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# GROUND RULES FOR CUSTODY MEDIATION AND MODIFICATION

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A national movement<sup>1</sup> has developed to encourage, and in some states require, mediation<sup>2</sup> for divorcing couples involved in child custody disputes.<sup>3</sup> The impetus for the movement toward mediation is a perception that a fault-based, win-or-lose custody dispute resolution system of litigation<sup>4</sup> disserves the child's best interests by encourag-

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<sup>1</sup> Richard Crouch, an active critic of attorney involvement in private divorce mediation, has observed, "It is as difficult today to be against mediation as it once was to be against motherhood. This dispute-resolution process is riding the crest of an immense wave of fad appeal, within both the professions and the media." Crouch, *Mediation and Divorce: The Dark Side Is Still Unexplored*, 4 FAM. ADVOC. 27 (1982). We disagree with Mr. Crouch's characterization of mediation as a "fad" but do agree with his observation that support for mediation in family disputes is building nationwide. See *Newsweek*, Jan. 10, 1983, at 42-45; Simon, *The Growth of Divorce Mediation*, Nat'l L.J., Aug. 30, 1982, at 1, 6-7.

<sup>2</sup> See generally Fuller, *Mediation — Its Forms and Functions*, 44 S. CALIF. L. REV. 305 (1971).

<sup>3</sup> Mediation programs range from the pilot programs of a particular judge, for example, Judge Frank Orlando's custody mediation service in Fort Lauderdale, Broward County, Florida, See Orlando, *Where and How — Conciliation Courts*, in ALTERNATE MEANS OF FAMILY DISPUTE RESOLUTION 111-51 (1982), to legislatively mandated mediation services, see, e.g., CAL. CIV. CODE § 4607 (West Supp. 1983) (mandating mediation of private custody disputes); MICH. COMP. LAWS § 552.513 (Supp. 1983) (directing that the State's Friend of the Court office make mediation available to couples who desire it, either directly or by contracting with private mediators). See generally Comeaux, *Procedural Controls in Public Sector Domestic Relations Mediation*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 79, 85 (1982); Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469 (1984).

<sup>4</sup> See generally M. Rosenberg, *The Adversary System and Dispute Processing In Our Society* (paper presented at the National Conference on the Lawyer's Changing Role in Resolving Dis-

ing parents to use their children, even unconsciously, as pawns in the divorce war.<sup>5</sup> The adversary model of dispute resolution, it is said, can discourage communication and cooperation between parents about their children during a time of great stress in the lives of all family members.<sup>6</sup> It is during this time that such familial interaction is most needed.<sup>7</sup> As a result, the adversary process can exacerbate the trauma of divorce for the children,<sup>8</sup> turning an already significant developmental crisis into a potential personality dislocation of even greater magnitude.<sup>9</sup>

In contrast, proponents of custody mediation argue that face-to-face negotiations between the parents, encouraged and supervised by a neutral third party, can facilitate the parents' transition from the hostility or alienation that may result from the breakdown of their relationship to a constructive, cooperative approach to their joint

putes, Harvard Law School, October 14-16, 1982) (publication forthcoming 1984).

<sup>5</sup> J. HAYNES, *DIVORCE MEDIATION* 3 (1981); H. IRVING, *DIVORCE MEDIATION: A RATIONAL ALTERNATIVE TO THE ADVERSARY SYSTEM* 19-20 (1981). See generally J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAK-UP* (1980).

<sup>6</sup> See H. IRVING, *supra* note 5, at 38; Pearson, *Child Custody: Why Not Let the Parents Decide?*, 20 *JUDGES J.* 4, 6 (1981).

<sup>7</sup> J. WALLERSTEIN & J. KELLY, *supra* note 5, at 26-51, 108-113. Wallerstein and Kelly conclude that:

Divorcing parents . . . face a bewildering array of tasks in putting their own lives in new and better order and in shaping the relationships of the postdivorce family. Many will need help in setting up postdivorce arrangements for the children and especially in arriving at the mutual understanding on which such arrangements must be based in order to endure. For people who have decided to separate from each other in sorrow and anger, joint planning is very difficult to achieve. . . . [D]ivorcing with children requires of the adults who had once been together the capacity to maintain entirely separate social and sexual roles while continuing their cooperation as parents on behalf of their children.

*Id.* at 317-18.

<sup>8</sup> Courts have characterized custody disputes as "acrimonious and counter-productive litigation" and have noted that "children inevitably become pawns to be sacrificed in what ultimately becomes a very cynical game." *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981) (establishing a presumption of custody for the primary caretaking parent as a disincentive to custody battles). Researchers have stressed that parental conflict over children undergoing divorce should be minimized because the child's adaption to the eventual divorce will be affected by the extent to which the custodial arrangements were made in conflict. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 *SYRACUSE L. REV.* 55 (1969). See J. WALLERSTEIN & J. KELLY, *supra* note 5; Pearson, *supra* note 6, at 6 ("The psychological literature tells us that divorce is significantly more damaging to children of all ages when it becomes a prolonged procedure fraught with bickering, and when children themselves become the focus of the divorce dispute.").

<sup>9</sup> See generally Watson, *supra* note 8. For descriptive accounts of adversary custody disputes from the child's perspective, see J. WALLERSTEIN & J. KELLY, *supra* note 5, at 51-54; S. Meehan, *Child Custody Disputes: The Experiences of Children and the Implications for Social Policy* (unpublished Ph.D. dissertation 1982) (available through University Microfilms International).

concern for their child.<sup>10</sup> Mediation, it has been suggested, helps to protect a child's interest in maintaining significant positive relationships with both of his parents following their separation.<sup>11</sup> To the extent that mediation facilitates speedy, private resolution of the intensely personal emotions and issues involved in parental custody disputes and encourages both parents to maintain a significant role in the child's life, it furthers the child's interest in an environment that closely approximates the functioning of the pre-separation family.<sup>12</sup>

This Article describes an approach to resolving some of the strategic and ethical problems faced by attorneys who wish to mediate the custody disputes of divorcing parents. Part I of the Article sets forth some of the issues custody mediators necessarily confront and the setting in which we attempted to resolve them. Part II discusses the mediation ground rules that we developed to ensure that the mediation process would be both beneficial for the child and his family and ethical for attorneys working with mental health professionals. Because future disputes might develop and circumstances could change, Part III suggests a mechanism to be included in separation agreements for reevaluating and, if necessary, modifying custody agreements reached through mediation. Finally, Part IV suggests factors that courts might consider in reviewing custody agreements that are developed through mediation. Appendix A reprints the full text of the mediation retainer agreement that describes our ground rules for the mediation process. Appendix B reprints that portion of a custody agreement that we developed in mediation which describes a mechanism for settling parents' future custody disputes.

As will be evident from what follows, our experience makes us opti-

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<sup>10</sup> J. HAYNES, *supra* note 5, at 5, 11-12; Fuller, *supra* note 2, at 325; Pearson, *supra* note 6, at 6, 10; Winks, *Divorce Mediation: A Non Adversarial Procedure for the No-Fault Divorce*, 19 J. FAM. LAW. 615, 650-51 (1981).

<sup>11</sup> J. WALLERSTEIN & J. KELLY, *supra* note 5, at 307-08, 310-11 (empirical study suggesting the psychological importance to the child of continuing contact with both parents). See Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C.D.L. Rev. 739, 746-47 (1983). But see J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31-40 (2d ed. 1979) (the child's need for stability and continuity requires the custody award to and the involvement of only one "psychological" parent and visitation by the noncustodial parent at the "psychological" parent's discretion). This position of Goldstein, Freud and Solnit has been sharply criticized as unsupported by available empirical evidence and of questionable constitutionality. See, e.g., Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1 ILL. L. REV. 121, 140-74 (1983); Strauss & Strauss, Book Review, 74 COLUM. L. REV. 996 (1974).

<sup>12</sup> Pearson, *supra* note 6. See Steinman, *supra* note 11. See also M. Rosenberg, *supra* note 4, at 19-22; Cooke, *Mediation — A Boon to Courts and Citizens*, 20 CT. REV. 8, 9 (1982); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

mistic that mediation by attorneys working with mental health professionals is a useful procedure for encouraging some parents with potential or actual custody disputes to settle their differences, control their antagonism towards each other and work together cooperatively for the sake of their children. We do not pretend to have the data or broad experience that would permit us to compare the outcomes of mediated custody disputes with the outcomes of those custody disputes that are resolved through litigation or through negotiations between parents, with or without the participation of lawyers, therapists and custody evaluators.<sup>13</sup> Rather, we offer our thoughts with the hope of adding to the continuing, useful dialogue on how custody mediation can and should be conducted to serve the best interests of children.

## I. THE FRAMEWORK FOR OUR MEDIATION

Our involvement in custody mediation began in 1983, when Columbia Law School's Clinical Seminar in Advocacy for Children<sup>14</sup> ("the Clinic") received an unsolicited request from a separated<sup>15</sup> couple who wished us to mediate issues regarding custody of their child. The Clinic is an interdisciplinary endeavor staffed by law students,<sup>16</sup> law faculty supervisors and affiliated mental health professionals, including a consulting psychiatrist and a full-time social worker. Usually, the Clinic is formally appointed by the Family Court as a "law guardian" for children in custody disputes and foster care cases.<sup>17</sup> In this instance, however, the couple that requested our aid in mediating

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<sup>13</sup> Compare Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497 (1984) with Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525 (1984) and Pearson & Thoennes, *Dialogue: A Reply to Professor Levy's Comment*, 17 FAM. L.Q. 535 (1984).

