived of efficiency benefits both because nonlawyer divorce mediation would be unavailable and because there would probably be a lack of lawyers sufficiently trained, experienced and interested in providing divorce mediation.¹²⁰ Finally, the efficiency value should be given greater weight when dealing with nonlawyer mediators than with lawyer mediators.

These arguments alone, however, do not compel the conclusion that nonlawyer divorce mediation is not the practice of law, because they give insufficient weight to concerns about the mediators' ability and good character, and disregard the need for supervision. However, if nonlawyer divorce mediation were not the practice of law and yet it were regulated in such a way that the public received adequate protection, then the public would most benefit by permitting nonlawyers to engage in divorce mediation. There is, in fact, no reason why an organization other than the local bar association could not regulate nonlawyer divorce mediation; the local bar has no particularly compelling reason to be the supervisory body. To the extent that divorce mediation routinely involves subjects relevant to the practice of law, the supervisory body could provide educational programs, including classes or seminars, on legal issues that would ensure the necessary competence.¹²¹ The supervisory body could issue licenses predicated upon evidence of sound moral character and competence in the basic legal (and non-legal) aspects of divorce mediation. Beyond licensing, the body could supervise mediators and maintain standards of knowledge and ability. As for the concern that nonlawyer divorce mediators might provide legal services beyond the mediators' qualifications, individual prosecutions for the unauthorized practice of

is an unfamiliar field and seems to go contrary to much of our training and experience."); Riskin, *supra* note 5, at 48 ("Nearly all courses at most law schools are presented from the viewpoint of the practicing attorney who is working in an adversary system of act-oriented rules, a context that he accepts.").

120. See, e.g., Gaughan, *supra* note 119, at 8 ("Attorneys . . . persist in the belief that mediation is a therapists' field, if not actually a form of therapy. Indeed, perhaps three-fourths of the divorce mediators currently in practice are not lawyers, but therapists or other professionals."); Cox, *Some Divorcing Couples Find Mediation Cheaper*, Wall St. J., Nov. 15, 1983, at 60, col. 1 (estimating that 20% of mediators are attorneys). But see Mathias, *supra* note 3 (estimating that by 1986 some 40% of mediators are attorneys). Regarding the need for lawyer mediators, compare Ray, *supra* note 5, at 422 ("In a mediation setting there may be little need for lawyers, a condition which reduces the disputant's costs and makes the proceedings less adversarial. Generally, lawyers are happy not to be part of cases which carry heavy emotional freight [sic] and little or no fee. In fact, one important finding concerning minor dispute mediation is that most of their economic claims are too small to be handled by lawyers.") with Riskin, *supra* note 5, at 42-43 (describing forces tending to make lawyers reluctant to recommend divorce mediation).

It is not unprecedented to open up areas of legal services to laymen where the gains outweigh the costs involved. See *infra* note 128.

121. The distinction between addressing legal issues and practicing law should not be confused or overlooked. A lay person who merely addresses legal issues does not necessarily engage in the practice of law.

law would be available, just as they are for individual accountants, real estate agents, and other professionals who violate the law.¹²² Concluding that nonlawyer divorce mediation does not automatically constitute the unauthorized practice of law is therefore in the public interest, provided that the concerns for ability, moral character and supervision are satisfied by a supervisory body other than the local bar association.

In addition to preserving the benefits of divorce mediation described above, this result would permit divorce mediation to develop naturally, independent of the constraints of local bar associations—which would tend to define divorce mediation in reference to lawyering. For example, a bar association might require that each party to the mediation also be represented by independent counsel.¹²³ Such a requirement, however, would eliminate many of the benefits that make divorce mediation an attractive alternative for many people, and public support for divorce mediation might atrophy.¹²⁴ Furthermore, such influences would tend to co-opt divorce mediation back into the formalistic adversarial system to which it would otherwise provide an alternative.¹²⁵

122. See *Auerbacher v. Wood*, 139 N.J. Eq. 599, 600, 53 A.2d 800, 801 (Ch. 1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948) ("During the past 15 years, courts of equity have frequently enjoined the unlawful practice of the law at the suit of a bar association."); see also *Thibodeau v. State*, 419 F. Supp. 87, 90 (D. Minn. 1976) (a Minnesota statute "permit[s] actions to be brought [to prevent the unauthorized practice of law] . . . by state and local bar associations and members thereof on behalf of the bar and the state"); *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 79-80, 366 P.2d 1, 3 (1961), *modified on other grounds*, 97 Ariz. 293, 371 P.2d 1020 (1962); *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 437, 575 P.2d 943, 946 (1978).

123. See Gaughan, *Divorce Mediation: A Lawyer's View*, FAM. ADVOC., Summer 1986, at 34, 35 ("The parties should consult separate legal counsel for advice and assistance during the mediation process. If a lawyer-mediator drafts the settlement agreement, separate counsel for each party should review it before it is signed."); *Standards of Practice for Family Mediators*, 17 FAM. L.Q. 455, 456 (1984) ("The mediator shall inform the participants that each should employ independent legal counsel for advice throughout the mediation process.").

124. This second opinion, duplicating the process of supplying legal information by the lawyer as mediator, could well eliminate all time and cost advantages attributable to the mediation process. . . . [This requirement also] ignores the mediator's neutrality and, at worst, seriously undermines it. . . . [Finally, i]nstead of the parties assuming responsibility for decisions and agreements, the independent legal representatives will assume much responsibility.

Pirie, *The Lawyer as Mediator: Professional Responsibility Problems or Professional Problems?*, 63 CANADIAN B. REV. 378, 400-01 (1985).

125. This process has been seen before. See, e.g., Clifford, *Alternatives to the Criminal Court System*, in NEIGHBORHOOD JUSTICE, *supra* note 10, at 203, 210 ("Courts of Equity in the seventeenth century grew out of a need to depart from the technicalities and delays of Common Law but they themselves eventually became so technical and bureaucratized that they were reintegrated with Common Law in a single system."); Silberman, *supra* note 6, at 108, 122.

There will likely be many cases where a separation agreement should—and must—be drafted by an attorney. However, as nonlawyer divorce mediation comes into its own, we might also find that "easy" agreements become increasingly common. All the while, the supervisory body would establish and monitor the permissible bounds for the divorce mediators and ensure that they have adequate training. Simultaneously, the local bar could also guard against the risk of the nonlawyer mediators' supervisory body expanding its domain into the realm of the practice of law, as it does

Concluding that nonlawyer divorce mediators are not necessarily practicing law is similar to the result reached in other circumstances by courts applying the "incidental" exception.¹²⁶ Like other professionals, such as bank trust officers (who are usually licensed), divorce mediators' services could be said to include "incidental" legal services.¹²⁷ One could rephrase the conclusion reached here as "nonlawyers may engage in the practice of law provided it is merely incidental to their profession as a divorce mediator."¹²⁸

now in relation to other professions. See *supra* note 122 and accompanying text. A nonlawyer divorce mediator should not be prevented from drafting agreements in appropriate circumstances.

In the end, nonlawyer mediators may conclude that they should never draft a separation agreement and that it must always be done by a lawyer. If the supervisory body concludes that this result is necessary for the protection of mediation clients as well as for mediators, so be it. However, that determination should be made by the nonlawyer mediating profession and not by the legal profession. See *supra* note 18 (second paragraph). Even if the demand for nonlawyer mediation falls because certain advantages are lost, the result would not have been promoted by the legal profession, which might be influenced by its own self-interest.

126. See *supra* notes 19-24 and accompanying text.

127. In order for the "incidental" exception to be conceptually applicable to divorce mediation, one must first conceive of divorce mediation as an independent profession. One would conceive of divorce mediators, like bank trust officers or accountants, performing their respective professional services while addressing few—if any—legal issues. This is in fact what some mediators claim they do. Telephone interview with Wendy Whicher, divorce mediator and member of the ABA Task Force that drafted the STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (Mar. 27, 1987). One could imagine that a lay divorce mediator mediates a divorce and then calls in a lawyer to address the spouses' legal questions. See Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 472 (1984); see also *supra* note 10.

One could then posit that, rather than continually calling upon the lawyer, the routine legal questions that arise in divorce mediation are taken over by the divorce mediator as incidental to the profession. See *State Bar v. Cramer*, 399 Mich. 116, 133, 249 N.W.2d 1, 7 (1976); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 comment ("Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists.").

Whether this conclusion is reached with reference to the values described above or through the use of the "incidental" exception, some legal questions would remain the exclusive domain of attorneys. See *supra* text accompanying notes 27-31; *infra* text accompanying notes 145-47.

128. See Silberman, *supra* note 6, at 127: "Mediation offered by skilled mental health professionals is an alternative service and process; the imparting of legal information is only an incidental component of the larger task of helping the couple resolve their own differences on the issues surrounding the marriage dissolution."

There are other circumstances in which nonlawyers have been permitted to perform what would otherwise be the practice of law — for example, where to do so was consistent with legislative intent. *E.g.*, *American Automobile Ass'n v. Merrick*, 117 F.2d 23 (D.C. Cir.), *modifying* 31 F. Supp. 876 (D.D.C. 1940); *Agran v. Shapiro*, 127 Cal. App. 2d Supp. 807, 820-23, 273 P.2d 619, 627-29 (1954); *Cramer*, 399 Mich. at 158 n.24, 249 N.W.2d at 18 n.24; *Auerbacher v. Wood*, 139 N.J. Eq. 599, 602, 53 A.2d 800, 803 (Ch. 1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948); *Miller, supra* note 113, at 429. A similar exception could be recognized for divorce mediators in those jurisdictions that have no-fault divorce laws since "it is contrary to [such laws] to create controversy between the parties" in an adversarial setting. *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 900, 142 Cal. Rptr. 509, 513 (1977). In 1977, it was reported that only three states—Illinois,

One practical question is whether a court should decide that non-lawyer divorce mediation is not the unauthorized practice of law when there is, in fact, no official body performing the supervisory functions outlined above. Courts should define the term "profession," and include in that definition the requirement of licensure and supervision by a state-recognized body.¹²⁹ Nonlawyer divorce mediators could then be authorized to provide services that would otherwise constitute the practice of law so long as the services were "incidental" to their duly licensed and supervised profession.¹³⁰

In states where there is no supervisory body, legal advice could not be "incidental" to the practice of divorce mediation. This result is sensitive to the public interest, and provides an incentive to establish a body to supervise nonlawyer divorce mediation, thereby not only protecting consumers from injury, abuses and disinformation, but also helping to organize divorce mediators and enabling them to develop their profession in a more structured and powerful manner.¹³¹ Finally, insulating the public from abuses also helps mediators avoid the reputation of being charlatans or crooks, in part by permitting internal disciplinary measures.¹³²

A definition of "profession" that includes a supervisory body also improves the "incidental" test itself. Making the "incidental" exception available to any person who hangs out a shingle seems to contravene the public interest. The way the courts currently define "profession" for purposes of the incidental test requires only that the individual's performance of legal services be incidental to his primary source of income. Insufficient regard has been shown for the need for supervision, education and character screening.

Some attorneys might object to the program for supervising nonlaw-

Pennsylvania and South Dakota—retained solely fault grounds for divorce. Freed & Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297, 298 (1977).

129. Defining "profession" to include a supervisory body is consistent with the ideas of some noteworthy commentators. Dean Roscoe Pound, for example, observed, "Historically there are three ideas involved in a profession: *organization*, learning, i.e., pursuit of a learned art, and a spirit of public service." R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 6 (1953) (emphasis added). The courts might use similar definitions in constructing a definition of "profession."

130. See Mathias, *supra* note 3 ("To date, mediation is not a certified or licensed profession.").

131. This result will also tend to have the effect of increasing the cost of divorce mediation; where there are no constraints on who is permitted to provide divorce mediation services, those who are entirely unqualified will presumably charge less than those who are minimally qualified. Eliminating those who are entirely unqualified may have the effect of eliminating the least expensive of the divorce mediation services. However, such a loss does not injure the public interests. Unfortunately, costs would probably also rise due to expenses related to supervision and regulation.

132. Cox, *supra* note 120: "Because licensing requirements are nonexistent and training programs meager, there is little way of screening out inept practitioners or charlatans. . . . Mediation courses typically run about a week."

yer mediators described above, on the grounds that providing laymen with formal legal training to be used in their day-to-day business assists in the unauthorized practice of law.¹³³ However, if the nonlawyers are not engaged in the unauthorized practice of law, it is hard to say that others are assisting them in such practice. In any event, since it is agreed that such questions are decided in reference to the public interest, such training in the "incidental" legal questions should be unobjectionable; since concerns as to ability, character and supervision are satisfied, the public interest requires that nonlawyers be permitted to offer divorce mediation services. In that divorce mediation necessarily touches upon legal issues, the public interest further requires that the information provided by mediators be accurate. The public interest would not be furthered by permitting nonlawyers to perform divorce mediation while preventing them from receiving adequate training.

B. Is Lawyer Divorce Mediation the Practice of Law?

The concerns underlying the practice of law question are not the same in lawyer and nonlawyer contexts. While still concerned about the public interest in efficiency and supervision in the lawyer context, courts also consider the local bar association's interests in supervising its members and protecting its reputation.¹³⁴

The values at stake in the lawyer divorce mediator setting lead to the conclusion that divorce mediation by lawyers should be considered the practice of law. As such, the local bar association would be responsible for supervising lawyers engaged in divorce mediation, and such mediation would have to conform to the relevant code of professional legal ethics.¹³⁵ While the same efficiency concerns are relevant here as under nonlawyer divorce mediation, these efficiency concerns are less compel-

133. Assisting in the unauthorized practice of law violates MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 (1980).

134. See *supra* notes 114-15 and accompanying text. Protecting the bar's reputation indirectly benefits the public. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble:

[I]t is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. . . . So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permits of no compromise.

135. The "incidental" exception is not available to lawyers. "People call on lawyers for services that might otherwise be obtained from laymen because they expect and are entitled to legal counsel. Attorneys must conform to professional standards in whatever capacity they are acting." *Baron v. City of Los Angeles*, 2 Cal. 3d 535, 542, 469 P.2d 353, 357, 86 Cal. Rptr. 673, 677 (1970) (quoting *Crawford v. State Bar*, 54 Cal. 2d 659, 668, 355 P.2d 490, 495, 7 Cal. Rptr. 746, 751 (1960)); see also *Liberian v. State Bar*, 21 Cal. 2d 862, 865, 136 P.2d 321, 323 (1943) (well settled that a licensed attorney "must conform to the professional standards in whatever capacity he may be acting in a particular matter"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 comment (1983) (rules governing lawyers' conduct in nonadjudicative proceedings "may subject lawyers to regulations inapplicable to advocates who are not lawyers").

ling when dealing with lawyer mediators. The question here is not whether divorce mediation should be permitted, but rather within what constraints it should operate.

Weighing in favor of designating divorce mediation the practice of law are (1) the need for responsible supervision of the mediator in order to protect the public, and (2) the interests of the local bar in supervising its members and protecting its reputation.

Local bar associations have a strong interest in protecting their reputations and the reputation of the profession as a whole.¹³⁶ The bar association therefore supervises the conduct of its members when they provide legal services to clients. These reputational interests are just as strong when the legal services are provided in divorce mediation. Thus, the local bar association has an interest in supervising divorce mediation performed by its lawyers that it does not have when the same divorce mediation services are performed by nonlawyers.¹³⁷

Several arguments justify requiring lawyer divorce mediators to conform their practice to the applicable code of professional legal ethics. When a consumer hires a mediator who is also a lawyer, rather than one who is not, he probably does so precisely because he wants a mediator who is a lawyer.¹³⁸ The consumer might prefer a lawyer for several reasons. First, the consumer might believe that he is getting both the services of a lawyer and a mediator for his money.¹³⁹ Second, even if the lawyer mediator said that he would be acting only in his capacity as a mediator, the consumer might still believe—and rightly so—that he is

136. See *supra* note 114 and accompanying text.

137. The public interest should always prevail when balanced against the interests of lawyers and bar associations in regulating their profession. Permitting lawyers to provide divorce mediation services under the same conditions as nonlawyers would not, however, benefit the public. First, a segment of the public may want the services of a lawyer divorce mediator who can be held to the higher level of obligations and expertise that the codes of legal ethics impose. See *infra* note 145. If lawyers were permitted to choose whether or not to maintain their divorce mediation practice consistent with legal ethics, the distinction between lawyers acting as lawyers and lawyers acting as nonlawyers would cause confusion in the legal profession and would boggle the minds of consumers. See *infra* note 150 and accompanying text. Furthermore, a lawyer who claims to practice divorce mediation as a nonlawyer would be prohibited from utilizing the full extent of his legal knowledge since the body that supervises nonlawyer mediators would not be qualified to monitor that information. Yet it is unlikely that an individual would refrain from conveying that information where the parties require it. See *infra* note 141. Additionally, if lawyers could function as nonlawyers in a divorce mediation context that would otherwise constitute the practice of law, then such an arrangement could exist in other situations as well. Lawyers could then choose to be regulated by other nonlegal bodies such as those which supervise accountants or real estate agents. In this way, lawyers could escape the yolk of their professional legal obligations, thereby rendering the bar association impotent.

138. See New Hampshire Bar Ass'n Ethics Comm., Proposed Op. (April 21, 1981); see also *supra* note 135.

139. See Crouch, *supra* note 101, at 34 ("What most [mediation clients] really seek, and at first think they are getting, is the modern alternative plus the traditional lawyer-client relationship.").

hiring a mediator who knows the law as only a licensed lawyer does.¹⁴⁰ Third, even if the attorney were to go on to say that he will not convey any legal information beyond that which a nonlawyer mediator would know, the consumer again would probably be correct in believing that the lawyer mediator's performance will nevertheless be greatly influenced by his legal knowledge and professional judgment¹⁴¹—not only in the direction in which he nudges settlements, but also in his conception of what is fair in light of his knowledge of legal norms. This perception of legal fairness might, for example, influence the lawyer mediator's perception of power imbalances¹⁴² and the necessity for discrete "help" for one side.¹⁴³ Fourth, a consumer might prefer a lawyer mediator because he knows that the lawyer has been licensed by the local bar. A consumer may justifiably infer from that license an affirmation by the bar that the lawyer's character, integrity, intelligence, and legal competence are sufficient.¹⁴⁴

Finally, a consumer might prefer to hire a lawyer mediator rather than a nonlawyer mediator because the consumer expects that the lawyer is engaged in the practice of law and is held to the higher standard of care required by the bar.¹⁴⁵ This difference would be especially impor-

140. See *Agran v. Shapiro*, 127 Cal. App. 2d Supp. 807, 817, 273 P.2d 619, 626 (1954) ("[A] more significant advantage of having a lawyer as mediator is his knowledge of the law and the legal consequences of the various decisions made by a divorcing couple."); *Coombs*, *supra* note 127, at 491; see also *Riskin*, *supra* note 114, at 333-34 (lawyers are desirable for their unique legal experience).

141. It is unlikely that an attorney would refrain from conveying legal information where he knows the parties require that information for a well-informed settlement, as evidenced from lawyers' actions in other settings. See *Rich*, *supra* note 5, at 778-79. To do so might also be a violation of the lawyer's ethical obligations. See *infra* note 143 and accompanying text.

142. See *supra* text accompanying notes 38-39.

143. "Even if the attorney follows a policy of giving no legal advice, any practical advice he does offer to help the couple make their decision may be affected by his legal background." *Coombs*, *supra* note 127, at 491. The lawyer mediator's opinion of whether the parties are making a "well-informed" settlement will likely be influenced by his knowledge (or perception) of what the law provides. It is this perception that is referred to in the text as a "perception of legal fairness."

For an observation as to whether such commentary actually helps one of the parties at the expense of the other see *Crouch*, *supra* note 101, at 33:

The lawyer may go to ultimately unwarranted lengths to preserve the tenuous mediation agreement from breaking down. Whether the lawyer lets mediation go on or solves the problem by cutting mediation off, he or she is probably acting for one party and against the other. In most exploitation situations, continuing the mediation means that one party benefits while the other loses.

144. Licensing is intended to ensure the practitioner's ability and character. See *supra* note 96.

145. See *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 232-33 (2d Cir. 1977) (lawyer owes client undivided loyalty); *State Bar v. Arizona Title and Trust Co.*, 90 Ariz. 76, 88, 366 P.2d 1, 9 (1961) (members of the bar are required to "observe the highest professional standards, and . . . live by the Canons of Professional Ethics"), *modified on other grounds*, 97 Ariz. 293, 371 P.2d 1020 (1962); *Gardner v. Conway*, 234 Minn. 468, 478, 48 N.W.2d 788, 795 (1951) ("Lawyers are not merely bound by a high code of professional ethics, but as officers of the court they are subject to its inherent supervisory jurisdiction."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-3 (1980) ("A nonlawyer who undertakes to handle legal matters is not governed as to integrity or legal

tant to those consumers who wish to minimize the risk of receiving bad or incomplete "incidental" legal advice, or who wish to have the information presented in context of its impact on other legal issues about which a nonlawyer may be uninformed. In fact, unlike the nonlawyer mediator, the lawyer mediator may be obligated to inform the consumer of significant though peripheral considerations; lawyers are expected "to discover [and inform their clients of] those additional rules of law which, although not commonly known [even by well-informed attorneys], may readily be found by standard research techniques."¹⁴⁶ The nonlawyer mediator, on the other hand, might actually be prohibited from so doing.¹⁴⁷

A lawyer mediator receives employment and economic benefits as a result of being licensed by the local bar. These benefits result from the positive assumptions that laymen make about licensed attorneys—that they know the law and are of sound moral character. This common perception of licensed attorneys derives from the commitment and efforts of generations of lawyers to conduct themselves in accordance with the ethical guidelines of their profession when utilizing their legal knowledge on behalf of a client. It would be unjust to permit the lawyer mediator to benefit from this reputation by joining the bar and yet not require of him the same ethical conduct.

Beyond this notion of fairness, requiring the lawyer mediator to comply with the code of professional conduct also can be justified in terms of an implied consent. By requesting and accepting a license to practice law, a lawyer accepts the obligation to abide by professional legal ethics when using his legal expertise on a client's behalf.¹⁴⁸ The lawyer mediator should not be allowed to lapse in this obligation.

These arguments resemble the "client reliance" test.¹⁴⁹ Courts protect the consumer's expectation that legal information will be accurate, complete, and consistent with the high standards to which lawyers are held. This consumer reliance derives from the client's belief that these

competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct.").

In a number of settings, lawyers are required to act in conformity with ethical obligations prescribed in the ethical code even though nonlawyers who perform the same service are not similarly obligated. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 comment (1983); *id.* at Rule 8.4 comment; see also *supra* note 135.

146. *Smith v. Lewis*, 13 Cal. 3d 349, 358, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975).

147. See *Agran v. Shapiro*, 127 Cal. App. 2d Supp. 807, 819, 273 P.2d 619, 627 (1954) (need to do research indicates a difficult question of law and is therefore the practice of law).

148. The obligation to conform one's conduct to the code of legal ethics arises out of one's licensing as a lawyer. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1980). As lawyers, lawyer mediators "have a duty to protect the integrity of the law and the legal process." Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 FAM. L.Q. 461, 462 (1984).

149. See *supra* text accompanying notes 56-59.

attributes are concomitant with being licensed to practice law. It is also unlikely that a consumer can distinguish between legal information that the lawyer provides in his capacity as a lawyer and that which the lawyer provides only in his capacity as a divorce mediator.¹⁵⁰

In addition, the reliance test protects the interests of the bar. By protecting the consumer's reliance, the bar ensures that the consumer will continue to hold these expectations of licensed attorneys. Similarly, where a consumer hires a lawyer mediator in reliance upon the mediator's licensure to practice law, protection of that reliance perpetuates the public's perception that attorneys are expert and of sound moral character.¹⁵¹

The interests of the bar also are implicated by the fact that, although very popular in the last ten years, divorce mediation is still new and experimental, and the role of the lawyer mediator is not yet clearly established. The bar has a significant interest in protecting and guiding the role of the lawyer in society. Although there does exist a "need for more creative experimentation on the ways mediation can be adapted to the American society,"¹⁵² alternatives like divorce mediation require a long trial period.¹⁵³ Today, "as public support for the idea of mediation continues to mushroom, [the] bandwagon effect should not obscure the need . . . for critical evaluation."¹⁵⁴

What is to be gained by having the local bar association supervise lawyer mediators while another organization supervises nonlawyer mediators? Bar associations, of course, do not acquire the authority to supervise nonlawyers merely because they supervise lawyers who perform the same service. Furthermore, little benefit would result from the bar supervising nonlawyer mediators who are not engaged in the practice of law. Since the nonlawyer mediators would not be held to the same standard of legal expertise as the lawyer mediators, the bar itself would have to maintain a dual system of supervision. It might actually be more convenient for separate bodies to perform the two supervisory functions.

150. Cf. New York State Bar Ass'n Comm. on Professional Ethics, Op. 206 (1971), N.Y. ST. B.J., Feb. 1972, at 120, 121 (difficult to distinguish lawyer's conduct as lawyer from conduct in other "related" occupation).

151. Nevertheless, licensure should not justify protection of a consumer's reliance indefinitely; a person who was at one time a licensed attorney should not be subject to the supervision of the local bar if that person is not now licensed to practice law. Rather, he should be able to undertake another career of his choosing. If the person is no longer licensed to practice law, the public is much less likely to rely upon the (former) licensure by the bar, and the threat to the bar is vastly reduced. See *infra* note 208.

152. Merry, *supra* note 103, at 191.

153. "Pretrial diversion was also an appealing and widely heralded concept ten years ago, but when diversion programs were finally subjected to empirical scrutiny, they were found to be wanting." Davis, *supra* note 10, at 157 (citations omitted).

154. *Id.*; see also Tomasic, *supra* note 100, at 245 ("[I]t is important to avoid over-enthusiasm for untested fads or reforms.").

This result would also eliminate the risk of an "appearance of impropriety" that would arise if the bar were perceived as treating nonlawyer mediators unfairly vis-a-vis lawyer mediators.¹⁵⁵

C. The "Bifurcated" System

Several advantages would flow from such a "bifurcated" system. Because nonlawyer divorce mediators are not trained in law, consumers with uncommon or complex issues probably would prefer to hire a lawyer mediator.¹⁵⁶ The lawyer mediator will clearly possess a broader spectrum of legal knowledge than a nonlawyer mediator. And because the lawyer mediator is engaged in the practice of law, he may apply his extensive legal knowledge to the consumer's non-incidental legal concerns.