<sup>14</sup> The Clinical Seminar in Advocacy for Children operates under the official name of Morningside Heights Legal Services, a nonprofit corporation established by Columbia Law School to administer its clinical programs.

<sup>15</sup> We use the words "separated" or "separation" in a popular rather than legal sense throughout this article to describe situations where at least one spouse believes the emotional relationship with the other spouse is over and as a result seeks to change the allocation of the couple's parental rights and responsibilities.

<sup>16</sup> See N.Y. JUD. LAW. §§ 478, 484 (McKinney 1983). Sections 478 and 484 of the Judiciary Law enable law students to gain valuable experience in clinical seminars by representing clients under the supervision of law school faculty in a program approved by the New York appellate courts. Clients, of course, must be informed of and consent to their representation by a student "attorney." See *infra* note 106.

<sup>17</sup> See N.Y. FAM. CT. ACT § 249 (McKinney Supp. 1983) (authorizing court appointment of law guardians in Family Court cases).

their dispute had no divorce or custody action pending in any court. Nor did they provide us with any guidance as to what they expected from "mediation."

Since the Clinic's interest in reducing trauma for the children of divorcing parents could be furthered by extending help to couples that had not yet invoked court process to settle their dispute, we decided to accept the couple's request for mediation services. Before we undertook the project, however, we wished to clarify the family's and our own expectations about what mediation involved. We therefore decided to formulate a set of "ground rules" for the process.

In creating those ground rules, we sought to answer the following typical questions that a prospective lawyer-mediator faces: How active a role should the mediator assume in the discussions? What legal standards, if any, should inform the mediator's suggestions to the parents? What subjects should be open for negotiation? Who is the mediator's "client"? Should the parents or the child retain independent counsel and, if so, how would outside attorneys be involved in the mediation process? What role should nonlawyer mental health professionals play in the mediation effort? To what degree should mediators be authorized to do independent investigation and thus invade the privacy of the couple seeking help in resolving their dispute? If the mediation should fail and the custody issues are litigated, what, if anything, revealed in mediation should be disclosed in court? What should be kept "confidential" between the spouses and the mediator, and what should not? How can the mediation process be structured to encourage courts to give maximum deference to mediated custody agreements?

Lawyers do not ordinarily prepare such a long list of hypothetical questions before accepting a new client. In our judgment, however, a set of operational ground rules embodied in a written retainer agreement was necessary in this case because many of the ethical problems posed by lawyer-assisted mediation are still largely unresolved. The Code of Professional Responsibility, in particular, furnishes little guidance to lawyers functioning as mediators.<sup>18</sup> The lawyers' ethical

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<sup>18</sup> The Family Law Section of the American Bar Association has recently taken a step towards reducing the uncertainty facing lawyers who want to act as mediators in family disputes by promulgating and publishing Standards of Practice for Family Mediators. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS (1984), reprinted in 17 FAM. L.Q. 455 (1984). The Family Law Section's Standards were not available when we drafted the custody mediation retainer agreement that is the subject of this article. Upon analyzing the Standards, however, we find that they are, in large part, consistent with our retainer agreement. *But see infra* notes 21, 114, 138, 151, & 154. The Standards have been adopted in principle by the Family Law Section, *see* Loeb, *Introduction to the Standards of Practice for Family Mediators*, 17 FAM. L.Q. 451, 453

code was developed in the context of a legal system in which judges authoritatively resolve issues based on facts and law presented by parties with adversary interests; it is designed primarily to describe the proper limits on the lawyer's advocacy role. For that reason, it does not focus on the particular problems of mediation in setting forth its general ethical standards. For example, are a lawyer-mediator's suggestions for settlement required to be limited to those consistent with existing law? The Code does not explicitly impose such an obligation, and some mediation proponents do not emphasize compliance with legal standards as a goal.<sup>19</sup> At best, the Code provides the prospective lawyer-mediator with an enumeration of the ethical issues she may encounter and a vague delineation of the outer boundaries of acceptable behavior.<sup>20</sup> We believed that these circumstances gave us, as prospective mediators, a special obligation of self-regulation that the very process of developing a written retainer agreement helps fulfill.<sup>21</sup>

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(1984), but without commentary, see Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 FAM. L.Q. 461, 463 (1984), suggesting that they might be modified in the future. The Standards are advisory only, in the sense that state bar associations, not the American Bar Association, have rulemaking authority for regulating the professional conduct of lawyers, Bishop, *supra* at 462. We will make reference to the Standards in this article, even though they did not influence the drafting of our mediation retainer agreement, in the hope of contributing to discussion about their merits.

<sup>19</sup> For example, John Haynes states that his aim for his book on divorce mediation is to "establish that people can be empowered to negotiate their own divorce settlement *outside* of the legal system." J. HAYNES, *supra* note 5, at xi (emphasis added). Nowhere in his list of eight criteria used to measure a "successful" divorce mediation is there an explicit statement that a settlement should reflect existing legal norms and doctrines on any issues. *Id.* at 127-28.

<sup>20</sup> The ABA Family Law Section's attempt to describe specific standards of practice for family mediators, see *supra* note 18, is in effect, an admission that the current lawyers' code of professional conduct is inadequate for establishing rules of conduct for lawyers acting as mediators.

<sup>21</sup> The American Bar Association's current Model Code of Professional Responsibility and the Model Rules of Professional Conduct recently proposed by the American Bar Association, encourage lawyers to put fee agreements in writing. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1980) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1983) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1983). Some kind of written retainer agreement between lawyer and client is thus the preferred legal practice.

The ABA Family Law Section's Standards of Practice for Family Mediators impose a general obligation on the mediator to "define and describe the process of mediation and its cost before reaching an agreement to mediate," STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. I (A)(1)-(7), *supra* note 18, at 455-56, and a specific obligation to have the parties to the mediation agree in writing that the mediator will not be required to disclose to third parties what is said during the mediation, STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. II(A), *supra* note 18, at 456. See *infra* note 138. The Standards do not impose a general requirement that a mediation retainer agreement be in writing. They also apparently do not even require that the mediator's fee arrangements be in writing and, to that extent, seem inconsistent with at least the spirit of Rule 1.5(b) of the Model Rules of Professional Conduct.

The couple that requested our help ultimately signed our retainer agreement and entered into mediation conducted by the Clinic. To protect the couple's confidences, we will not discuss the details of their dispute or their mediation in this article. It is important to note, however, that we drafted a formal, written custody and child support agreement for the couple that embodied the parents' ultimate decision to share decision-making, physical care and financial support of their child during an informal separation period pending divorce.

In drafting the parents' final agreement, we gave substantial thought to how they could deal with disputes about its terms or operation and with changed circumstances that might undermine its premises. The parents' signatures on a written custody agreement at the conclusion of the mediation would not be the end of the family's adaptation to a post-divorce environment. We therefore deemed it essential that the family establish a mechanism through which it could deal with any future disputes or changes in circumstances with minimal emotional and economic costs, in the same spirit of cooperation that we sought to encourage in the initial mediation sessions.<sup>22</sup> With this in mind, we included in the parents' custody agreement a series of clauses comprising what can loosely be called a custody modification dispute resolution mechanism. The modification procedures begin with face-to-face negotiations between the parents alone and, if the dispute is not resolved, proceed to mediation and, perhaps, to arbitration.

A note of caution is warranted at the outset. Every mediation retainer agreement or future dispute resolution mechanism must be specifically tailored to the circumstances of both the mediator and the family members affected by the dispute. Our circumstances were those of a law school-based, interdisciplinary clinic undertaking pri-

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The Standards seem to us inadequate in this respect. When a lawyer engages in a dispute resolution process like mediation, one with which the client is relatively unfamiliar, we believe a more detailed written retainer agreement that includes a description of fee arrangements is necessary to clarify the role expectations of all concerned. The retainer agreement serves as a valuable checklist of issues to discuss with the client before mediation begins. It also serves to protect the lawyer from charges of fraud and overreaching should the relationship of mediator and client deteriorate. Finally, it is an aid to a court that might have to decide what weight to give a custody agreement reached through mediation. *See infra* text accompanying notes 179-85. We thus encourage other attorney-mediators to employ a detailed written retainer agreement and the Family Law Section to modify the Standards to require a written retainer agreement.

<sup>22</sup> J. WALLERSTEIN & J. KELLY, *supra* note 5, at 316-17.



vate mediation<sup>23</sup> in New York State without compensation.<sup>24</sup> Uncritical use of our agreements in materially different circumstances would be unwise. We offer what we developed instead as a stimulus for further discussion and as a checklist of the issues to be considered before a lawyer assumes the mediator's role.

We recognize that our retainer agreement and modification provisions were developed in an optimal environment. As members of a clinic affiliated with a large university, we did not have to worry about collecting fees to keep the lights on. We have a small caseload, a great deal of discretion in choosing our cases, an excellent mental health staff with whom to consult continuously, and the luxury of being able to devote substantial care and attention to each matter we undertake. We believe, however, that this article and the sample provisions it describes fulfill what we hope will be an increasingly important function of clinical projects at law schools — experimenting with models for the delivery of legal services that can then be replicated in and adapted to other settings. It is our hope that future attorney-mediators can benefit from the mediation and modification procedures that the Clinic developed.

## II. THE RETAINER AGREEMENT

### A. *Issues To Be Mediated and Standards To Be Applied*<sup>25</sup>

We began the retainer agreement with an explicit statement of the

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<sup>23</sup> Private mediation services such as ours should be distinguished from public mediation programs such as California's, which are implemented under the auspices of the courts and treat mediation as a public function. *See supra* note 3. Public mediation is often conducted by a state employee whose formal court affiliation may give him a degree of coercive power to compel the family to participate in the mediation and to influence the court decision through recommendations if mediation fails. *Cf. McLaughlin v. Superior Court*, 140 Cal. App. 3d 473, 483, 189 Cal. Rptr. 479, 486 (Ct. App. 1983) (parties have a right to cross-examine mediator/evaluator who makes custodial recommendations to the court under California's mandatory mediation program). The mediation process we developed, in contrast, began with the assumption that participation by all concerned was voluntary and that the clients could withdraw at any time without sanctions.

<sup>24</sup> We recognize that because our mediation services were free of charge, as required by the Clinic's student practice order, *see supra* note 16, we had a greater degree of freedom from economic constraints — both our own and the family's — than attorneys conducting private mediation on a fee basis will enjoy. Presumably, if we had conducted the mediation for a fee, the cost would have been divided between the parents equally based on their respective abilities to pay. The ABA Family Law Section's Standards of Practice for Family Mediators prohibit mediators from making contingent fee arrangements with couples to which services are provided. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. I(A)(5), *supra* note 18, at 456.

<sup>25</sup> *See* Appendix A, ¶ 1 for the portion of the retainer agreement dealing with the issues

Clinic's perception of the proper focus and agenda of the mediation process. Rather than assume that *any* parental agreement resulting from mediation would inevitably be in the child's interests because it would represent a willing compromise between the parents,<sup>26</sup> we structured the mediation around the relevant legal standard:<sup>27</sup> the best interests of the child.<sup>28</sup>

We are, of course, familiar with the trenchant criticisms of the vagueness and uncertainty of the "best interests" standard.<sup>29</sup> The elasticity of the concept could leave a mediator free to define it as she wished, raising the danger that the mediator would, consciously or unconsciously, impress her own values on the couple.<sup>30</sup>

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discussed in this section of the article.

<sup>26</sup> This appears to be the position of John Haynes, who has written:

The mediator must always remember his/her primary function, that is, to facilitate the negotiations of some other persons' divorce or separation agreement. When the agreement is drawn up it belongs to the couple and affects their future lives and the lives of the children . . . .

. . . .  
The mediator has the power to influence the couple in any given direction. However, if s/he moves the couple too far out of an acceptable pattern, the possibility develops that although the arrangement is written into the agreement, the couple actually operate under [its] own idea of what is proper. In that case the mediator has helped draft an agreement that will be honored in the breach, with all the consequent legal dangers.

J. HAYNES, *supra* note 5, at 135. Although Haynes suggests here that the mediator's function is to facilitate agreement regardless of governing legal standards and norms, he suggests elsewhere that the mediator seek to achieve certain substantive goals for the family: "an uncoupling of the spouses in a way that leaves no victims, allows the couple open lines of communication between themselves, and provides each child with a direct and open line of communication to each parent." *Id.* at 35. Haynes never seems to resolve the tension between these competing views. We suggest that the dilemma be resolved in favor of the child's interests in maintaining communication with both parents.

<sup>27</sup> Under the Model Rules of Professional Conduct the attorney may restrict the scope of the representation by limiting its objectives in advance if the client consents. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1983). The Family Law Section's Standards of Practice for Family Mediators strongly imply, but do not specifically state, that the mediator can limit the subjects to be covered in the mediation with the participants' consent. See STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. I(A)(2), (3), *supra* note 18, at 456.

<sup>28</sup> N.Y. DOM. REL. LAW. § 240 (McKinney Supp. 1983). The Standards of Practice for Family Mediators agree that the mediator has a duty to promote the best interests of the child:

The mediator has a duty to promote the best interests of the children. The mediator also has a duty to assist parents to examine the separate and individual needs of their children and to consider those needs apart from their own desires for any particular parenting formula. If the mediator believes that any proposed agreement between the parents does not protect the best interests of the children, the mediator has a duty to inform them of this belief and its basis.

STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. III(E), *supra* note 18, at 457.

<sup>29</sup> See Mnookin & Kornhauser, *supra* note 12, at 958; Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 249-54 (1975).

<sup>30</sup> The ABA Family Law Section's Standards for Family Mediators do not provide any guid-

However, we did not approach the "best interests" test from a philosophical vacuum. Rather, we began our evaluation of custody plan proposals with the assumption, based upon significant empirical evidence,<sup>31</sup> that a child's interests are usually best served by maximizing his contact with both parents in the post-divorce family and ensuring both parents a meaningful role in his future.<sup>32</sup> This philosophy can express itself in a wide variety of post-separation cooperative parenting arrangements, including but not limited to joint decision-making ("legal custody") and joint responsibility for child care ("physical custody").<sup>33</sup>

Parents voluntarily undertaking custody mediation are much more likely to be receptive to such a philosophy than are parents who resort to the adversary system to settle a custody dispute.<sup>34</sup> Mediation, in turn, further encourages and reinforces this cooperative attitude. Mediation may thus be seen as a procedural handmaiden to joint custody and a device for implementing its values.<sup>35</sup>

We view joint custody as a philosophical commitment rather than a rigid rule of law mandating that all parental decisions be made jointly or that the child spend fifty percent of each week with each parent. A family's circumstances are too unique and the available empirical evidence too tentative to allow someone who is helping parents formulate post-separation custody arrangements to say unequivocally that particular divisions of time or decision-making responsibility between parents are always in a child's best interests. Rather, a mediator helping parents devise a custody plan should properly take

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ance to help mediators define the "best interests of the child."

<sup>31</sup> See, e.g., J. WALLERSTEIN & J. KELLY, *supra* note 5, at 132-34; Abarbanel, *Shared Parenting After Separation: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 320 (1979). See generally Clingempeel & Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOLOGICAL BULL. 102 (1982) (review of empirical research on joint custody).

<sup>32</sup> See *Beck v. Beck*, 86 N.J. 480, 486-88, 432 A.2d 63, 65-66 (1981). In adopting this premise, we assume that neither parent lacks basic parenting skills or capabilities or is physically or emotionally abusive to or neglectful of the child. Even if a parent had such problems, the child might be better served by maintaining contact between the child and the parent undergoing rehabilitation and therapy than by isolating the child from the parent indefinitely. See *Santosky v. Kramer*, 344 U.S. 745, 765 n.15 (1982); Giarretto, *Humanistic Treatment of Father-Daughter Incest*, in CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 146 (1976).

<sup>33</sup> *Beck v. Beck*, 86 N.J. 480, 497-500, 432 A.2d 63, 71-72 (1981). See Steinman, *supra* note 11, at 740-41.

<sup>34</sup> Pearson, *supra* note 6, at 10.

<sup>35</sup> The Denver Mediation Project, for example, reports that couples who engage in mediation are far more likely to develop joint custody arrangements than couples who utilize the adversarial process. Pearson, Thoennes & Van Kool, *Mediation of Contested Child Custody Disputes*, 11 COLO. LAW. 336, 339 (1982).

into account a wide variety of factors, such as the extent of child care and decision-making responsibilities each parent is willing to assume; the parents' work schedules, personal obligations and future plans; the size of the parents' living accommodations and their suitability for children; the parents' geographical proximity to one another; the presence or absence in the family of siblings and stepparents; the age, mental and physical capacity and schooling needs of the child; and the child's own wishes.

Our joint custody orientation served as a basic philosophical framework for the custody mediation. To build on that framework, we intended to ascertain the particular needs and interests of the child whose custody arrangement we would be mediating. We felt that our Clinic was as qualified as any person or institution to help the parents formulate the details of a custody plan that would serve that individual child's "best interests." Our mental health professionals would interview the child and the parents to learn about their concerns regarding separation and divorce, to ascertain their custody plan preferences and then to assess the situation independently.<sup>36</sup> Our lawyers would talk to each family member, examine the family's situation in great detail, and draft the documents necessary to make a custody plan concrete. No other institution that might come in contact with this family except, perhaps, an unusually well-structured and staffed family court, would devote as much time, attention and expertise as we could to a determination of the child's needs and an assessment of the quality and feasibility of the parents' proposed custody plans.

We defined the purposes of mediation, therefore, as twofold: facilitating cooperation and communication between the family members so as to encourage maximum contact with the child by both parents and helping the parents develop a custody plan specifically tailored to their child's individual interests. We hoped that this early delineation of our goals for the mediation would give the parents a common reference point — their joint interest and involvement in their child's welfare — to guide them in their post-separation planning.<sup>37</sup> In that way, the negotiations between the parents could focus on their plans for the child's future rather than on their past difficulties.<sup>38</sup> We were, to use Roger Fisher's and William Ury's phrase, trying "to separate

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<sup>36</sup> See *infra* text accompanying notes 84-95.

<sup>37</sup> See R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 84-96 (1981).