But while lawyer divorce mediation would be an option for parties with difficult or complex legal issues, other parties would not have to hire a lawyer mediator if a nonlawyer could fully and properly address their needs. This option would preserve efficiency benefits of divorce mediation for those parties. Lawyer mediators would likely charge more for their services than would nonlawyer mediators for several reasons: (1) lawyer mediators would be able to provide legal information about a broader spectrum of issues, and about more complex issues, than would nonlawyer mediators;¹⁵⁷ (2) lawyer mediators would be held to a higher standard of care than would nonlawyer mediators;¹⁵⁸ (3) lawyer mediators presumably would have higher opportunity costs when providing divorce mediation; (4) lawyer mediators would have fulfilled more exhaustive educational prerequisites;¹⁵⁹ and (5) lawyers traditionally are "reluctan[t] to counter lay competition by cutting fees."¹⁶⁰

Additionally, under the bifurcated system, the bar would have an incentive not to put unnecessary restrictions on divorce mediation. For

155. See *infra* note 163.

156. See Miller, *supra* note 113, at 430 ("There are occasions upon which the presence of an expert is required in order to discern problems which are not readily apparent to a layman."); Rich, *supra* note 5, at 775 ("[In a] divorce situation . . . proper anticipation of complex tax issues, of the problematic ambiguities of a visitation agreement, or of the need for education and medical expenses is best done by a lawyer.").

157. See *supra* text accompanying note 146.

158. See *supra* text accompanying notes 145-46.

159. Miller, *supra* note 113, at 443; Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 709 (1977); Tomasic, *supra* note 100, at 232 (mediators require far less training than do lawyers). The training programs for mediators mentioned in a number of studies vary from a matter of hours to a matter of weeks. See, e.g., Coombs, *supra* note 127, at 471 (five day training program and a 250-hour "practicum" upon completion of the five day program); Riskin, *supra* note 5, at 36 (mediators undergo a 40-hour training program); see also *supra* note 132.

160. Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 COLUM. L. REV. 1153, 1179 (1971) (quoting Q. JOHNSTONE & D. HOPSON, JR., *LAWYERS AND THEIR WORK* 157-58 (1967)).

example, it might be in the economic interest of the bar to require each party to the mediation to retain independent counsel since more lawyers would then be employed.¹⁶¹ The parties' only alternative would be to hire lawyers and enter the traditional system. Under the bifurcated system, however, members of the bar would stand to lose mediation clients if the bar's constraints upon mediation became overly burdensome. The parties would have the additional alternative of hiring a nonlawyer mediator.¹⁶² Finally, because the local bar would not be the exclusive source of divorce mediation services, the constraints it might impose upon divorce mediation by lawyers would be less likely to appear to have an impermissible economic purpose.¹⁶³

IV

LAWYER DIVORCE MEDIATION AND PROFESSIONAL ETHICS

Having concluded that divorce mediation provided by lawyers is the practice of law, it is necessary to address the ethical standards to which mediation must conform.¹⁶⁴ Is it possible for lawyers to practice divorce mediation without violating their professional responsibilities to their clients?¹⁶⁵ If so, what are the appropriate limits to such a practice?

This Part will examine divorce mediation in light of three sets of guidelines promulgated by the ABA: (1) the Model Code of Professional Responsibility, approved in 1980, which is the pattern for the codes of ethics in effect in most American jurisdictions;¹⁶⁶ (2) the Model Rules of

161. See Miller, *supra* note 113, at 440-41.

162. See Pirie, *supra* note 124, at 381 ("There is . . . a danger that professional regulations may have a negative effect on the supply of, demand for, or quality of mediation services. The legal profession . . . should be concerned if any potential consequences of the legal profession's influence are negative.").

163. See Silberman, *supra* note 6, at 124 ("[There is] criticism that the 'unauthorized practice' prohibition operates primarily for the benefit of lawyers rather than the public, by securing for lawyers a monopoly of certain 'social' tasks . . ."); Law. Man. on Prof. Conduct (ABA/BNA) 21:8011 (1984) ("Examinations of judicial decisions on unauthorized practice indicate that the vast majority of cases are brought not by injured consumers but by the bar. . . . [One study reported that] of 144 decisions . . . only 12 involved specific injury to anyone, either actual or alleged."); MODEL RULES OF PROFESSIONAL CONDUCT Preamble ("The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.").

164. "Divorce mediation is a useful service that attorneys frequently are capable of performing and, with proper precautions, are authorized to perform *under prevailing standards of professional conduct*." Connecticut Formal Op., *supra* note 83, 56 CONN. B.J. at 499 (emphasis added).

165. Although it seems incongruous to suggest that something could be the practice of law and yet impossible for lawyers to do without violating the ethical standards, this is precisely the status of any form of practice that necessarily involves conflicts of interest, such as "personal injury mediation." The question as to divorce mediation is whether it *always* consists of an impermissible conflict, or only in particular situations. Similar questions are asked in relation to the representation of co-defendants in a criminal trial.

166. Law. Man. on Prof. Conduct (ABA/BNA) 1:3 (1987).

Professional Conduct, promulgated in 1983 and adopted in at least 19 states;¹⁶⁷ and (3) the Standards of Practice for Lawyer Mediators in Family Disputes, passed by the ABA House of Delegates in 1984, but not yet accepted as authoritative in any state.¹⁶⁸ This Part concludes that while the Standards of Practice help to resolve many of the problems discovered in applying the Model Code and the Model Rules to divorce mediation, they require some important modifications before being accepted as authoritative guidelines for lawyers practicing divorce mediation.

A. The ABA Model Code of Professional Responsibility: A Critique

Several provisions of the Model Code are at the center of the controversy concerning the ethical obligations of a lawyer providing divorce mediation. Unfortunately, rather than facilitating the resolution of contentious issues, the Model Code is subject to divergent and conflicting interpretations. Some ethics committees have determined that the Code prohibits lawyers from practicing divorce mediation, while other committees conclude that the practice is permissible. Between these two extremes, a jumbled array of decisions permits lawyer divorce mediation within a multitude of constraints.

The Model Code cannot serve its primary purpose¹⁶⁹ when applied to divorce mediation because it fails to provide clear and consistent answers to attorneys who look to it for ethical guidance. Application of the Model Code to divorce mediation is awkward because the Code was not drafted with divorce mediation in mind.¹⁷⁰ For example, it makes little sense to review lawyer divorce mediation in terms of "zealousness." The Code contains no provisions that exclude lawyer divorce mediation from the terms of the Code, nor does it provide ethical guidelines to instruct attorneys providing divorce mediation.

The most problematic of the Model Code's provisions is Canon 5: "A lawyer should exercise independent professional judgment on behalf of a client."¹⁷¹ Disciplinary Rule 5-105 requires a lawyer to decline or

167. *Id.* This count is current as of April 15, 1987. Three more states have incorporated into their codes some principles of the Model Rules. *Id.*

168. *See infra* note 253.

169. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980) (purpose is to "define the type of ethical conduct that the public has a right to expect").

170. The Code of Professional Responsibility provides comparatively detailed guides for the lawyer representing clients in the adversarial role of zealous advocate or confidential advisor. The Code also recognizes that lawyers may serve as "impartial arbitrators or mediators." However, the Code nowhere defines these latter roles and their responsibilities or expressly considers the role of lawyers asked to provide impartial legal assistance to parties with differing interests, in an effort to compose their differences without resort to adversary negotiation or litigation.

N.Y. City Ethics Op., *supra* note 39, DIVORCE MEDIATION: READINGS at 310.

171. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980). The Model Code

discontinue any employment that is likely (1) to adversely affect his exercise of independent professional judgment on behalf of a client or (2) to involve him in representing differing interests.¹⁷² DR 5-105(C), however, permits a lawyer to represent multiple clients "if it is obvious that he can adequately represent the interests 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."¹⁷³ This Section explores two conflicting interpretations of Canon 5 and related provisions as applied to divorce mediation, and identifies problems associated with each. The Section concludes that the Model Code should be revised to clarify the ethical status of divorce mediation, and to provide guidelines for lawyers engaging in the practice.

A number of ethics committees have read Canon 5 as strictly prohibiting lawyers from practicing divorce mediation.¹⁷⁴ Three premises underlie this conclusion. The first is that "the mediator-lawyer represents [the interests of] both husband and wife."¹⁷⁵ The second is that the parties' interests must conflict because of the "substantial likelihood of prejudice or profound conflict in every marital problem."¹⁷⁶ The parties' conflicting interests interfere with the attorney's duty of loyalty and his obligation to inform his clients of "potential adverse consequences."¹⁷⁷

defines "Canons" as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relations with the public." Canons "embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived." *Id.*, Preliminary Statement.

172. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) & (B) (1980). Disciplinary Rules are "mandatory," defining the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* at Preliminary Statement. Ethical Considerations (EC) are "aspirational in character and represent the objectives toward which [lawyers] should strive." *Id.*

173. *Id.* at DR 5-105(C) (1980).

174. *See infra* notes 175-82.

175. Oregon Ethics Op., *supra* note 93, in DIVORCE MEDIATION: READINGS at 337; Wisconsin Ethics Op., *supra* note 56, WISC. B. BULL. at 61; *see also* Coogler, *Changing the Lawyer's Role in Matrimonial Practice*, 15 CONCILIATION CTS. REV. 1, 5 (1977) ("The [mediating] attorney has the responsibility of providing all required legal advice for each party in the same manner as if he were representing each of them individually.").

176. West Virginia State Bar Ass'n Legal Ethics Comm., Inquiry 77-7, 3 W. VA. ST. B.J. 3 (1977); *see also* New Hampshire Bar Ass'n Comm. on Professional Ethics, Op. 10, 10 N.H.L.W. 311 (1983) [hereinafter New Hampshire Ethics Op.] ("Given a finite amount of income, property, children and visitation time, the differing interests of the divorcing parties are highly apparent."); Maryland Ethics Op., *supra* note 7, at 9; Wisconsin Ethics Op., *supra* note 56, WISC. B. BULL. at 61.

This conflict between the parties might interfere with the lawyer's obligation to obtain full knowledge of his clients' positions. Each party will tend to keep secrets from a lawyer attempting dual representation. Ohio State Bar Ass'n Legal Ethics and Professional Conduct Comm., Formal Op. 30, 48 OHIO B. 780, 783 (1975) [hereinafter Ohio Ethics Op.].

177. [I]t would be difficult for the lawyer mediator to advise a husband not to pay an agreed-upon figure for child support if too high or a wife not to accept an amount agreed upon as child support which is too low and not be subject to severe criticism by the party or avoid being accused of favoring the interest of the spouse over the interest of that party.

To do so benefits one client at the expense of the other.¹⁷⁸ The third premise is that consent by the spouses is inherently flawed,¹⁷⁹ either because it is impossible for the parties to be truly informed about the implications of their consent,¹⁸⁰ or because it is not "obvious" that the lawyer can adequately represent the conflicting interests of the parties.¹⁸¹ "[J]ust as there must be some medical procedures that a physician, regardless of the patient's consent, may not perform, so there is a standard of adequate representation that lawyers, regardless of their client's urgings, may not descend below."¹⁸² A strict interpretation of Canon 5

Wisconsin Ethics Op., *supra* note 56, WISC. B. BULL. at 61.

178. "An attorney conducting mediation between adverse parties attempts to help them reach an agreement that will settle their dispute. To achieve this goal, one or both parties will generally have to relinquish some demands. Thus, the mediation will seem to 'adversely affect' at least one party with the attorney-mediator's cooperation." Comment, *supra* note 40, at 990.

This conflict also arises as a result of (1) the Model Code's requirement that "[a] lawyer should preserve the confidences and secrets of a client," MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980), and (2) the lawyer's duty of loyalty to the *other* client "to impart to the client information which the lawyer possesses that is relevant to the affairs as to which the lawyer is employed and that might reasonably affect the client's conduct with respect to such affairs." New York State Bar Ass'n Comm. on Professional Ethics, Op. 555, N.Y. ST. B.J., Apr. 1984, at 57; *see* Maryland Ethics Op., *supra* note 7, at 9; *see also* Law. Man. on Prof. Conduct (ABA/BNA) 51:1503 (1984) (discussing the "delicate balance between the duty of a lawyer-intermediary to keep each client adequately informed and the duty to maintain each client's confidences").

179. It would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and informed consent of the parties. This is due to the great likelihood of prejudice to a party. [N]o disclosure under DR 5-105(C) would be sufficient to cure the conflict of representing two individuals in what is likely the most important legal matter of their lives . . .

New Hampshire Ethics Op., *supra* note 176, 10 N.H.L.W. at 312; *see also* Michigan State Bar Professional Ethics Comm., Formal Op. 85, 24 MICH. ST. B.J. 265 (1945); *cf.* United States v. Hobson, 672 F.2d 825, 828 (11th Cir. 1982), *cert. denied*, 459 U.S. 906 (1982) (in representing multiple criminal defendants, "the right to counsel of choice is not absolute . . . and must give way where its vindication would create a serious risk of undermining public confidence in the integrity of our legal system").

180. *See* Crouch, *supra* note 101, at 34 ("Considering the number of lawyers who fail to appreciate the amount of conflict of interest being consented to or protections forfeited, it is unlikely that clients appreciate how much protection they are giving up."); New York State Bar Ass'n Comm. on Professional Ethics, Formal Op. 258, 44 N.Y. ST. B.J. 556, 556 (1972) [hereinafter New York Op. 258] ("It would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and informed consent of both parties. The likelihood of prejudice is so great in this type of matter as to make impossible adequate representation of both spouses, even where the separation is 'friendly' and the divorce uncontested.").

181. Where a lawyer is asked to undertake the representation of both spouses in a dissolution of their marriage, the existence of fear and intimidation most often would be masked and not readily ascertainable. Revelation of the real problem and reasons prompting the action would not likely be made to the lawyer nor would a spouse readily repose in him confidences or secrets. . . . In effect, the lawyer representing both spouses would be materially shackled in any effort to obtain the information essential to a truly professional performance.