<sup>38</sup> *Id.* at 5-7 (discussing the opposite effects of employing positional as opposed to cooperative bargaining).

the people from the problem."<sup>39</sup>

This "best interests" orientation of the mediation was complemented by the limitation we imposed on the scope of the process. Rather than discussing all disputed issues between the separating spouses, we restricted the mediation's agenda to child-related topics.<sup>40</sup> We would not attempt to reconcile the parties although, admittedly, the children would not face the harsh consequences of divorce if genuine reconciliation did occur. Even if we had been equipped to do marriage counseling, the parents had not requested such services.<sup>41</sup> Our objective was limited to helping the parents recognize and manage the effects of their planned separation or divorce on their child.<sup>42</sup>

We decided to mediate issues of child support as well as custody. Child support is a fundamental obligation both parents owe their children morally and legally,<sup>43</sup> an obligation we believe to be inextricably intertwined with child custody.<sup>44</sup> Inadequately funded physical custody arrangements are a major source of psychological distress for children, who often experience not only a loss of emotional support but also a significant decline in their standard of living after divorce.<sup>45</sup> We therefore concluded that we could not properly mediate a custody agreement without ensuring that it provided for the child's financial support.

In addition, patterns of behavior in child custody and support are generally linked. More contact with a child seems to encourage

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<sup>39</sup> *Id.* at 11.

<sup>40</sup> But see O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* 117 (1978) (no restriction should be placed on the issues to be mediated).

<sup>41</sup> We were prepared to refer them to a marriage counselor if it appeared that the parents wanted those services.

<sup>42</sup> "Once divorce is inevitable, the professional's role changes to one of attempting to make the separation as painless as possible, to help the couple maintain their individual dignity, and to assist the children to make the transition by reducing the conflict inherent in the process of divorce." J. HAYNES, *supra* note 5, at 4. Cf. O.J. COOGLER, *supra* note 40, at 118 (mediation rules explicitly state that the decision to dissolve the marriage is not at issue).

<sup>43</sup> See *Brescia v. Fitts*, 56 N.Y.2d 132, 436 N.E.2d 518, 451 N.Y.S.2d 68 (1982); N.Y. DOM. REL. LAW. §§ 236, 237, 240 (McKINNEY SUPP. 1983-1984); N.Y. JUD. LAW § 461(A) (McKINNEY 1983).

<sup>44</sup> The California mandatory custody mediation statute, CAL. CIV. CODE § 4607 (West Supp. 1983), provides for mediation of only custody and visitation, not support. This limitation may be due to that state's reliance on formulas to determine child support amounts. See Lefcourt, *The Use of Mediation to Resolve Family Disputes*, N.Y.L.J., Mar. 29, 1983, at 1, col. 2.

<sup>45</sup> J. WALLERSTEIN & J. KELLY, *supra* note 5, at 23-25, 42-43, 231; Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1260-63 (1981).

higher levels of payment of child support.<sup>46</sup> Voluntary, out-of-court, written settlements also seem to encourage higher levels of child support payment.<sup>47</sup> It thus serves the child's interest in adequate financial support to have child support issues addressed in custody mediation.

Unlike custody and child support, issues of spousal support, division of marital assets and other property arrangements necessitated by a disruption of the family unit focus primarily on each parent's rights and not on their common obligations to their child. We recognize, of course, that resolution of these issues can be integrally connected to the child's welfare; their resolution may well affect the child's standard of living, and the parents' satisfaction or dissatisfaction with the arrangements will affect their willingness to cooperate on parenting issues.<sup>48</sup> Property division and spousal support issues, however, are inherently "zero-sum,"<sup>49</sup> in the sense that one parent's gain is the other parent's loss; giving one parent more property or maintenance means taking it from the other. Since it is a fair assumption that each parent will seek to maximize his or her own welfare, negotiations that deal with zero-sum issues are likely to be highly adversarial.<sup>50</sup> Thus, the argument that each spouse should be separately represented in such negotiations gains force.<sup>51</sup>

Custody and support issues can also be characterized as a zero-sum. Increased child support paid by one parent may lessen the support obligation for the other, assuming that the child's financial needs are defined as a fixed sum. Likewise, more time for one parent alone with the child means less time available for the other parent. Finally, if one parent has the exclusive right to decide where a child will be educated, the other does not.

It is not, however, in the child's, and thus society's, best interests

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<sup>46</sup> D. CHAMBERS, *MAKING FATHERS PAY* 128 (1979).

<sup>47</sup> U.S. Dep't of Commerce, Bureau of the Census, Series P. 23, No. 124, *Child Support and Alimony: 1981 (Advance Report)* 2 (May 1983).

<sup>48</sup> J. WALLERSTEIN & J. KELLY, *supra* note 5, at 24-26. In comparing the post-divorce income of husbands and wives with dependent children, even assuming full compliance with alimony and child support orders, Weitzman concluded that the presence of children greatly exacerbates "the discrepancy between the [spouses'] postdivorce standards of living, especially among middle-class and upper-middle-class couples, that fosters much of the feeling of injustice expressed by so many women [as the traditional custodial parent] after divorce." Weitzman, *supra* note 45, at 1244-46.

<sup>49</sup> See L. THUROW, *THE ZERO-SUM SOCIETY* 11 (1980).

<sup>50</sup> G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 130 (1983).

<sup>51</sup> *But see* Levine v. Levine, 56 N.Y.2d 42, 436 N.E.2d 476, 451 N.Y.S.2d 26 (1982) (suggesting that an attorney for one spouse can draft a separation agreement for both without the agreement being *per se* invalid).

for parents to view custody and child support issues as inherently adversarial; the child needs the time, guidance and financial resources<sup>52</sup> of both his parents to cope with the enormous difficulties of post-divorce life. Mediation, which can encourage parents not to take a zero-sum view of child-related issues but rather to work together toward common parenting goals, serves as a particularly suitable process for resolving child custody and support issues. By excluding property division and spousal support from the mediation agenda, we were, in effect, telling the parents that they could treat each other as adversaries when it came to the purely monetary issues between them but not when it came to their child.

Focusing the initial mediation efforts on the child-related issues and leaving other matters for later resolution had two distinct benefits. First, limiting the agenda to the child maximized the possibility of parental agreement on at least some issues, thereby laying a foundation of trust and cooperation on which future agreements could build.<sup>53</sup> Second, resolving the child's future first reflected a symbolic commitment to the view that the parents' and society's first concern in the process of disentangling families should be the children. Morally, "[t]he choice between the possibility of harm inflicted on a mature, responsible adult and a developing, helpless child seems a clear one."<sup>54</sup> Thus, while we purposefully restricted the scope of the mediation to our areas of competence and expertise,<sup>55</sup> we believe that directing initial mediation efforts to child-related concerns also makes good policy sense.

We were aware that limiting the range of issues on which the parents could negotiate during the mediation reduced the possibilities of "integrative bargaining,"<sup>56</sup> that is, allowing the parents to make trade-offs and compromises on all divorce-related issues. For example, limiting the negotiation agenda to child custody and support would prevent a parent from giving up the right to a certain level of

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<sup>52</sup> See *supra* note 43 (citing authorities).

<sup>53</sup> See T. SCHELLING, *THE STRATEGY OF CONFLICT* 45 (1960).

<sup>54</sup> Note, *Alternatives to "Parental Rights" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 156 (1963). See also Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 85-90 (1981).

<sup>55</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 ("A Lawyer Should Represent a Client Competently"); *id.* EC 6-1; *id.* DR 6-101 (1980). Cf. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. IV (C), *supra* note 18, at 458 (requiring mediator to "endeavor to assure" participants have "sufficient understanding of governing law," thus implying an obligation on the mediator to understand the governing law).

<sup>56</sup> See Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 KANSAS L. REV. 69, 95-96 (1982).

maintenance in exchange for increased contact with his or her child. Such integrative bargaining might have maximized the parties' satisfaction with the ultimate settlement. On the other hand, it also could have permitted the parent in the stronger bargaining position at the beginning of the dispute to extract from the other parent concessions on custody arrangements that were unrelated to the child's welfare. We believed that parents should not be required to sacrifice contact with their child in exchange for necessary economic support or needed support in exchange for custody or visitation privileges. As one writer has said, "such behavior [by the parents] comes close to active abandonment of ethical propriety insofar as the child's interests are concerned."<sup>87</sup>

Historically, allowing trade-offs between monetary and custody issues has had a particularly adverse financial effect on mothers. As the traditional primary caretaker of children in this society, mothers tend to be "risk-averse"<sup>88</sup> about their role in the child's life; when custody and maintenance issues are linked in bargaining, women faced with uncertainty about the custody arrangement that a court may order after litigation are more likely than men to make financial concessions to avoid jeopardizing their custody rights.<sup>89</sup>

The justification for structuring the agenda to favor the parent who is less willing to risk his or her contact with the child does not, however, turn on the likely gender of that parent; many men are also obviously concerned about the risk of losing contact with their children after divorce. Rather, the justification turns on the child's interest in meaningful contact with both of his or her parents following their divorce.<sup>90</sup> Given our goals as mediators, we necessarily rejected structuring the agenda to reward the parent who was willing to risk his or her relationship with the child to gain advantage in an equitable distribution and maintenance struggle.

### B. *Who Is the Client?*<sup>91</sup>

Current rules of professional responsibility require the lawyer oper-

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<sup>87</sup> Watson, *supra* note 8, at 59.

<sup>88</sup> Mnookin & Kornhauser, *supra* note 12, at 970-71.

<sup>89</sup> *Id.*; Weitzman, *supra* note 45, at 1252-53.

<sup>90</sup> See *Weiss v. Weiss*, 52 N.Y.2d 170, 174-75, 418 N.E.2d 377, 379-80, 436 N.Y.S.2d 862, 865 (1981) (visitation with the noncustodial parent following divorce should not be considered that parent's "natural right" since such a characterization ignores "the primacy of the child's welfare"). See also *supra* note 11 (citing authorities).

<sup>91</sup> See Appendix A, ¶¶ 3 & 4 for the portion of the retainer agreement dealing with the issues



ating in the adversary system to represent his or her clients zealously and without conflicting obligations toward other parties.<sup>62</sup> Although multiple representation of potentially conflicting interests is permitted in limited circumstances,<sup>63</sup> it is the disfavored exception to the general rule.

The basic assumption of mediation, in contrast, is that the disputants have common interests that can be shaped into a mutually beneficial agreement. A mediator generally works with parties in potential conflict, reversing the basic assumption of the lawyer in an adversary system — that parties with even potentially conflicting interests are better served by separate attorneys.

In an attempt to fit mediation into the framework of traditional legal ethics, we asked ourselves the traditional lawyer's question: who is our client? As mediators between parents who would be seeking to reach an agreement on child custody and support issues on which their interests would both converge and diverge, we could conceivably define our client as any of the following: one parent, both parents, the child, the entire family, or no one.

We felt it essential to avoid taking sides with either parent in the mediation<sup>64</sup> unless necessary to further the child's interests. We could not, then, represent one parent and leave the other unrepresented, a technique that has been suggested<sup>65</sup> to circumvent the ethical problems inherent in representing two clients with potentially divergent interests.<sup>66</sup>

We could represent both parents, provided that their interests were "substantially but not entirely compatible" and they consented

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discussed under this heading.

<sup>62</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

<sup>63</sup> *Id.*

<sup>64</sup> See STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. III, *supra* note 18, at 457.

<sup>65</sup> Silberman, *Professional Responsibility Problems of Divorce Mediation*, 7 FAM. L. REP. (BNA) 4001 (1981). See Ohio State Bar Ethics Committee, Op. 30 (O.S.B.A. Report 780 1975) (permitting an attorney to draft a separation agreement when representing one parent only if the other parent consents to being unrepresented). A recent New York Court of Appeals case has stated that an attorney who drafts a separation agreement and represents one spouse while the other is unrepresented is not *per se* overreaching. *Levine v. Levine*, 56 N.Y.2d 42, 436 N.E.2d 476, 451 N.Y.S.2d 26 (1982). Thus, we may have been ethically permitted to represent only one parent. We nevertheless deemed such a role arrangement inconsistent with a mediator's neutrality.

<sup>66</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105; *id.* EC 5-14 to 5-16 & 5-19 (1980). See STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. III(A), *supra* note 18, at 457 ("A lawyer-mediator shall not represent either party during or after the mediation process in any legal matters.").

after full disclosure.<sup>67</sup> Nevertheless, we declined to do so. We preferred that the parents look to outside counsel to protect their self-interests. First, there is an obvious danger inherent in joint representation — that the lawyer's advice to one client would compromise his or her obligations to the other. Second, we feared that, despite our best intentions, we might unconsciously identify with one parent's situation and be less impartial than the standard for joint representation requires. Finally, representing the parents and not the child was incompatible with our view that the child's interests should prevail if a conflict arose between the parents' and the child's interests.<sup>68</sup>

Despite our decision not to represent either or both parents, we knew they would view us as an authoritative source of legal advice. Moreover, any custody and support agreement they signed would necessarily affect their legal rights. We therefore felt ethically compelled to advise them of their potential conflict of interests to ensure that their consent to the process would be fully informed.<sup>69</sup> Because we had refused to represent either parent, it was also important that the parents were aware of the option to seek independent legal advice at any time during the process.<sup>70</sup>

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<sup>67</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980). The Code of Professional Responsibility envisions a lawyer serving as a "mediator" between clients with conflicting interests, see *id.* EC 5-20, but does not define the mediator's role or explain how a lawyer can play that role consistent with the general prohibition of Canon 5 against representing conflicting interests. See New York City Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 80-23 (1981), reprinted in 7 FAM. L. REP. (BNA) 3097 (1981) [hereinafter cited as N.Y.C. Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 80-23].

The Model Rules of Professional Conduct, not yet adopted by the state bar associations, also envision that the attorney can act as an intermediary "between clients," MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(a) (1983), when "the clients' interests are substantially though not entirely compatible," *id.* Rule 2.2 comment. Rule 2.2, however, "does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties." *Id.* The Model Rules of Professional Conduct do not clearly distinguish between a lawyer acting as an intermediary between clients and a lawyer acting as a mediator without clients. The comments to Rule 2.2 suggest that how the lawyer designates herself is a decision left to her discretion, presumably to be made after consultation with the affected parties.

The ABA Family Law Section's Standards of Practice for Family Mediators seem to suggest that a lawyer acting as a mediator is prohibited from regarding either parent as a client, see *supra* note 66.

<sup>68</sup> See *supra* text accompanying note 54.

<sup>69</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(c) (1980) (compelling disclosure of multiple representation). See also MODEL RULES OF PROFESSIONAL CONDUCT rule 1.7 (1983); N.Y.C. Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 80-23, *supra* note 67; Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 248-50 (1982).

<sup>70</sup> See Boston Bar Ass'n Comm. on Ethics, Op. 78-1 (1978); N.Y.C. Bar Ass'n Op. 80-23, *supra* note 67; Silberman, *supra* note 65, at 4003; STANDARDS OF PRACTICE FOR FAMILY MEDIATORS, art. VI(A), *supra* note 18, at 459. See *infra* text accompanying notes 92-100.

Having declined to represent either or both parents, we could have taken the alternative position that we represented the child — that the parents, in effect, had hired us without charge to be the child's lawyer.<sup>71</sup> If we had explicitly established a lawyer-client relationship with the child,<sup>72</sup> however, we would have been bound by the prohibition against disclosing a client's confidences without consent.<sup>73</sup> A lawyer whose client is a child has the same obligation not to disclose client confidences as a lawyer whose client is an adult.<sup>74</sup> This prohibition seemed inappropriate in a process designed to facilitate open communications within the family unit. We wanted to be free to tell the parents whatever their child told us, without agonizing about whether our professional obligations to our client would permit such action, if we believed that it would help the parents plan more effectively for the child's future. We also wanted our affiliated mental

<sup>71</sup> See New York City Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 82-18 (1983).

<sup>72</sup> See generally Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes*, 87 YALE L.J. 1126 (1978).

<sup>73</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

<sup>74</sup> See Institute of Judicial Administration, American Bar Association, Counsel for Private Parties, JUVENILE JUSTICE STANDARDS, Rule 3.3 (1979) [hereinafter cited as JUVENILE JUSTICE STANDARDS]. Rule 3.3 provides:

(a) Establishment of confidential relationship. Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation, at the same time explain that the lawyer's obligation of confidentiality makes privileged the client's disclosures relating to the case.

(b) Preservation of client's confidences and secrets.

(i) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal a confidence or secret of a client to another, *including the parent of a juvenile client*.

(d) Disclosure of confidential communications.

. . . A lawyer may reveal:

(i) confidences or secrets with the informed and competent consent of the client or clients affected. . . .

(ii) Confidences or secrets when permitted under disciplinary rules of the ABA Code of Professional Responsibility or as required by law or court order.

(iii) The intention of a client to commit a crime. . . .

*Id.* (emphasis added). The comment to Rule 3.3(b) states that "an attorney [for a child] may not reveal to parents statements made by the juvenile client within the professional relationship" unless one of the criteria for an exception to the rule of confidentiality is satisfied. *Id.* comment. The comment to Rule 3.3(d) regarding disclosure of confidential communications states, "Section 3.3(d) follows the ABA Code of Professional Responsibility, DR 4-101(c), in specifying circumstances in which lawyers may reveal their client's confidences or secrets. Generally, these rules apply to juvenile cases as they do to other matters." *Id.* comment. See also MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.14(a) (1983) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, . . . because of minority, . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

health professionals to have the same professional freedom to share the child's concerns and problems with the parents. Characterizing the Clinic's client as the child could hinder them as well as us in this objective.<sup>75</sup>

We also did not characterize ourselves as the child's lawyer because we did not want to be bound by the child's definition of the objectives of the representation.<sup>76</sup> Lawyers for children are bound by the same requirements of zealous representation as are lawyers for adults;<sup>77</sup> if we deemed ourselves the child's lawyer, the ethical precepts of the profession would require us to "abide by a client's decisions concerning the objectives of representation."<sup>78</sup> Such zealous advocacy of any position that the child might take, however, seemed potentially inconsistent with our goals for the mediation: encouraging the parents to communicate, cooperate and compromise in caring and planning for their child after the separation or divorce and helping them to define a particular custody plan that would more specifically further their child's best interests.