Ohio Ethics Op., *supra* note 176, 48 Ohio B. at 783.

182. Maryland Ethics Op., *supra* note 7, at 9. The conclusion that Canon 5 prohibits divorce mediation by lawyers is bolstered by Canon 9: "A lawyer should avoid even the appearance of professional impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980); *see*

would thus prohibit lawyers from practicing divorce mediation. This result is not necessarily in the public interest because lawyer mediators can provide an intermediate option between nonlawyer mediators and the traditional adversarial system.

Other ethics committees taking a more "expansive" approach have concluded that Canon 5 does not prohibit lawyers from performing divorce mediation. These committees generally dispute at least one of the three premises identified above. First, they deny that the lawyer represents *both* parties in mediation, arguing that he represents *neither*.¹⁸³ Second, they suggest that the divorcing parties may not have differing interests or that their interests may differ only slightly.¹⁸⁴ They contend that this possibility is accounted for in Model Code EC 5-15:

[T]here are many instances in which a lawyer may properly serve multiple clients having potentially differing interest in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client¹⁸⁵

Since the parties are voluntarily in mediation to work out a mutually agreeable divorce settlement, it is possible for their interests to "vary only slightly."¹⁸⁶ Third, these committees believe that the parties may effectively consent to being represented by the same attorney,¹⁸⁷ and that the attorney can adequately represent those differing interests.¹⁸⁸

New York Op. 258, *supra* note 180, 44 N.Y. ST. B.J. at 557 ("It is simply not possible in such situations to avoid if not actual overreaching at least the appearance of such, to the ultimate dissatisfaction or injury of one or both spouses."); *see also* Wisconsin Ethics Op., *supra* note 56, WISC. B. BULL. at 61 ("[T]he proposed agreement . . . asks [the lawyer] to serve as a legal advisor not only for each of the parties but then to ultimately resolve the dispute in the best interest of each party. This no person can successfully do without criticism."); Pirie, *supra* note 124, at 407-08.

183. We are aware of the many authorities that hold that in a divorce proceeding a lawyer may not as attorney represent both parties. We have no quarrel with those authorities The potential conflicts [of interest] in a divorce are clearly too great to permit representation of both parties. The lawyer acting as mediator, however, does not represent either party.

Boston Ethics Op., *supra* note 89, B.B.J., June 1979, at 15; *see also* Connecticut Formal Op., *supra* note 83, 56 CONN. B.J. at 499-500; Gaughan, *supra* note 123, at 35.

184. *See, e.g.*, Arizona State Bar Comm. on Rules of Professional Conduct, Op. 76-25 (1976) [hereinafter Arizona Ethics Op.] ("There are undoubtedly some cases in which dual representation would not be improper. Should adversity of interest arise at some later time, the lawyer will presumably have to disqualify himself"); Connecticut Formal Op., *supra* note 83, 56 CONN. B.J. at 499; *see also* Silberman, *supra* note 6, at 109-11.

185. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 (1980).

186. If one of the parties is forced to mediate by the other party, mediation is—by all accounts—improper.

187. "While the absence of independent representation is a significant factor to be taken into consideration when determining whether a separation agreement was freely and fairly entered into, the fact that each party retained the same attorney does not, in and of itself, provide a basis for rescission." Connecticut Formal Op., *supra* note 83, 56 CONN. B.J. at 499 (citing *Christian v. Christian*, 42 N.Y.2d 63, 396 N.Y.S.2d 817, 365 N.E.2d 849 (1977)).

188. *See, e.g.*, Oregon Ethics Op., *supra* note 93; *see also* *Levine v. Levine*, 56 N.Y.2d 42, 49,

These committees argue further that Model Code EC 5-20 also supports the conclusion that lawyer divorce mediation is permissible.¹⁸⁹

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 relations. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute either of the parties involved.¹⁹⁰

Some ethics committees have held that "[t]he Code's recognition that lawyers may serve as mediators . . . make[s] it inconceivable to us that the Code would deny the public the availability of non-adversary legal assistance in the resolution of divorce disputes."¹⁹¹

To add to the confusion, the committees that agree that the Code permits divorce mediation by lawyers do not agree on which constraints the Code imposes on the divorce mediator. For example, committees disagree about whether the lawyer mediator should¹⁹² or should not¹⁹³ be permitted to draft the separation agreement, and some permit such drafting only under certain circumstances.¹⁹⁴

Ethics committees also differ as to the nature and scope of a lawyer's duty of loyalty to the clients under Canons 4, 5, and 9. One commentator posits that virtually all ethics committees believe that "a lawyer may not act as mediator if the lawyer has represented one of the parties beforehand. This restriction is applicable even in cases where the subject matter of the mediation is completely unrelated to the past representation."¹⁹⁵ Yet EC 5-20 states that a lawyer may mediate "matters which involve present or former clients . . . [provided] he first discloses such present or former relationships."¹⁹⁶ There is also disagreement over

451 N.Y.S.2d 26, 29, 436 N.E.2d 476, 479 (1982) (dual representation in drafting divorce agreement not improper where consent fully informed and voluntary).

189. *E.g.*, Arizona Ethics Op., *supra* note 184; Connecticut Formal Op., *supra* note 83; Oregon Ethics Op., *supra* note 93; Boston Ethics Op., *supra* note 88.

190. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1980).

191. Connecticut Formal Op., *supra* note 83, 56 CONN. B.J. at 498 (quoting N.Y. City Ethics Op., *supra* note 39, in DIVORCE MEDIATION: READINGS at 315). Other committees have argued that, unlike the situation envisioned in EC 5-20, "[i]n [divorce] mediation the parties usually have directly adverse interests." Comment, *supra* note 40, at 990. *See, e.g.*, New Hampshire Bar Ass'n Comm. on Professional Ethics, Proposed Op. (Apr. 21, 1981); Wisconsin Ethics Op., *supra* note 56.

192. *See, e.g.*, Oregon State Bar Ass'n Comm. on Legal Ethics, Proposed Op. 70-46 (1980) [hereinafter Oregon Proposed Op.]; Boston Ethics Op., *supra* note 88.

193. *See, e.g.*, Maryland Ethics Op., *supra* note 7.

194. *See, e.g.*, New York City Ethics Op., *supra* note 39.

195. Pirie, *supra* note 124, at 401; *see, e.g.*, New Hampshire Ethics Op., *supra* note 176; Wisconsin Ethics Op., *supra* note 56; *see also* R. WISE, LEGAL ETHICS 155 (1966) ("If the former client has any reason to feel aggrieved, the necessity of maintaining proper public relations for the bar and of avoiding the appearance of wrongdoing should cause the attorney to refuse to accept employment in a capacity adverse to the interests of a former client.").

196. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1980).

whether the lawyer mediator can represent either party after the mediation. Some committees find that the lawyer mediator may not subsequently represent either party,¹⁹⁷ while others permit subsequent representation in matters unrelated to the mediation,¹⁹⁸ and still others prohibit it in any related matters involving litigation.¹⁹⁹

Another area of confusion is whether disclosures made in the course of mediation are confidential. Most committees that have addressed this question are unclear about whether disclosures made by the parties during mediation would be confidential, although some committees hint that the disclosures probably would not be protected.²⁰⁰

The Model Code was not drafted with divorce mediation in mind, and its terms seem to prohibit the practice. The "expansive" interpretation of the Model Code leads to the conclusion that divorce mediation by lawyers is in the public interest and should be permitted. But an interpretation of the Code should not be measured entirely by whether it reaches an approved result; the interpretation must also be justified given the language of the Code. Otherwise, the Code's integrity and purpose are undermined. The expansive interpretation of the Code suffers from such flaws. Accordingly, the Model Code should be revised to accommodate this new practice.

The argument that the terms of DR 5-105 permit divorce mediation because lawyer mediators do not represent either party is unpersuasive. Arguing that a lawyer mediator represents "neither" party rather than "both" is an attempt to address a fundamental question by means of labels rather than by an examination of the nature of the relationship between the lawyer mediator and the divorcing parties in light of the underlying ethical values. In any event, the assertion that the lawyer mediator represents neither party is not sufficient to remove divorce mediation from the scope of DR 5-105. Besides prohibiting a lawyer from representing differing interests, DR 5-105 also prevents the lawyer from undertaking employment that is "likely to adversely affect the exercise of his independent professional judgment in behalf of a client."

DR 5-105 would be inapplicable to lawyer divorce mediation if the

197. See, e.g., Maryland Ethics Op., *supra* note 7; Virginia State Bar Ass'n Standing Comm. on Legal Ethics, Op. 544, VA. B. NEWS, Dec. 1984, at 23; New York City Ethics Op., *supra* note 39.

198. See, e.g., Connecticut Informal Op., *supra* note 42; see also *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978); *Cannon v. United States Acoustics Corp.*, 398 F.Supp. 209 (N.D. Ill. 1975), *aff'd in part and rev'd in part on other grounds*, 532 F.2d 1118 (7th Cir. 1976).

199. See, e.g., Connecticut Formal Op., *supra* note 83; Maryland Ethics Op., *supra* note 7; Oregon Proposed Op., *supra* note 192; Boston Ethics Op., *supra* note 88; New York City Ethics Op., *supra* note 39; see also *City Council v. Sakai*, 58 Haw. 390, 402, 570 P.2d 565, 573 (1977).

200. E.g., Connecticut Formal Op., *supra* note 83; Connecticut Informal Op. *supra* note 42; Florida Bar Professional Ethics Comm., Op. 86-8 (1986) [hereinafter *Florida Ethics Op.*], summarized in *Law. Man. on Prof. Conduct* (ABA/BNA) 901:2502 (1987); New Hampshire Ethics Op., *supra* note 176.

lawyer does not exercise "professional judgment" when mediating, or if his professional judgment is not exercised "in behalf of a client."²⁰¹ This provision would be inapplicable only where the lawyer merely restates general principles of law or provides legal "information" that is "neutral" as between the parties.²⁰² But this situation never occurs. It is inaccurate to assert that a lawyer providing divorce mediation services does not use his professional judgment. Quite the contrary: He identifies for and communicates to the parties the law relevant to the issues at hand and explains how the issues would likely be resolved in court.²⁰³ A recitation of general legal principles alone would be of little value to the parties because they would likely be unfamiliar with legal processes and norms.

Without the lawyer's predictions of the range of likely outcomes, one or both parties to the mediation are likely to give up rights out of ignorance. Mediated settlements should thus be reached between parties who have made *informed* compromises.²⁰⁴ If an uninformed agreement is reached, and the uninformed party later becomes informed, he or she is

201. One might also assert that neither party is a "client," which is similar to arguing that the lawyer divorce mediator does not "represent" either party. The notion of "client," however, encompasses more than a relationship of "representation." For example, EC 4-1 defines "client" as one who has "employed or sought to employ the lawyer." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1980); see also BLACK'S LAW DICTIONARY 230 (5th ed. 1979) (a "client" is a "person who employs or retains an attorney . . . to appear for him in courts, *advise, assist,* and . . . act for him in any legal business. It should include one who disclosed confidential matters to an attorney while seeking professional aid, whether the attorney was employed or not.") (emphasis added).

202. Gaughan, *supra* note 123, at 35.

203. "A workable agreement is formulated in a framework which takes account of the 'shadow of the law,' the probable result if the case went to court." Gaughan, *supra* note 119, at 10 (citing Mnookin & Kornhauser, *supra* note 104, at 950-97); see also Rich, *supra* note 5, at 776 ("Parties to a dispute should have some understanding of the likely consequences of submitting their case to a court. The mediating lawyer would supply that understanding of consequences."). This information is necessary to reduce the danger that a less powerful or less informed party unknowingly gives up legal rights that would be important to him. In short, "the parties must, inevitably, understand the law and how it applies to their particular situation." Pirie, *supra* note 124, at 381; see also Coombs, *supra* note 127, at 493; *supra* notes 35-38 and accompanying text. Where one or both of the parties lacks such understanding or where one of the parties is significantly "weaker" or vulnerable to overreaching by the other, the divorce mediator must withdraw from the mediation. See ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES Standard VA (1984).

204. "The mediator who permits the participants to reach an agreement . . . which is not based upon the intelligent evaluation of data and a scrutiny of facts, misrepresents the participants." Bishop, *supra* note 148, at 466. See also O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 122 (1978) ("The mediator will be expected to provide additional information and to raise questions that help identify and explore the needs of the family."); Riskin, *supra* note 114, at 336 ("In some cases, the best way for the neutral lawyer to inform the parties of their rights is to tell them what she thinks they would be told by individual lawyers.").

In addition to emphasizing the areas of agreement between the parties, the divorce mediator might also promote agreement by contributing substantive legal and nonlegal information the parties generally require in order to create a mutually acceptable separation agreement. See Boston Ethics Op., *supra* note 185, B.B.J., June 1979, at 14 ("A mediation approach should give the clients a better

likely to become dissatisfied with the agreement, thereby increasing the likelihood that the agreement will be violated. The party is also likely to feel cheated or deceived by the lawyer mediator, and that both injures the reputation of the legal profession and exposes the lawyer mediator to a malpractice claim.²⁰⁵ Finally, parties would be much more hesitant to engage in mediation because of the risk that they will not correctly assess their own rights, or because of the knowledge that the other party clearly is more informed about the legal issues. To avoid these situations, the lawyer mediator must frequently use "professional judgment."