Simply put, in defining their preferences for post-separation custody arrangements, children do not always know where their best interests lie.<sup>79</sup> For example, a child's expressed preference to live with one parent may be attributable to a particular stage of psychological development, to the child's temporary anger at one parent for "causing" the divorce, or to a desire to bribe or punish one or both of them. Younger children, in particular, lack the capacity for long-range thinking and projection that is important for such critical decisions and often come to regret their initial custodial choices later in life.<sup>80</sup> In addition, asking a child to make a choice of custodial arrangements can create an extremely stressful, frustrating, and guilt-inducing situation for the child,<sup>81</sup> especially since we could not guarantee that his parents would respect his stated preferences.

Judges in litigated custody battles are charged to consider a child's

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<sup>75</sup> See American Medical Association, Judicial Council, Op. (1982); Sussman, *Reporting Child Abuse*, 8 FAM. L.J. 245, 297-99 (1974).

<sup>76</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

<sup>77</sup> "[T]he goals of adequate disclosure of all relevant information and the achieving of just results in juvenile proceedings can best be obtained by counsel assuming in juvenile court the functions of counseling and advocacy in the same manner as in other courts of civil and criminal jurisdiction." JUVENILE JUSTICE STANDARDS, *supra* note 74, at 7.

<sup>78</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

<sup>79</sup> See *Lincoln v. Lincoln*, 24 N.Y.2d 270, 247 N.E.2d 659, 299 N.Y.S.2d 842 (1969); J. WALLERSTEIN & J. KELLY, *supra* note 5, at 314-15. See generally Note, *supra* note 72, at 1163-72.

<sup>80</sup> J. WALLERSTEIN & J. KELLY, *supra* note 5, at 314-15.

<sup>81</sup> *Id.*, *supra* note 5; see S. Meehan, *supra* note 9, at 65-67, 80-91.

preferences and to give them greater weight as the child grows older, but not to treat them as dispositive.<sup>82</sup> We decided to give the child's preferences the same weight in mediation as they would have in the courtroom. Our conclusion was that custody mediators should listen to the child's custodial preferences but must do so critically and should feel free to disregard them with good reason.

Our decision not to be the child's lawyer in the mediation was also based on a related belief that the allocation of decision-making power in the family undergoing separation should parallel the legal system's allocation of such power in the pre-divorce family. In a legally intact family, the parents have a constitutionally protected right to override a child's preferences on most major issues concerning the child's care and custody,<sup>83</sup> although they should obviously take their child's wishes into account. One of the major problems in the post-divorce family is the perception by the child that the authority and competence of his parents have been eroded by the divorce experience.<sup>84</sup> We attempted to structure the mediation process to protect and reinforce parental decision-making authority in the post-separation family while focusing the parents' attention on the child's best interests. The achievement of this goal would be more difficult if we gave the child, and only the child, a legal representative during mediation. This would magnify the child's capacity to influence his parents' decisions out of proportion to his capacity to do so before the family's separation.<sup>85</sup>

Thus, despite the Clinic's usual designation as a law guardian bound zealously to advocate the child's preferences, we decided to play a different role in this mediation setting. The decision was not an easy one and took extended discussion within the Clinic. Ultimately, we supported our conclusion by distinguishing our proper role as child advocates under court appointment from our role when two parents seek our help voluntarily to mediate a dispute concerning their child.

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<sup>82</sup> See *Freiderwitzer v. Freiderwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982); *Dintruff v. McGreevy*, 34 N.Y.2d 887, 316 N.E.2d 716, 359 N.Y.S.2d 281 (1974); *Salk v. Salk*, 89 Misc.2d 883, 889, 393 N.Y.S.2d 841, 845 (Sup. Ct. 1975); CONN. GEN. STATS. § 46b-56(b) (West Supp. 1984) (child's preference is one factor in any best interests determination, "if he is of sufficient age and capable of forming an intelligent preference").

<sup>83</sup> See *Parham v. J.R.*, 442 U.S. 584 (1979). See generally *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1351-57 (1980).

<sup>84</sup> See J. WALLERSTEIN & J. KELLY, *supra* note 5, at 36, 168. See generally C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1979).

<sup>85</sup> See J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 105-11 (1979).

By asking a judge to resolve their custody dispute, parents declare themselves unable to resolve their differences on their own. One parent, or perhaps both, believes that the coercive decision-making power of the court is preferable to private agreement on post-separation custodial arrangements. Therefore, once parents invoke the coercive power of the court to resolve their dispute, the presumption of autonomy and competence that normally protects parental decision-making power from state scrutiny is weakened. When the parents cannot decide on the child's future themselves, counsel for each parent will zealously promote their client's particular views in an attempt to influence the court's exercise of its coercive power. In these circumstances, the state may appoint a lawyer for the child to aid it in deciding on a custody arrangement, even if the parents' decision-making autonomy is reduced as a result. If coercion is to be exercised, the child also should be heard as to how.

If the parents voluntarily seek mediation, however, we assume that they desire and are able to settle their disagreements without invoking the coercive power of a court. The parents have not declared themselves presumptively incapable of jointly making decisions concerning their child by asking someone else in authority to make those decisions for them. The rationale for giving their child, and no one else, a zealous advocate for his preferences thus disappears in the mediation setting.

We rejected the fourth alternative, representing all three family members, for the same reasons that we declined to represent the parents jointly<sup>86</sup> or to represent the child.<sup>87</sup> Such triple representation would further compound the ethical problems of potentially conflicting loyalties and confidentiality obligations to multiple clients.

We thus ultimately concluded that we could best serve our two goals — defining and advocating the particular child's "best interests" and promoting a general atmosphere of communication, compromise and cooperation in a reconstituted family unit — by presenting ourselves as advocate for neither the parents nor the child,<sup>88</sup> but as, in effect, "counsel for the situation."<sup>89</sup> Mediators, we decided,

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<sup>86</sup> See *supra* text accompanying notes 67-70.

<sup>87</sup> See *supra* text accompanying notes 71-85.

<sup>88</sup> See Oregon Bar Ass'n Comm. on Legal Ethics, Op. 70-46 (1980); Boston Bar Ass'n Comm. on Ethics, Op. 78-1 (1978); New York State Bar Ass'n Comm. on Professional Ethics, Op. 258 (1972); Silberman, *supra* note 65, at 4002.

<sup>89</sup> This phrase was coined by Justice Brandeis in describing the attorney's role when the interests of a client, such as a child, are so closely tied with those of other parties. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 64-65 (1978). See also Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965); Note, *supra* note 72, at 1176-77. But see Crouch,

should not be anyone's personal "attorney" in the traditional sense.<sup>90</sup>

### C. *Relationship of Outside Counsel to the Mediation Process*<sup>91</sup>

At several points in the retainer agreement we tried to encourage the parents to look to outside counsel for advice regarding their individual legal rights.<sup>92</sup> We anticipated that the parents might consult with private counsel for help in deciding whether to undertake the mediation,<sup>93</sup> in weighing the advisability of various interim custody and support proposals suggested during the course of mediation,<sup>94</sup> and before signing any final custody agreement that we drafted for them.<sup>95</sup>

Their attorneys, however, would not personally participate or be present as silent observers during the mediation sessions.<sup>96</sup> Our theory was that the presence of counsel for the parents during the mediation would significantly complicate the negotiation process and increase the likelihood that it would develop an adversarial, "zero-sum" tone. The presence of counsel could also hinder communication between the parents; many lawyers have a tendency to speak for their clients during a negotiation session even if their clients are present. Since one of the major benefits of mediation reported by researchers is that participants tend to understand each other better because they communicate directly,<sup>97</sup> we believed that the parents were more

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*supra* note 69, at 228 (criticizing the phrase for being intentionally vague and devoid of ethical standards).

<sup>90</sup> For a general critique of this type of solution to mediation's ethical problems, see Crouch, *supra* note 1 and Crouch, *supra* note 69.

<sup>91</sup> See Appendix A, ¶¶ 3, 7, 10 & 11 for the portions of the agreement discussed in this section.

<sup>92</sup> See STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. VI, *supra* note 18, at 459 (stating that mediators should urge participants to obtain such outside legal advice).

<sup>93</sup> See *infra* text accompanying note 155.

<sup>94</sup> See *infra* text accompanying note 70.

<sup>95</sup> See *supra* text accompanying notes 156-57.

<sup>96</sup> The ABA Family Law Section's Standards of Practice for Family Mediators state that "[e]ach of the mediation participants should have independent legal counsel before reaching final agreement," STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. VI(A), *supra* note 18, at 459, but do not authoritatively decide whether the mediation participants should have a right to have their counsel present at mediation sessions. The Standards do state, however, that the mediator should reach agreement with the participants on this issue. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. VI(B), *supra* note 18, at 460. We agree with the judgment not to resolve this issue in promulgated standards and to leave it to be decided jointly by the mediator and participants.

<sup>97</sup> Pearson & Thoennes, *Divorce Mediation: Strengths and Weaknesses Over Time*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION, 51, 67-68 (1982).

likely to develop a lasting framework for post-divorce cooperative parenting if they spoke for themselves. If a parent, after consulting with outside counsel, came to believe that he or she was treated unfairly in the mediation, that parent could so inform the other parent and the mediators and insist that the unfairness be rectified.<sup>98</sup>

We hoped, however, that the parents would take the custody and support agreement that we drafted to their respective attorneys for review.<sup>99</sup> We would then communicate directly with the parents' lawyers to explain provisions in the agreement or to answer any questions that they might have. The parents' consultation with independent counsel after they had reached basic agreement would not only be likely to make the final agreement more complete and polished but, more importantly, would provide both the parents and the Clinic with some assurance that the agreement was fundamentally fair to both parents.<sup>100</sup> Further, the costs to the parents of consulting with outside counsel would be minimized because most of the detailed work of negotiating and drafting the agreement would have been accomplished before outside counsel became heavily involved.

We did not suggest that the child should have similar access to outside counsel primarily because we did not think that adding a child's lawyer to the mediation process was likely to benefit the child significantly. We planned to give the child's preferences for custodial arrangements approximately the same weight in the mediation that most court-appointed child advocates actually give those preferences in representing a child in a contested case,<sup>101</sup> regardless of the theoretical obligations such lawyers have to represent the preferences of their youthful clients zealously.<sup>102</sup> Our goals for the mediation — promoting settlement and cooperation between the parents and protecting the child's individual interests — were also similar, if not identical, to the goals of most court-appointed law guardians.<sup>103</sup> Further, having a child's lawyer in the process might undermine rather than

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<sup>98</sup> If the parent continued to feel that his or her interests were not being addressed, he could withdraw from the mediation without prejudice. See *infra* text accompanying notes 150-54.

<sup>99</sup> See STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. VI(D), *supra* note 18, at 460 (requiring review of agreements reached in mediation by independent counsel for each participant).

<sup>100</sup> See *infra* text accompanying note 151.

<sup>101</sup> See generally Note, *supra* note 72 (empirical survey showing that many court-appointed lawyers for children advocate custody plans that are contrary to their client's expressed desires).

<sup>102</sup> See *supra* notes 77-78 and accompanying text.

<sup>103</sup> Note, *supra* note 72.



reinforce parental decision-making authority.<sup>104</sup>

*D. Cooperation Between Lawyers and Mental Health Professionals During Mediation and the Child's Role in the Mediation Process*<sup>105</sup>

The Clinic intended that the primary mediators in this case would be law students working under law faculty supervision.<sup>106</sup> We decided, however, that our law student-mediators would have the additional assistance of the Clinic's affiliated mental health professionals. We felt that our consulting psychiatrist and full-time social worker could fulfill several valuable functions in the custody mediation: enhancing the child's understanding of and adjustment to the divorce and sharing the child's concerns with his parents; improving our effectiveness as mediators by increasing our understanding of the psychodynamics of the mediation; and injecting an additional and important view of the child's best interests into the mediation process.

One of the primary advantages of having an interdisciplinary custody mediation team is that mental health professionals are available to talk with the child. These conversations fulfill the child's essential need to discuss his reactions to his parents' separation with a sympathetic "someone" who is not preoccupied with personal reactions to the separation.<sup>107</sup> The mental health professional can also give the child a broader perspective on the divorce process and on his feelings about it; even a child who is too young to express his preferences for the future can benefit from the opportunity to have some of his questions answered by a mental health ally. Finally, the mental health professionals can identify any particular fears, concerns or misunderstandings that the child may have about the divorce and can share the child's perspective with his parents, thus providing the parents with helpful insights into the child's adjustment and suggested methods for easing his transition to post-divorce life.<sup>108</sup>

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<sup>104</sup> See *supra* text accompanying notes 83-85.

<sup>105</sup> See Appendix A, ¶¶ 2, 5 & 6 for the portions of the retainer agreement discussed in this section of the article.

<sup>106</sup> Disclosure of student status is required under the New York statute that enables supervised law students in law school clinical programs to engage in the practice of law. See *supra* note 16 and accompanying text. The students who undertook the mediation had undergone intensive simulation training in child advocacy and had read extensively in the social science and legal literature on child advocacy and mediation. They were supervised by a faculty member who teaches family law and has experience in law school clinical programs.

<sup>107</sup> J. WALLERSTEIN & J. KELLY, *supra* note 5, at 38-54, 317-18.

<sup>108</sup> *Id.* See generally J. HAYNES, *supra* note 5.

Another function that we hoped our mental health professionals could perform was helping us, as mediators whose primary training was in law rather than human relations, to handle with sensitivity and finesse the emotion-laden discussions among members of a family in crisis.<sup>109</sup> Some practitioners argue that mediation should be conducted by trained social workers, with attorney involvement limited to the agreement drafting stage.<sup>110</sup> While we agree that mental health professionals are better trained than lawyers to help divorcing parents cope with the emotional aspects of their separation, we felt that attorney involvement in the discussions would be beneficial in many, if not all, stages of the mediation as well.

Lawyers who are trying to promote agreement focus on solving problems concretely. Lawyers are also sources of authority on the legal implications of possible solutions to the numerous problems faced by a separating family.<sup>111</sup> Lawyer-conducted mediation should thus help the parents focus on the problems — as opposed to the people — involved in formulating a custody plan and ensure that the written agreement resulting from the mediation accurately embodies the parents' concerns and conforms to existing law. Thus, although we did not rule out having the Clinic's mental health professionals conduct *some* of the mediation sessions themselves, either alone or in conjunction with us, as lawyers we also wanted to be prepared to function skillfully as mediators.<sup>112</sup>

We felt that our mental health professionals could improve our effectiveness as lawyer-mediators in several ways. First, by explaining their perceptions both of the individual family members and of the friction and interaction to be expected in a family in flux, the mental health professionals might be able to help us better understand the dynamics of the mediation.<sup>113</sup> Second, they might be able to give us

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<sup>109</sup> Coombs, *supra* note 3, at 494; Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Smith, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C.D.L. Rev. 582, 598 (1979) ("In these emotional situations attorneys must consider the human problem in order to best resolve the legal problem.").

<sup>110</sup> J. HAYNES, *supra* note 5, at 3-14, 139-45.

<sup>111</sup> Coombs, *supra* note 3, at 491.

<sup>112</sup> This fluid and flexible approach towards each profession's role may be contrasted with, for example, Coogler's "structured mediation" model. "Structured mediation" requires that a family counselor conduct the mediation within an explicit set of very formal rules. Once the couple has reached an agreement, an "impartial advisory attorney" is brought in to answer any questions, give legal advice, and solemnize the result in formal separation agreement terms. See O.J. COOGLER, *supra* note 40. See also Coombs, *supra* note 3.

<sup>113</sup> Cf. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. V(D), *supra* note 18, at 459 ("The mediator shall inform the participants that emotions play a part in the decisionmaking process. The mediator shall attempt to elicit from each of the participants a confirmation that each

advice on how to raise difficult, personal issues with the parents, how to observe and respond to subtle cues that the parents and child might be sending us and how to help the parents communicate with each other more openly, comfortably and rationally. Finally, they could even assist us with the seemingly technical aspects of mediation, such as recommending a seating arrangement conducive to comfortable discussions.

Our mental health professionals could also help us answer perhaps the most difficult question a custody mediator faces — what role should the child play in the process?<sup>114</sup> In the particular mediation we conducted, the answer to the question was relatively easy since there was only one, four-year-old child involved. We did not expect any direct participation by a four-year-old in the actual negotiations; such a young child would almost surely not understand most of what was being said by the adults involved and could easily be hurt by the communications. We anticipated instead that our mental health professionals would interview the child privately and then convey the child's feelings to his parents.

As a natural result of drafting the retainer agreement, however, we did consider the general question of how children should be involved in custody mediation. Given that children and parent-child relationships differ, this issue cannot be definitively resolved. Rather, the decision must be made case by case, based upon the same types of considerations that should guide a judge's or custody investigator's decision whether to interview a child and ask his preferences for custodial arrangements. Some of the most important factors are: Does the child have a sufficient level of cognitive functioning and emotional maturity to prepare for participation in the mediation? What have the parents already told the child about the deterioration of their relationship? Is the child's involvement in the mediation likely to enhance or harm his relationship with one or both parents? Are the child's preferences and feelings likely to be better understood and taken into account by the parents if the child expresses them directly or if a trained professional speaks to the parents on the child's be-

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understands the connection between one's own emotions and the bargaining process.").

<sup>114</sup> The Family Law Section's Standards of Practice for Family Mediators state that the mediator has a duty to promote the best interest of the child, *see supra* note 28, but provide no guidance as to how a mediator should organize the proceeding to fulfill that duty. We think the Standards should be amended to require the mediator to discuss with the parents the child's role in the mediation and at least to consider personally interviewing the child, if at all feasible. Otherwise, the child's interests in the process of decision as well as the outcome are too likely to be disregarded by the adults participating in it, including the mediator. *See infra* text accompanying notes 116-17.

half? Evaluation of these and the numerous other factors that must be considered before a child becomes extensively involved in the mediation sessions requires the insights of both the legal and the mental health professions. Since we did not have an absolute rule about whether and how the child should participate in the mediation, it seemed to us that the best way for a mediation retainer agreement to address the issue was to put the parents on notice that such participation might be recommended by the mediators but would be discussed with the parents before it would occur.<sup>115</sup>

The final function we envisioned for the mental health professionals was helping the parents and lawyers to determine the type of custody arrangement that would serve the child's best interests. We had consciously rejected the notion that a custody mediator's role was simply to serve as a passive facilitator of parental agreement and the corollary notion that any plan on which the parents could agree would be, by definition, a good plan for the child.<sup>116</sup> Rather, we believed that the Clinic and its affiliated mental health professionals should take an active role in helping the parents define and promote the best interests of their child. We decided that an independent assessment of the child by our mental health professionals might be needed because the parents' description of their child's reaction to the separation could be distorted by their own reactions to the situation or based upon statements that the child had made to appease them.<sup>117</sup>

We concluded that the Clinic's mental health professionals should assess the family situation in as much detail as necessary to ensure that the custody arrangement on which the parents ultimately agreed would be beneficial for the child. We felt that it would be necessary for our mental health professionals to meet with the child and the parents at least once.<sup>118</sup> If, in their professional judgment, it was advisable to conduct further family evaluations, they could interview the family members more extensively at the Clinic or make personal visits to the child's home or homes. Of course, they would also have access to any information that we might obtain in the mediation sessions.