Similarly, the argument that information provided by the attorney is "neutral"—that it is analogous to situations where a lawyer uses legal knowledge and non-confidential information to provide "general business information" to his employer—is also unconvincing. First, the lawyer divorce mediator should inform the parties how the local custom and laws would apply in their case.²⁰⁶ Although this communication could be considered "legal information," it is not "general legal information," such as the recitation of statutory language. To the extent that a distinction can be made between "legal advice" and "legal information," providing this legal information requires no less skill than providing traditional legal advice.²⁰⁷ In fact, it is the failure to use such skills that should be considered legal malpractice.²⁰⁸

basis of information as to the applicable law and the normal terms of separation . . . than would be available if the parties proceeded without legal advice").

205. "According to [those opinions holding that the mediator does not represent either party,] the neutral lawyer has an obligation to explain things to the disputants. And though the obligation is unclear, its existence plainly creates a risk that he will be charged with professional misconduct or malpractice. This risk may dissuade lawyers from undertaking neutral roles in mediation." Riskin, *supra* note 114, at 346.

206. See *supra* note 203.

207. Interview with Lawrence D. Gaughan, Professor of Law at George Mason Univ. and experienced divorce mediator in Washington D.C. (Mar. 24, 1987).

208. *Id.* Wendy Whicher, a divorce mediator and member of the Task Force that drafted the STANDARDS OF PRACTICE, disagrees. She states that in her mediation practice she provides the parties only with legal information and that it does not require her to use her legal skills. At most, she simply reads the relevant laws to the parties. Telephone interview with Wendy Whicher (Mar. 27, 1987). If a party wants to know the probable outcome in court, Whicher will not provide that information. *Id.*

Some people put great emphasis on the distinction between legal information and legal advice because, for them, it plays a crucial role in identifying the practice of law. To the extent that the providing of legal information does not require the practitioner to use legal skills, this distinction has merit. Gaughan, however, rejects the notion that providing legal information draws upon legal skills any less than providing legal advice. Interview with Lawrence Gaughan, *supra* note 207.

Gaughan and Whicher may not, in fact, be very far from agreement. Gaughan seems persuasive in claiming the lawyer who does not provide his clients with the legal understanding they require in order to make fully informed decisions does them a disservice. Furthermore, the lawyer may violate his ethical obligations to his clients. However, one could accept Gaughan's position and support Whicher's practice as well. Whicher permitted her license to practice law to lapse. As a result, many of the concerns discussed above that weigh in favor of calling lawyer divorce mediation the practice of law do not apply to her. Clients will no longer rely upon licensure when selecting her

Unlike the case where an attorney participates in general economic forecasts for his employer, in a divorce mediation there is actual conflict. The attorney might benefit one party's interests at the expense of the other by the mere form in which he presents the "general" information.²⁰⁹

Furthermore, even if the information could be presented in a neutral fashion, the attorney's choice of which principles are relevant to the facts of the case are likely to benefit one party more than the other. The Oregon Ethics Committee found that an attorney practicing divorce mediation was "provid[ing] legal advice to both parties by way of framing the legal issues and guiding the parties to a fair settlement."²¹⁰ Just by raising some legal principles he feels are relevant (and omitting others he feels are not), the mediator is applying law to specific facts, and in the process may benefit one party at the expense of the other. This choice is very similar to a lawyer's role in choosing which forms are relevant for a divorcing couple. In a number of self-help kit cases, just making a decision on which forms were relevant was deemed a determination based upon the specific facts of the case.²¹¹

Nearly all of the legal information the lawyer mediator provides will necessarily benefit one of the parties at the expense of the other, because the interests of the parties conflict. Although

the parties [have] expressed desire to reach an agreement over the issues presented, . . . there is nevertheless a decided conflict in how that agreement will be reached, who will make [what] concessions, and who will receive the immediate benefit of those concessions. . . . The consensus of the parties over their long-range goals does not imply agreement over how to arrive there. If it did, there would be no need for mediation.

to mediate. She probably should not, however, be permitted to advertise the fact that she is trained as a lawyer and was formerly licensed to practice law. In short, she should be treated like any other nonlawyer divorce mediator. When she refuses to tell her clients what the probable outcome in court would be, she may in fact be conducting divorce mediation in the only manner legally available to her. Like other nonlawyer divorce mediators, she cannot practice law.

209. Providing the parties with information that will sometimes benefit one party and sometimes benefit the other is inherent in divorce mediation. In this context, the talisman of a lawyer's duty should not be whether one party benefits at the expense of another, since such conduct is one aspect of the service the client expects from the lawyer divorce mediator.

The importance of the form can be analogized to a drafting context:

[T]he role of an attorney in drafting a contract is seldom that of a mere scrivener or secretary. The layman's concept of 'putting the agreement into legal language' is misleading and evidences a poor understanding of a lawyer's craftsmanship because our 'legal language' is *English*. . . . If you remove the . . . "adversarial" role of the attorney in drafting a contract, there is little that the parties . . . cannot do for themselves. . . . An attorney who considers . . . subtle turns of draftsmanship may find it impossible to remain impartial; an attorney who does not consider them may be rendering a very low quality of legal service.

Maryland Ethics Op., *supra* note 7, at 10 (emphasis in original).

210. Oregon Ethics Op., *supra* note 93, in *DIVORCE MEDIATION: READINGS* at 336.

211. See *supra* text accompanying notes 61-70.

Even in the most bitter divorce litigation, the parties can generally agree on their ultimate goal of wanting to be divorced.²¹²

Information provided by the lawyer mediator that improves either party's understanding of his or her rights strengthens one party's relative position in the mediation.²¹³ Even if the lawyer mediator avoids giving "advice" outright, he might subtly give advice in the form of helping the parties to arrive at a settlement that he would recommend, or by "nudging" the parties toward a common ground—often nudging more actively that party who appears to the mediator to be farther from the range of reasonable arrangements. Although some might claim that it is beyond the legitimate role of the lawyer mediator to "recommend" a settlement, he cannot avoid it. For example, where a blatant imbalance of power exists between the parties, and it appears to the attorney that one party is taking advantage of the other, the lawyer is obligated to withdraw his services as mediator.²¹⁴ Yet his withdrawal serves as a strong recommendation that the weaker party not accede to the agreement. Conversely, if he does not withdraw, the lawyer mediator effectively recommends the agreement as reasonable.²¹⁵ Because the lawyer mediator must exercise his "professional judgment," and because he cannot help but injure at least the short-term interests of one of his clients, DR 5-105 would still prohibit divorce mediation, even if the lawyer mediator did not "represent" either party to the mediation.

The purpose of DR 5-105 is to protect the integrity of attorneys and the legal profession, and to perpetuate the trust and confidence of the public, all of which are jeopardized when an attorney has or is perceived to have conflicting obligations. In divorce mediation, the lawyer mediator does appear to have conflicting obligations, because

[i]f it appears to the attorney involved . . . that one client is benefitting from the mediation while the other is being prejudiced, the attorney is placed in an untenable situation. He cannot advise the one client to terminate the mediation without adversely affecting the interests of the other. Despite this conflict, the attorney cannot keep silent without violating his obligation of loyalty.²¹⁶

It seems unlikely that the drafters of the Model Code would have permit-

212. Maryland Ethics Op., *supra* note 7, at 9; see also Ohio Ethics Op., *supra* note 176, 48 OHIO ST. B.A. REP. at 781 ("Spouses who seek a dissolution of marriage will not necessarily be antagonistic to one another, but they will have differing interests with respect to all matters which must be covered by the Separation Agreement.").

213. If, for example, the husband did not know that he has a 50% interest in his wife's pension accumulated from the date of their marriage, merely reciting the law of community property would drastically alter the relative bargaining positions of the spouses.

214. See *supra* note 39 and accompanying text.

215. Crouch, *supra* note 101, at 344 ("Whether the lawyer lets mediation go on or solves the problem by cutting mediation off, he or she is probably acting for one party and against the other.").

216. Maryland Ethics Op., *supra* note 7, at 9.

ted exceptions for certain types of practice like divorce mediation without having established some other provisions to safeguard the conflicts of interest involved. Excluding lawyer divorce mediators from the ethical obligations in DR 5-105 would undermine the very purpose of that provision.

It is also unlikely, under the Code, that clients are able to consent to lawyer divorce mediation. Although the argument that any consent to joint representation must be uninformed goes too far,²¹⁷ it is questionable whether divorcing parties can give an informed consent when the legal profession itself has been unable to establish the ethical boundaries of lawyer divorce mediation.²¹⁸

In addition to an informed consent, section DR 5-105(C) requires that it be "*obvious*" that the lawyer can adequately represent the interests of each client.²¹⁹ Even if, based on proper disclosure, the clients understood the complexities sufficiently well to provide their informed consent, the conflicting interests of the parties will often make it far from "*obvious*" that the lawyer mediator can satisfy his obligations as established by the Code.²²⁰ In fact, the lawyer mediator will actually at times injure the interests of one of his clients in protecting the interest of the other.²²¹

Finally, regardless of whether his clients' interests are actually prejudiced, Canon 9 would usually prohibit lawyer divorce mediation because the lawyer's actions appear to benefit the interest of one client to the detriment of the interests of the other.²²²

Nor does EC 5-15 support the argument that lawyer divorce mediation is permitted by the Code. EC 5-15 recognizes that a lawyer may take on multiple clients where their interests only *potentially* or *slightly* differ, such as the representation of grantors and grantees, sellers and

217. Some cases must exist where such an arrangement could be wise. See *infra* note 228 and accompanying text.

218. See *supra* text accompanying notes 171-200.

219. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR5-105(c) (1980) (emphasis added). There seems to be a trend toward a relaxed review of client consent and minimizing or circumventing the requirement that it be "*obvious*" that the lawyer can adequately represent both parties. *E.g.*, Massachusetts State Bar Ass'n Comm. on Professional Ethics, Op. 85-3, 70 MASS. L. REV. 151, 153 (1985) (client consent to mediation valid if lawyer explains he "is not representing either party"); Florida Ethics Op., *supra* note 200, in Law. Man. on Prof. Conduct (same requirements). Although this trend has the effect of enabling lawyers to provide divorce mediation (with client consent) under the Code, this result is not justified by the text of the Code itself.

220. Even outside the litigation context, "[c]lient consent notwithstanding, a lawyer may not . . . represent multiple parties . . . whose interests or positions are fundamentally antagonistic." Law. Man. on Prof. Conduct (ABA/BNA) 51:301 (1987). Similarly, DR 7-101 prohibits lawyers from "intentionally . . . prejudic[ing] or damag[ing] his client during the course of the professional relationship." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(3) (1980).

221. See *supra* notes 213-16 and accompanying text.

222. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

buyers, lessors and lessees, lenders and borrowers.²²³ These contexts are usually significantly different from divorce mediation.²²⁴

Perhaps a closer analogy is provided by a lawyer's ability to dissolve partnership agreements under EC 5-15.²²⁵ Even in this context, however, the conflicts of interest are more likely to be merely potential or slight than in a divorce setting. Business relations generally are not as intimate as matrimonial relations, and hence the process of their dissolution is likely to be less emotional. Furthermore, divorces probably tend to be more contentious because the parties are essentially renegotiating a multi-year contract;²²⁶ divorces involve long-term issues—like alimony or child visitation rights—that are often decided in an atmosphere of anger, distrust, or frustration.

Additionally, divorce often involves interests of third parties that have no analogues in partnership dissolution, and the state has a particular interest in protecting these.²²⁷ In *Klemm v. Superior Court*,²²⁸ for example, the state interceded to protect the public interest in keeping people off the welfare rolls through manipulative agreements and ensuring adequate provisions for minor children.

Furthermore, compared to parties in divorce mediation, parties to a dissolution of a business partnership are more likely to have comparable bargaining skills and experience; it is less likely that one party will

223. See e.g., *Klemm v Superior Court*, 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509, 512 (1977) (citing *Lessing v. Gibbons*, 6 Cal. App. 2d 598, 605-06, 45 P.2d 258, 261 (1935)).

224. "DR5-105(c) allows a lawyer to represent two clients whose interests vary only slightly. . . . It would not be covered by . . . the general agreement of the two parties to mediate their dispute, even though to some extent this agreement may constitute some evidence of what the parties believe is 'adequate representation.'" Maryland Ethics Op., *supra* note 7, at 9 (emphasis added).

225. See Arizona State Bar Ass'n Comm. on Professional Responsibility, Op. 76-25 (1976).

226. "While divorce ends the husband-wife relationship, the parental relations [for example] continue to exist." Coombs, *supra* note 127, at 469, see also Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-83 (1984) (questions of custody and support are frequently subject to a number of renegotiations); Friedman, *supra* note 101, at 188 (divorce agreements "may be long term and require future modification").

227. See, e.g., *In re Themelis*, 117 Vt. 19, 24, 83 A.2d 507, 510 (1951) (discussing interests of children and the judicial system); Mnookin & Kornhauser, *supra* note 104, at 954-55 (discussing state's role as *parens patriae* regarding child support, custody, and visitation).

228. 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977). The only dispute in the dissolution proceeding was between the state and the parties to the dissolution. The attorney that represented both parties in the proceeding was not retained to resolve disputes between the two clients, but between his clients and the state. In this regard, the court stated, "As a matter of law, a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. . . . However, if the conflict is merely potential, there being no existing dispute or contest between the parties" then dual representation may be permissible. *Id.* at 898-99, 142 Cal. Rptr. at 512; see also Arizona State Bar Ass'n Comm. on Professional Responsibility, Formal Op. 76-25 (1976) ("*Prima facie*, a lawyer should decline representation of both parties but there are undoubtedly some cases in which dual representation would not be improper The law of dissolution for married couples with no children and few assets is simple and uncomplicated.").

require special assistance to protect rights he or she would not knowingly forego. Thus, in a partnership setting, agreement between the parties is less likely to result from undue pressure by one of the parties. In any case, relying upon EC 5-15 as the authority permitting a lawyer to provide divorce mediation services is misplaced because in divorce mediation, even more than in a business setting, the lawyer will often be unable to accurately determine the degree to which the parties' interests actually differ.²²⁹

Also, in contrast to a divorce, the dissolution of a business partnership is less likely to be centered around subjective emotional issues. In a business setting, the dollar value of the partnership can usually be determined, including the value of its goodwill. The partners can then distribute the partnership assets according to whatever agreement they reach. In a divorce context, on the other hand, how does one determine the cash value of weekend visitation? Does the value of child custody offset the value of the house? These issues also are more likely to engender second-guessing after the fact since an objectively verifiable index does not exist for many of the trade-offs that would otherwise permit the parties to divide the assets evenly. The increased likelihood of second-guessing increases the risk that both the legal profession and the lawyer will be exposed to harsh criticism.

The terms of the Model Code thus prohibit divorce mediation. While lawyer divorce mediation should be permitted, it should not be permitted by forcing inappropriate analogies, nor by creatively reading the Code to avoid its express provisions.²³⁰ An overly expansive reading of the Code undermines one of the central purposes for having a code of professional ethics, which is to provide attorneys with clear guidelines by which to shape their own conduct. If interpretations of the Code are too disparate, the Code will be of little help to the practitioner, and its legitimacy will suffer. Furthermore, uniformity in legal ethics is important to ensure the continued self-supervision and autonomy of the legal profession.²³¹ Ethical rules should be static enough to promote uniformity and

229. In many cases, "the degree to which a person's choice is free is questionable. For one thing, the facts of long-standing marriages can be so subtle that the dominant party is actually the one who appears as the weaker, fooling even experienced observers." Crouch, *supra* note 101, at 33; see also Ohio Ethics Op., *supra* note 176, 48 OHIO B. at 783 ("[S]ituation pragmatics make it impossible . . . to make a proper judgment as to the degree of variances in differing interests.").

230. Indeed, EC 5-15 should not be relied upon as the authority for permitting lawyers to provide divorce mediation because, in many cases, those parties whose interests differ more than "slightly" could nonetheless benefit from divorce mediation.

231. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

clear enough to assist lawyers who must refer to them for guidance. An exposition of the ethical obligations of attorneys that is not supported by the text of the Code does not serve these purposes. Furthermore, the Code should be as explicit as possible in order to assist the consumer who wants to inform himself of the ethical obligations of attorneys and of the nature of the service he can expect to receive. A consumer should not have to do legal research to discover if a judicial gloss has been placed over the language of the Code. Nor, for that matter, should a lawyer. The ABA Model Code should thus be revised to include provisions defining the ethical boundaries within which attorneys may perform divorce mediation. Lawyers and ethics committees should not be forced to improvise or extrapolate upon these provisions.²³²

B. The ABA Model Rules of Professional Conduct: A Critique

An alternative to the Model Code is the ABA's Model Rules of Professional Conduct.²³³ Although an improvement over the Model Code, the Model Rules are also inadequate, in part because they simply codify much of the confusion that grew up around the Model Code. Rules 2.2 and 1.7 are particularly relevant to the issue of lawyer divorce mediation.

Rule 2.2 establishes that a lawyer may act as an "intermediary" where

three circumstances are present: (1) the clients consent to such representation after consultation regarding the risks involved; (2) the lawyer believes the matter can be resolved compatible with the best interests of the clients, or if the resolution is unsuccessful, there is little risk of material prejudice to the interests of the clients; and (3) the lawyer reasonably believes there will be no improper effect on the lawyer's duty to each client.²³⁴

From this language, one might conclude that lawyer divorce mediation is permissible under the Model Rules, especially since the Model Rules omit the Model Code's language requiring "zealous" representation,²³⁵ instead requiring "diligence" on the part of the lawyer.²³⁶ However, the comment to Rule 2.2 provides that "a lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with *potentially*

Law. Man. on Prof. Conduct (ABA/BNA) 1:102 (1987).

232. "The Committee nevertheless believes that the principles of the Code permit the extrapolation of certain guidelines for lawyers asked to participate in such non-adversarial activities." New York City Bar Ethics Op., *supra* note 39, in *DIVORCE MEDIATION: READINGS* at 310. The problem with extrapolation is that different people "extrapolate" differently. *See also supra* note 109.

233. *See supra* note 167 and accompanying text.

234. Law. Man. on Prof. Conduct (ABA/BNA) 51:1503 (1984).

235. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

236. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

conflicting interests.”²³⁷ Unfortunately, the same controversy that plagued the Model Code must now be addressed when reading the Model Rules—whether the interests of the parties are actually or only potentially in conflict.

One must resolve the question of whether the parties’ interests actually conflict before one can confidently interpret the language in the comment, which states that

[a] lawyer acts as intermediary in . . . helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve *potentially conflicting interests* by developing the parties’ mutual interest.²³⁸

At the end of this list of very specific examples is the general notion of “mediating a dispute between clients.” Divorce mediation is strikingly absent from this list of examples. It is possible that “divorce mediation” is omitted not because it is prohibited, but because the drafting committee did its best to avoid the issue altogether.²³⁹ This indecision is highlighted by the fact that the drafting committee follows this general language by reverting to language that focuses on the parties’ “*potentially conflicting interests*.”

If this language were not enough to keep the debate open, the comment to Rule 2.2 states that “a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who *contemplate contentious negotiations*.”²⁴⁰ Again, determining whether the interests of the parties actually or only potentially conflict will in large part determine whether or not lawyer divorce mediation is permissible.

The Model Rules also perpetuate the debate about whether the divorce mediator must necessarily benefit one party at the expense of the other.²⁴¹ This question remains central because the comment to Rule 2.2 also states that “intermediation is improper when . . . impartiality cannot be maintained.”²⁴²

237. *Id.* Rule 2.2 comment (1983) (emphasis added).

238. *Id.* (emphasis added).

239. Even the Family Law Section of the ABA drafted standards for ethical family mediation “[w]ithout either advocating or sanctioning the practice for lawyers.” Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 FAM. L.Q. 461, 461 (1984). See also *infra* text accompanying note 252.

Unfortunately, the examples provided in the comment to Rule 2.2 resemble those provided in the Model Code and do not resolve the issues that arose in that context. See *supra* text accompanying notes 223-29.

240. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment (1983) (emphasis added).

241. See *supra* notes 209-15 and accompanying text.

242. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment (1983).

Finally, the comment to Rule 2.2 also fuels the fiery question of whether the lawyer divorce mediator "represents" both parties. Rule 2.2 "does not apply to a lawyer acting as . . . mediator between or among parties who are not clients of the lawyer."²⁴³ Rather, it applies only "when the lawyer *represents* two or more parties with potentially conflicting interests."²⁴⁴ On one hand, strong arguments can be made that Rule 2.2 does not apply to divorce mediation;²⁴⁵ on the other hand, one could argue that it actually prohibits lawyer divorce mediation altogether.²⁴⁶

The ethical questions surrounding divorce mediation also remain unresolved in Rule 1.7, which is the counterpart to the Model Code's DR 5-105.²⁴⁷

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.²⁴⁸

The comment to Rule 1.7 discusses the rule in the context of litigation, and states that

[a] possible conflict does not itself preclude the representation [of multiple parties]. The critical questions are the likelihood that a conflict will eventuate, and, if it does, whether it will materially interfere with the lawyer's independent professional judgment

. . .

[C]ommon representation of persons having *similar* interests is

243. *Id.*

244. *Id.* (emphasis added).

245. Wendy Whicher, member of the Task Force, argues that Rule 2.2 is clearly inapplicable to lawyer divorce mediation, and was intended to apply to what is more accurately described as a lawyer engaging in "shuttle diplomacy" between clients. Telephone interview with Wendy Whicher (Mar. 27, 1987). This position is bolstered by the distinction made in the ABA's *Lawyers' Manual* between "intermediation" and "mediation." See *Law. Man. on Prof. Conduct* (ABA/BNA) 51:1503 (1984) ("Unlike a mediator, the lawyer acting as intermediary maintains a lawyer-client relationship with each party, and must ensure that the interests of each are *fully represented*." (emphasis added)).

246. If Rule 2.2 is inapplicable to divorce mediation, what conclusion follows as to its propriety? If it does not apply because one or more of the three conditions can never be met, then it follows that the lawyer may *not* engage in the practice. If, however, Rule 2.2 is inapplicable because "intermediary" is not equivalent to "mediator," then we must look elsewhere in the Rules for guidance.

247. See *supra* text accompanying notes 171-73. Rule 1.7 omits the "obvious" requirement contained in DR 5-105.

248. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.²⁴⁹

In a section headed "Other Conflict Situations," the comment states that "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them."²⁵⁰

Rule 1.7 is indeterminate on the divorce mediation question. Interpretation of Rule 1.7 and its commentary depends on the resolution of the debates surrounding Rule 2.2. One could argue that divorce mediation is (usually) permissible because the lawyer divorce mediator reasonably believes that neither client will be adversely affected and because both clients consent, or that any conflict that might arise would not interfere with the lawyer's independent professional judgment. But on the other hand, an ethics committee could hold that Rule 1.7 prohibits divorce mediation because a lawyer could not reasonably believe that the "representation will not adversely affect the relationship with the other client."²⁵¹

As under the Model Code, if the lawyer mediator represents neither party then the conflict-of-interest provision (in this case Rule 1.7) would not apply to divorce mediation. As a result, the risks to those interests that such provisions are supposed to ameliorate remain unaddressed in the Rules.

The confusion pervading both the Model Code and the Model Rules results from the ABA's schizophrenia regarding divorce mediation. One commentator notes that the Kutak Commission, in its earlier drafts of the Model Rules, "specifically stated that 'under some circumstances a lawyer may act as an intermediary between spouses in arranging the terms of an uncontested separation or divorce settlement' but that language was deleted in the final draft."²⁵² The result of the ABA's failure to address divorce mediation is a complete absence of discussion in the Model Rules on the issue and an abundance of language that is sufficiently broad, vague, and inconsistent to permit the debate that grew up around the Model Code to live on in the text of the Model Rules. In regard to divorce mediation, the Model Rules provide no more guidance to practitioners than does the Model Code.

249. *Id.* Rule 1.7 comment (1983) (emphasis added).

250. *Id.*

251. See, e.g., New Hampshire Ethics Op., *supra* note 176; see also *supra* note 179.

252. Silberman, *supra* note 6, at 121.

C. *Standards of Practice for Lawyer Mediators in Family Disputes: A Proposal for Modification and Adoption*

In August of 1984, the House of Delegates of the American Bar Association approved the Standards of Practice for Lawyer Mediators in Family Disputes.²⁵³ The ABA's approval of these Standards was significant because it demonstrated that the ABA recognizes that lawyers may provide divorce mediation without violating their ethical obligations as lawyers. This fact alone should influence those ethics committees that have held lawyer divorce mediation to be unethical.²⁵⁴

The Standards also represent the ABA's acknowledgment that [i]f mediation is to be a viable alternative means of resolving disputes involving custody and economic aspects of divorce, it is manifest that there must be standards and guidelines which all [lawyer] mediators must be *bound to observe*. This is in the best interest and for the protection of the public in general and of the participants in mediation in particular. . . . In this vein . . . the Task Force . . . developed the "Standards of Practice for Lawyer Mediators in Family Disputes."²⁵⁵

The Standards make a significant contribution to lawyer divorce mediation, and should be supported notwithstanding a few flaws. Still, even three years after their approval, their overall effect on divorce mediation has been marginal.

One flaw in the Standards of Practice is that they do not definitively establish that lawyers who provide divorce mediation services are engaged in the practice of law. In several ways, the Standards of Practice seem to accept implicitly the proposition that the lawyer mediator is practicing law. For example, the commentary²⁵⁶ to the Standards of Practice repeatedly makes reference to the ethical conduct of the lawyer, to ethical considerations, and to what is ethically appropriate.²⁵⁷ In fact, the commentary to Standard VIB, which prohibits the lawyer mediator from representing either or both of the parties in a marital dissolution, even states that a lawyer mediator cannot violate this duty "without violating the Canons of Ethics,"²⁵⁸ which apply only if the lawyer is practic-

253. STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984) [hereinafter STANDARDS OF PRACTICE]. The Family Law Section of the American Bar Association appointed a Task Force on Mediation to develop guidelines for the lawyer mediator. The Standards of Practice are the product of this Task Force. A preliminary version of the Standards of Practice was published as *Standards of Practice for Family Mediators*, 17 FAM. L.Q. 455 (1984).

254. See *supra* notes 175-82.

255. STANDARDS OF PRACTICE, *supra* note 253, Preface, at vii (emphasis added).

256. The commentary to the Standards of Practice was not passed by the House of Delegates, but was added later by a special committee to explain the guidelines in more detail. As such, it is less authoritative than the comments to the Model Rules.

257. See, e.g., STANDARDS OF PRACTICE, *supra* note 253 Standard IIID commentary, Standard VA commentary, Standard VIA commentary.

258. STANDARDS OF PRACTICE Standard VIB commentary.

ing law.

The Standards of Practice do not directly address this question, and so take an ambiguous position. Perhaps one reason the Standards of Practice are silent on this question is that their drafters did not reach a consensus on whether lawyers who provide divorce mediation are practicing law.²⁵⁹ When asked whether the fact that the Standards of Practice are addressed only to lawyers²⁶⁰ indicates that lawyer mediators are engaged in the practice of law, one Task Force member responded that nonlawyers were excluded not because a determination was made that the Standards described the practice of law, but because of "political considerations."²⁶¹ Nonlawyers were excluded because the ABA did not want to appear to be preempting the authority of other organizations to establish standards for divorce mediation.²⁶²

The Standards of Practice should explicitly state that the lawyer mediator is practicing law. In addition to protecting the values discussed above, this result is consistent with the approach recommended by a number of the Task Force members who state that the Standards are to be read in conjunction with the Model Rules, particularly Rule 2.2.²⁶³

The Standards of Practice should also provide that the lawyer mediator represents both parties to the mediation. Currently, the Standards presume that the lawyer mediator represents neither party.²⁶⁴ While sev-

259. At least one member of the Task Force argues that a lawyer divorce mediator need not be engaged in the practice of law. Telephone interview with Wendy Whicher, *supra* note 208. Other members of the Task Force insist that the lawyer mediator is practicing law. Telephone interview with Thomas A. Bishop, former member of the board of directors of the Association of Family and Conciliation Courts (AFCC) and also a member of the ABA Task Force (Mar. 26, 1987); telephone interview with Ellen Effron, member of the Task Force (Mar. 24, 1987).

260. The Standards of Practice define mediation "as a process in which a *lawyer* helps family members resolve their disputes," STANDARDS OF PRACTICE Preamble (emphasis added), whereas earlier drafts of the Standards defined mediation as "a process in which a *qualified person* helps family members resolve their disputes," and differentiated between "mediator" and "lawyer mediator." *Standards of Practice for Family Mediators*, *supra* note 253, at 455.

261. Telephone interview with Joel Shawn, lawyer divorce mediator, co-chair on the ABA Family Law Mediation Committee and member of the Task Force that developed the Standards of Practice (Mar. 27, 1987).

262. *Id.* At that time, the AFCC was drafting standards for divorce mediation applicable to both lawyers and nonlawyers.

The group convened by the AFCC for purposes of drafting the "Model Standards of Practice for Family and Divorce Mediation" included lawyer mediators, members of the Family Law section of the ABA Committee on Alternative Dispute Resolution, and nonlawyer mediators. Telephone interview with Thomas A. Bishop, *supra* note 259.

263. Telephone interview with Ellen Effron, *supra* note 259; telephone interview with Joel Shawn, *supra* note 261.

264. STANDARDS OF PRACTICE Preamble commentary. The confusion about whether the lawyer mediator represents both parties or neither seems unnecessary since the result is really little more than a conclusory label. See *ABA Conference Examines Alternative Dispute Resolution Techniques*, 8 FAM. L. REP. 2479, 2480 (1982) (one "attorney continues to reject the term 'mediator' in describing his function, instead stating, 'I see myself as a lawyer practicing non-adversary family law. . . . I am rendering legal advice—legal information—to my clients, but not in an adversary

eral of the Standards reflect the same concerns underlying the traditional ethical obligations embodied in the Model Code and Model Rules, to say that the lawyer mediator represents neither party is unfortunately to disjoin the Standards from the tradition of these other ethical codes. In the Model Code and Rules, a lawyer's ethical obligations, such as the requirement that he obtain the client's informed consent, traditionally flow from the lawyer's representation of the client's interests. Similarly, Model Rule 2.2 applies exclusively in situations where the lawyer represents both parties.²⁶⁵ If the Standards of Practice are to be read in conjunction with the Model Rules, they should be consistent with the ethical notions found in the Rules (and in the Code).

Although some lawyer mediators claim that they do not advance either party's interests, and therefore do not represent either party, the lawyer divorce mediator often does in fact advance the interests of his clients.²⁶⁶ And even granting that, on occasion, a lawyer mediator does not "advance" either party's interests, it is recognized today that partiality is not the talisman of representation. For example, Rule 2.2 recognizes that a lawyer may represent a client without being an advocate of that client's interests. The lawyer's role as divorce mediator should be recognized merely as another role the lawyer may perform in representing his clients' interests. Unfortunately, the Standards of Practice currently agree with those who sidestepped conflict-of-interest barriers to divorce mediation with the argument that such provisions of the Code were inapplicable to divorce mediation because the lawyer mediator does not represent either party. Although this argument had the virtue of permitting lawyer divorce mediation when it may otherwise have been prohibited, it also has the unfortunate result of alienating the ethical role of the lawyer mediator from the ethics the history has constructed over time. The result of saying that the lawyer mediator practices law but represents neither party is that no one knows how to translate the traditional ethical values of lawyers to a lawyer who represents nobody but is practicing law.

Worse yet, even the underlying justification for this position—that it makes divorce mediation permissible—is moot vis-a-vis the Standards of Practice. Currently, the Standards state that the lawyer mediator represents neither party but contain certain conflict-of-interest provisions. This is puzzling: It is conceptually unclear how a lawyer can suffer from a conflict of interest, because he represents neither party. Instead, the

way"). Divorce mediation should now be fully accepted into the fold of proper roles for an attorney, and its ethics derived therefrom. The argument that the lawyer represents neither party should be abandoned.

265. See *supra* text accompanying note 244.

266. See *supra* notes 203-13 and accompanying text.

Standards should state that divorce mediation is permissible; that it is to be distinguished from the role of a lawyer in an adversarial context; and that—since the lawyer represents both parties—the lawyer must comport with certain ethical obligations. As in other contexts, the conflict-of-interest provisions would then arise from the lawyer's representation of interests that may conflict.

Such a change would support, for example, Standard IIIC, which requires the mediator to be impartial as between the mediation participants. Furthermore, the fact that the lawyer divorce mediator represents both parties would explain his duty to “facilitate the ability of the participants to negotiate their own agreement, while raising questions as to the fairness, equity and feasibility of proposed options for settlement.”²⁶⁷ It describes the manner in which the lawyer represents the interests of clients in mediation. This obligation should not arise out of a lawyer's commitment to a “process,”²⁶⁸ but out of an obligation to his *clients*. What is the origin of a lawyer's obligation to a person he does not represent?²⁶⁹

Many of the other disclosure requirements in the Standards of Practice are also conceptually clearer if lawyer divorce mediators are viewed as representing both parties. For example, Standard IV requires the lawyer mediator “to assure that the mediation participants make decisions based upon sufficient information and knowledge.” In part, this obligation requires the lawyer to assure that the parties understand the applicable law and how it applies to them (in part by recommending that the parties also retain independent legal counsel) before making any agreements. This duty arises from the fact that the lawyer is practicing law on behalf of his clients, and so must conform to certain ethical obligations owed to his clients. These obligations should be viewed as obligations, not to a process, but rather to clients, and they should be conceptualized as arising from the lawyer mediator's representation of both parties.

Similarly, obtaining the parties' ultimate agreement to proceed with the divorce mediation should be seen as the same as the lawyer's obligation to obtain informed consent in other situations where the lawyer represents clients with potentially conflicting interests. For example, since

267. STANDARDS OF PRACTICE Standard IIIC.

268. There is some support for the argument that the ethical duties of the mediator arise from an obligation the mediator has to the mediation itself, to ensure that the mediation is a fair one; this obligation of a fair mediation is not owed to the individual clients per se. See, e.g., Silberman, *supra* note 6, at 120 n.49 (conceptualizing role of lawyer mediators as “representing the situation”). But see Crouch, *How To Handle Conflicts of Interest*, FAM. ADVOC., Winter 1987, at 4, 6 (criticizing attorneys who claim to represent “the marriage,” citing *Hilt v. Bernstein*, 75 Or. App. 502, 707 P.2d 88 (1985) (lawyer's overreaching in dual representation of husband and wife held to be malpractice)).

269. If the lawyer divorce mediator represents neither client, then the conflict-of-interest rules are not implicated. Maine Bar Ass'n Professional Ethics Comm'n, Op. 71, 1 MAINE B.J. 199, 199 (1986).

the lawyer mediator represents both parties, he is obligated, as he would be under DR 5-105 and Rule 2.2, to inform the parties how their interests conflict. As a result, Standards that require discussion of the divorce mediation process²⁷⁰ and the implications of one party's paying all of the lawyer mediator's fee²⁷¹ are understood as necessary for the parties to offer their informed consent to mediate.

So conceived, the lawyer's duty to monitor the mediation process is consistent with the notion that parties hire a lawyer mediator because they want someone qualified to comment on a number of legal issues, some of which may be tangential. They pay for and expect the benefit of the lawyer's legal knowledge. With this result, we can at last abandon the splitting of hairs in an attempt to distinguish legal information from legal advice,²⁷² which is uniquely irrelevant when the information or advice is coming from a lawyer. Viewing the lawyer mediator as representing both parties achieves this result and accords clients the protection that they expected when they hired a lawyer divorce mediator.

If the lawyer's representation of the clients' interests is inadequate, the lawyer divorce mediator should be subject to liability to the extent he would be in any other setting. In this context, the lawyer divorce mediator's duty to recommend independent legal counsel²⁷³ should be reinterpreted as deriving from the lawyer's traditional obligation to determine whether he is qualified to represent the client, and if he is not, to (1) decline or withdraw from the representation, (2) educate himself and proceed with the representation, or (3) retain—with the client's consent—additional counsel qualified to assist in the representation. Although the parties are not required to retain separate independent legal counsel, the lawyer divorce mediator should advise them to do so. If they refuse, the lawyer divorce mediator need not abandon the mediation, but he may proceed only if he can adequately serve the interests of his clients without separate independent counsel. In other words, the

270. STANDARDS OF PRACTICE Standard I.

271. STANDARDS OF PRACTICE Standard IF commentary. This is the ethical equivalent of one person paying a lawyer's fee for services rendered to another, governed by MODERN RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1983) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR5-107(A) (1980).

272. See *supra* notes 206-08 and accompanying text. This distinction is perpetuated by the Standards. Since the lawyer mediator represents neither party, the lawyer mediator is presumably not giving the parties legal advice, but only legal information. See STANDARDS OF PRACTICE Preamble (mediator provides "information" which "is not a substitute for . . . independent legal advice"); *id.* Standard IG commentary ("mediator should take care to explain to the participants that they should not look to the mediator for legal advice"); *id.* Standard IVC commentary ("The need for independent legal advice should be stressed. . . . This is not to say that the lawyer mediator is precluded from providing participants with information about laws. . . . Although the giving of specific advice dealing with a specific problem is prohibited, providing general legal information is permitted.").

273. *Id.* Standard VI.

lawyer divorce mediator must have determined that he can alone adequately inform the parties to the extent necessary to proceed with the divorce mediation. If he fails, he should be subject to liability as he would be in other settings.

Nevertheless, some respected lawyer divorce mediators believe that the Standards of Practice do not subject the lawyer divorce mediator to legal malpractice even if one party makes inadequately informed decisions, because the lawyer mediator represents neither party.²⁷⁴ On the other hand, one commentator has reported that some legal malpractice insurers do consider the lawyer in this setting to be exposed to such liability.²⁷⁵ In fact, the Standards arguably may impose on the lawyer divorce mediator only the responsibility to recommend that the participants obtain independent legal counsel.²⁷⁶ The liability of the lawyer divorce mediator under the Standards is not clear, because it is not clear what it means to practice law for a client without representing him.

Where independent counsel are retained by the mediating parties, these lawyers also represent the interests of their respective clients. To the extent that their clients are still not adequately informed and protected, all of the lawyers should be subject to liability as would be appropriate in more traditional settings.

A similar analysis applies to questions surrounding the drafting of separation agreements. Since drafting the actual separation agreement would usually be so risky for the lawyer mediator, he would probably refuse to do it except in the most simple and straightforward cases. The

274. Personal interview with Lawrence D. Gaughan, Arlington, Va. (Mar. 26, 1987). Gaughan believes that mediation should only be performed when each party has separate counsel, and any action for malpractice would be directed against the counsel of the aggrieved party and not against their mediator.

Ethical guidelines are used for internal bar proceedings. Violation of such guidelines does not establish a cause of action for malpractice. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983). It is, however, an important factor to be considered when evaluating a claim of malpractice. See *Hilt v. Bernstein*, 75 Or. App. 502, 707 P.2d 88 (1985) (malpractice found in improper conduct in dual representation).

275. Telephone interview with Joel Shawn, *supra* note 261.

276. See STANDARDS OF PRACTICE Standard IG commentary ("Although mediation may proceed even though one or both participants have not obtained counsel prior to the first mediation session, they do need to be advised as to their need for, and to understand the benefit from, attorney representation."); *Id.* Standard IVC ("The mediator shall endeavor to assure that the participants have a sufficient understanding of . . . law . . . by recommending to the participants that they obtain independent legal representation during the process."); *id.* Standard VID ("While a mediator cannot insist that each participant have separate counsel, they should be discouraged from signing any agreement which has not been so reviewed. If the participants, or either of them, choose to proceed without independent counsel, the mediator shall warn them of any risk involved.").

But see *id.* Standard VIA commentary ("Any decision that is not based upon the participants' informed view or informed position will not be viable, might not be enforceable and could be unethical.").

now-common practice of retaining outside counsel for this function—a practice encouraged by Standard VID—would likely continue.

Confidentiality is important in divorce mediation because it allows the parties to be candid about “family secrets” and other personal matters that are relevant to the mediation process. Even if it is not an adversary proceeding, a divorce involves deep feelings that can not be probed unless the attorney has each client’s individual confidence.²⁷⁷ Full disclosure maximizes the probability of successful mediation and of a fair separation agreement.²⁷⁸

Since the lawyer divorce mediator would be representing both parties, and the lawyer would learn of each client’s secrets in his capacity as the client’s lawyer engaged in the practice of law on the client’s behalf, the legal profession should recognize that such disclosures are confidential and should be treated accordingly. This would achieve the effect desired in Standard II.

The similar purposes underlying the attorney-client privilege are relevant in this setting as well. Courts should recognize the attorney-client privilege for these communications. The first step toward this goal is to recognize that the lawyer divorce mediator *represents* his mediation clients.

Viewing a lawyer mediator’s ethical obligations in this way also facilitates the evaluation and application of other ethical requirements to that practice. For example, Standard IIIA states, “The mediator shall not represent either party during or after the mediation process in any legal matter. In the event the mediator has represented one of the participants beforehand, the mediator shall not undertake the mediation.”²⁷⁹ This obligation can be understood relative to the lawyer’s traditional obligations articulated in Model Rules 1.6, 1.7 and 2.2.²⁸⁰ Standard IIIA, then, embodies the traditional concerns that have constrained the practice of law—in this instance, concerns about (1) conflicts of interest, (2) the use of information against the interests of the client who confided in the lawyer, and (3) the confusion that might result from the lawyer’s changing roles with the clients. Regarding these Standards as derivative of the lawyer’s traditional obligations, we can evaluate them in a familiar and long-standing ethical context and assess the values they express. The obligation to protect a client’s confidences protects both the interests of the public and the reputation of the bar.

277. Ohio Ethics Op., *supra* note 176, 4 OHIO B. at 783.

278. For a thorough discussion about the values which favor confidentiality, see Friedman, *supra* note 101, at 196.

279. STANDARDS OF PRACTICE Standard IIIA.

280. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6, 1.7, 2.2 (1983); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4, 5 (1980).

In light of the traditional ethical concerns embodied in the Model Code and Model Rules, Standard IIIA is overbroad. Under Model Rule 1.6(a), a lawyer may reveal information relating to the representation of a client where that client consents after consultation. The ABA has determined that this Rule adequately serves the concerns underlying the confidentiality principle, which are to "facilitate[] the full development of facts essential to proper representation of the client but also [to] encourage[] people to seek early legal assistance."²⁸¹ Similarly, in mediation, where the lawyer mediator had previously represented one or both parties, concern for the protection of confidential information should not prevent that party from consenting to its disclosure. Standard IIIA is even more objectionable with respect to a lawyer divorce mediator's future representation of a past mediation client: If we maintain that the lawyer divorce mediator has not "represented" that party, and so deny the existence of any attorney-client relationship, we are committed to the view that the lawyer did not receive any confidential information within the terms of the Model Code and Model Rules. And even if revelations made in the course of a mediation are confidential,²⁸² it is not clear why mediation clients should be prevented from consenting to its disclosure, rare as that consent may be.

Another value embodied in Standard IIIA is also seen in Model Rule 1.7, which prohibits a lawyer from representing a client if such representation will materially limit the lawyer's representation of that client or will be directly adverse to another client. Yet Rule 1.7 permits such representation, provided that the lawyer reasonably believes that such representation will not be adversely affected and the appropriate clients consent.²⁸³ Again, denying the power to consent to the divorce mediation client is an inconsistent and undesirable conclusion.

Finally, Standard IIIA is intended to eliminate confusion that might arise from the lawyer's changing roles.²⁸⁴ However, Model Rule 2.2, describing the lawyer's role as intermediary, recognizes that "confusion can arise as to the lawyers role," but establishes that the problem can be eliminated when "the lawyer make[s] clear the relationship."²⁸⁵ The "consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances."²⁸⁶ The lawyer divorce mediator is equally capable of providing the divorce mediation

281. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983).

282. See *infra* notes 277-78.

283. See also *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1345-46 (9th Cir. 1981) (upholding "informed consent" to joint representation, under MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5, DR5-105(c) (1980)).

284. STANDARDS OF PRACTICE Standard IIIA commentary.

285. MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 2.2 comment (1983).

286. *Id.*

clients with a similar clarification. This is especially true in light of the fact that both parties to the mediation are likely to have separate independent representation monitoring the proceedings,²⁸⁷ whereas Rule 2.2 assumes each party *not* to have engaged separate independent representation.²⁸⁸

These changes would improve the Standards of Practice by grounding the ethical conduct requirements for lawyer divorce mediators in the values that underlie the regulation of lawyer conduct. And since a lawyer mediator's conduct will be evaluated by other lawyers, it is preferable to justify these duties in terms of their role in protecting these values rather than to create a set of rules without a clear legislative history or based unnecessarily upon notions foreign to the evaluating body. Additionally, lawyers who provide both divorce mediation and traditional services will not have to switch back and forth between different notions of ethical conduct. Finally, viewing these requirements in light of their role of protecting certain values helps to better evaluate and interpret them.

With these changes, The Standards of Practice should be adopted in local jurisdictions with coercive effect as supplements to the local code of ethics.²⁸⁹ The Standards should govern the conduct of lawyers representing clients in the role of divorce mediator. The preface to the Standards of Practice states that "[t]here must be standards and guidelines which all mediators must be bound to observe. This is in the best interest and for the protection of the public in general and of the participants in mediation in particular."²⁹⁰ But this goal is frustrated so long as lawyer divorce mediators' ethical obligations are not backed by coercive effect.²⁹¹

287. See STANDARDS OF PRACTICE Standard VI.

288. MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 2.2 (1983). Of course, the lawyer divorce mediator need not represent former clients if he believes that he is unable to do so or that the parties cannot fully grasp the significance of his changed role. But where a lawyer formerly represented the wife in drawing a will, or represented both when buying their house, why should the parties be always prevented from consenting to the subsequent representation? Furthermore, why should a lawyer divorce mediator be forbidden to draft a will for a former mediation client?

As in Rule 2.2(C), however, if the lawyer divorce mediator is for some reason forced to withdraw from the representation, then he should not continue to represent either client on the subject of the mediation.

289. The Introduction to the Standards states that the ABA offers the Standards "as a model for adoption by state and local bar associations and organizations of *lawyer*-mediators." STANDARDS OF PRACTICE Introduction (emphasis added). Like the Model Rules and Model Code, the Standards do not have coercive effect except to the extent that they are adopted by a local jurisdiction.

290. STANDARDS OF PRACTICE Preamble (1984).

291. Several members of the Task Force have stated that they did not envision that the Standards would be implemented with coercive effect, but rather that they would merely advise practitioners in a way similar to that of the Ethical Considerations of the Model Code. Telephone interview with Ellen Effron, *supra* note 208; telephone interview with Wendy Whicher, *supra* note 259; telephone interview with Thomas A. Bishop, *supra* note 262 (only intended to advance

Currently, the Standards of Practice have not yet been adopted in any jurisdiction. Consequently, the Standards are at best only "aspirational" in character, comparable to the Ethical Considerations of the Model Code. The unfortunate result is that the Standards of Practice, the ABA's tool for informing lawyers and ensuring that their law practice—when in the form of divorce mediation—is conducted in an ethical manner, have no bite.²⁹² Practically speaking, it is left to the individual lawyer to choose whether to conduct his divorce mediation practice in conformity with the Standards of Practice. And he may choose not to do so with impunity from the bar. To the extent that local ethics committees are informed by the Standards of Practice when evaluating a lawyer's conduct under the applicable code of ethics, the ethics committees are faced with the same problem that existed before the development of the Standards of Practice. Namely, ethics committees are forced to extrapolate from the relevant code of ethics—be it based upon the Model Code or Model Rules—in an effort to determine what conduct that code requires of a lawyer divorce mediator. Also, the benefit that consumers receive as a result of being informed of an attorney's minimum ethical standards is also sacrificed.²⁹³

Some people, including some members of the Task Force,²⁹⁴ believe that it would be premature to adopt binding standards for lawyer divorce mediators because the profession still needs time to develop a set of appropriate standards through trial and error.²⁹⁵ But it is misleading to have ABA Standards of Practice that use compulsory language and yet are neither compulsory nor representative of other compulsory standards. Furthermore, the actual adoption of standards by the ABA would seem to inhibit the continued search for appropriate standards that are so badly needed.

The cost of continued inaction is too high to permit lawyer divorce mediation to continue in its present unregulated state. Lawrence D. Gaughan, an experienced lawyer divorce mediator, believes that the greatest threat to divorce mediation today derives from the low quality of service many mediators provide.²⁹⁶ Another lawyer mediator contends that the greatest obstacle is a lack of demand resulting from the public's

discussion of appropriate standards, not to impose coercive effects or to decide the practice of law question).

292. As phrased by one member of the Task Force regarding the draft of the Standards which was adopted in principle by the Family Law Section of the ABA, the Standards of Practice are no more than an effort by "the Bar to express its beliefs as to the ethical parameters of a process which is so intertwined with the legal system." Bishop, *supra* note 239, at 462.

293. See *supra* text accompanying notes 231-32.

294. Telephone interview with Thomas A. Bishop, *supra* note 259; telephone interview with Wendy Whicher, *supra* note 208.

295. Telephone interview with Thomas A. Bishop, *supra* note 259.

296. Personal interview with Lawrence D. Gaughan, *supra* note 274.

reluctance to try this new approach.²⁹⁷ Mr. Gaughan's response, however, is that low demand results from the disheveled state of divorce mediation today, and as the quality of service increases, so will demand.²⁹⁸ This process requires binding standards that establish and inform lawyers and consumers of the minimum level of performance required of lawyer mediators.

In fact, Thomas Bishop states that his own goal for the Standards of Practice was to provide mediators and consumers with a guide to inform them as to what is expected from a divorce mediator.²⁹⁹ It is unclear how that objective is realized so long as the Standards are not given coercive effect. If the Standards serve to tempt consumers into divorce mediation, it seems improper to have consumers undertake mediation only to find that the mediator need not comply with those Standards. In fact, the lay person is unlikely to know during the course of the mediation what the lawyer divorce mediator has omitted in contravention of the Standards. As long as the Standards of Practice remain the equivalent of "advice" to lawyer mediators, they will provide the consumer with little assistance in evaluating the quality of the mediation services received.

Furthermore, permitting lawyers to roam so freely in an area of legal practice undermines both the values regarding protection of the public and the interests of the bar. For example, the purpose of limiting the practice of law to licensed attorneys is, in part, "to protect the public from being advised and represented in legal matters by . . . persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct."³⁰⁰ Unless the Standards of Practice are given some coercive effect, lawyers mediators who do not conform to the Standards of Practice are under no more control than are nonlawyers.³⁰¹ "Proper protection of the public requires that 'no person be permitted to act in the . . . capacity of a lawyer unless he is subject to the regulations of the legal profession.' "³⁰² The lawyer divorce mediator acts as a lawyer, and so should be subject to the regulations—and not just the advice—of the legal profession.

With these proposed modifications, the Standards of Practice would be sensitive to the values underlying the regulation of lawyers. The Standards are more properly conceived of and understood as guidelines by which lawyers gauge their own conduct and the conduct of other lawyers

297. Telephone interview with Joel Shawn, *supra* note 261.

298. Personal interview with Lawrence D. Gaughan, *supra* note 274.

299. Telephone interview with Thomas A. Bishop, *supra* note 259.

300. Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1189 (Fla. 1978) (quoting State v. Sperry, 140 So. 2d 587, 595 (Fla. 1962)).

301. See *supra* notes 291-93.

302. Tennessee Ethics Op., *supra* note 8, at 801:8107 (citing MODEL CODE OF PROFESSIONAL CONDUCT EC 3-4 (1980)).

when practicing law in the form of divorce mediation. While they protect the same concerns that justify the supervision of lawyer conduct in other settings, these modified Standards are tailored to the specific demands of a lawyer in his role as divorce mediator. Accordingly, local jurisdictions should adopt them with coercive effect.

CONCLUSION

Is divorce mediation the practice of law? If it is not, then lawyers and nonlawyers alike may provide that service. If it is, then nonlawyers are prohibited from providing that service and lawyers may provide it only so long as it is done in accordance with the applicable code of legal ethics.

Because of the many problems that plague the various tests traditionally used to define the practice of law, and because any such inquiry requires an understanding of the concerns that drive it, this question must be answered with reference to the values underlying the restrictions on the practice of law. Because different sets of values underlie restrictions on the practice of divorce mediation by nonlawyers and lawyers, respectively, the question of whether divorce mediation is the practice of law requires a bifurcated inquiry. An examination of the values at stake in each of these two cases yields this conclusion: divorce mediation is not the practice of law when performed by nonlawyers (at least when it is done under the auspices of a mediation supervisory body); but when performed by lawyers, it is the practice of law, and so is subject to all relevant professional codes of conduct and ethics.

This Comment considered lawyer divorce mediation in relation to the ABA Model Code of Professional Responsibility, the ABA Model Rules of Professional Conduct, and the ABA Standards of Practice for Lawyer Mediators in Family Disputes. Notwithstanding a few opinions that creatively interpret its terms, the Model Code now prohibits divorce mediation, but should be revised to permit it. The Model Rules were not drafted with divorce mediation in mind, and so do little to improve upon the Model Code. They too should be amended. Finally, the Standards of Practice are a vast improvement over the Code and the Rules with respect to divorce mediation. Although they too are flawed, the Standards should be modified and adopted with coercive effect by local jurisdictions.

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