By learning about the child's situation in as much detail as they deemed appropriate, our affiliated mental health professionals could

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<sup>115</sup> See Appendix A, ¶ 6.

<sup>116</sup> See *supra* text accompanying notes 26-28. Accord STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. III(E), *supra* note 18, at 457.

<sup>117</sup> See J. WALLERSTEIN & J. KELLY, *supra* note 5, at 100-03, 115-17.

<sup>118</sup> See *supra* note 114.

develop a strong sense of the child's needs and the custodial arrangement alternatives. Their perspective on those needs and alternatives would be informed by years of experience working with children and families during and after divorce. They would therefore be in an excellent position to help determine whether some sort of joint physical custody or joint decision-making authority would be beneficial for the particular child.<sup>119</sup> If so, we felt that they could help the parents decide on a custody plan that would serve those goals while also addressing their child's more individualized needs; if not, we felt that they could help devise viable alternatives.

We tried to be sensitive to the privacy concerns of the family unit involved in the mediation. We assumed, however, that parents willing to talk in mediation about future cooperation for their child's sake would be receptive to the services of mental health professionals seeking to help the parents facilitate their child's adjustment to the separation.<sup>120</sup> The only purpose in asking the parents to empower the Clinic to investigate and appraise their family situation was to help their children, a goal that they, presumably, would share. The ultimate checks upon the degree of intrusion into family privacy authorized by the retainer agreement were the confidentiality of the mediation process and the entirely voluntary nature of the couple's involvement with the Clinic.<sup>121</sup> If either or both of the parents objected to the involvement of mental health professionals in the mediation, the process would end.

Although we easily concluded that our affiliated mental health professionals should be involved in the mediation, there remained the ethical question whether the Code of Professional Responsibility, given its concern with preserving a lawyer's independent professional judgment, permitted such cooperative mediation efforts between attorneys and professionals from other disciplines.<sup>122</sup> Many mediation

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<sup>119</sup> See *supra* text accompanying notes 31-36.

<sup>120</sup> Cf. *supra* text accompanying notes 34-35.

<sup>121</sup> See *infra* text accompanying notes 129-41 & 150-54.

<sup>122</sup> See Silberman, *supra* note 65, at 4005-08. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 (1980) ("A Lawyer should Assist in Preventing the Unauthorized Practice of Law."); *id.* Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."), and Ethical Considerations and Disciplinary Rules thereunder.

The Standards of Practice for Family Mediators recently published by the ABA's Family Law Section do not address the problems of collaborative mediation between lawyers and mental health professionals explicitly. They do, however, attempt to set standards of practice for non-lawyer family mediators acting alone, see STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. IV(C), *supra* note 18, at 458, as well as lawyers acting alone. Only the lawyer-mediator is allowed to "define legal issues" for the participants. *Id.* Presumably, this standard would control collaborative mediation.

services involve a great deal of cooperation between attorneys and social workers.<sup>123</sup> The general rule is that such cooperative arrangements are permitted,<sup>124</sup> provided that the lawyers exercise independent professional judgment on behalf of their "clients"<sup>125</sup> and that the nonlawyers do not give legal advice.<sup>126</sup>

Under this standard, we concluded that the functions we planned for mental health professionals would not raise ethical problems. Certainly, permitting our social worker or psychiatrist to speak with the child and to share the substance of those discussions with us would not interfere with our independent professional judgment any more than the independent judgment of a judge would be tainted by the report of a custody investigator regarding her conversations with a child.<sup>127</sup> The help of our affiliated mental health professionals in improving our interviewing and mediation skills would also be ethically innocuous. Their assistance in conducting some mediation sessions, with or without lawyers present, would similarly not intrude upon our domain, provided that they did not give the parents legal advice — something that they would be no more likely to do than we would be likely to give the parents a discourse on child development. We had worked together long enough to know that each professional had a strong sense of his or her professional limitations and role boundaries.

The assistance of our affiliated mental health professionals in applying to the particular family in question what seems to be a legal

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As a non-profit, law school-based clinical program that does not charge fees for its services, we did not need to face the ethical dilemmas raised when lawyers split fees. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-8 (1980); *id.* DR 3-102. See Silberman, *supra* note 65, at 4005; N.Y.C. Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 80-23, *supra* note 67. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a) (1983).

<sup>123</sup> See, e.g., O.J. COOGLER, *supra* note 40, at 23-20; Coombs, *supra* note 3, at 489-91.

<sup>124</sup> See e.g., N.Y.C. Bar Ass'n, Comm. of Professional and Judicial Ethics, Op. 80-23, *supra* note 67; Connecticut Bar Ass'n Informal Op. 8301, reprinted in 9 FAM. L. REP. (BNA) 2013 (1982) (endorsing a "team" mediation approach).

<sup>125</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D) (1980). See N.Y.C. Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 80-23, *supra* note 67; Silberman, *supra* note 65, at 4006. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(d)(3) (1983).

<sup>126</sup> Canon 3 of the Model Code of Professional Responsibility provides that attorneys should not assist in the unauthorized practice of law. One commentator has noted, however: "So long as the lawyer performs the legal services in mediation and the mental health professional uses his/her expertise to move the parties along, a reasonable interpretation of Canon 3 should permit experimentation with [an interdisciplinary model]." Silberman, *supra* note 65, at 4005. See also N.Y.C. Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 80-23, *supra* note 67; MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983). See also *supra* note 122.

<sup>127</sup> Cf. *Kessler v. Kessler*, 10 N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1 (1962) (discussing due process issues raised by the involvement of mental health experts in litigated custody cases).

standard, the best interests of the child, raised potentially more troublesome ethical issues. It could be argued that, by engaging in a collaborative application of law to fact, we would be delegating legal decision-making to nonlawyers. However, we concluded that this conceptual concern did not pose significant problems in practice.

We neither anticipated nor, in fact, experienced being forced to choose between our judgments and those of the mental health professionals in helping the parents formulate a custody and child support plan. We discussed cases with our coworkers in the mental health field so frequently and exchanged insights and expertise so consistently that any decisions the Clinic reached were necessarily the product of the cumulative thinking of all the persons and professions involved in the case.

Continued collaboration seemed entirely appropriate in the context of a child custody mediation. Determining the best interests of a child, after all, cannot properly be viewed as a purely legal question; law, mental health, social mores, humanity, common sense and intuition all play a part in defining the child's best interests. Indeed, courts themselves solicit the opinions of mental health experts in making custody determinations.<sup>128</sup> We believed it unproductive to attempt to parse the "best interests" decision into "legal" and "mental health" components, as the Code of Professional Responsibility would seem to contemplate, especially when so many courts recognize the desirability of collaborative decision-making. To us, the possibility of lawyers delegating legal decision-making to non-lawyers was simply not a realistic concern in the context of the mediation process we envisioned.

### *E. Confidentiality Against The Outside World<sup>129</sup>*

Voluntary mediation is more likely to succeed if all of the participants are assured that communications made during the mediation are kept confidential against the rest of the world. Otherwise, the dialogue might be inhibited by a lack of candor and cooperation or the process abused to gain discovery or other advantage in a later litigated custody battle. We therefore wanted to ensure that we would not be put in the position, should the mediation fail, of being asked to reveal our files to the court, of having our mental health profes-

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<sup>128</sup> See N.Y. FAM. CT. ACT § 252 (McKinney Supp. 1983); AMERICAN PSYCHIATRIC ASSOCIATION, REPORT OF THE TASK FORCE ON CLINICAL ASSESSMENT IN CHILD CUSTODY (1982).

<sup>129</sup> See Appendix A, ¶ 7 for the portion of the retainer agreement relating to this discussion.

sionals called to the witness stand and asked which of the parents is the more fit, or of being involved in any other way in subsequent litigation.

We could not, however, be fully assured that the legal system would respect the confidentiality of the mediation process if what was said during mediation became relevant to a court dispute between the parents. None of the potentially applicable evidentiary privileges seemed to apply. We had specifically disclaimed the existence of a lawyer-client relationship with any of the participants in the mediation.<sup>130</sup> Therefore, the attorney-client privilege did not exist.<sup>131</sup> Our associated mental health professionals defined their "patient" as the family, not its individual members. They, too, thus disclaimed the existence of the conventional doctor-patient or social worker-client relationship even though such a relationship might have protected the resulting communications as privileged.<sup>132</sup> We also could not rely on the privilege for settlement negotiations<sup>133</sup> which has so many exceptions that attempts to claim it in court seem to lead to disclosure rather than confidentiality as a general rule.<sup>134</sup>

Moreover, even if there were an argument that an evidentiary privilege covered the mediation proceeding, we still faced the problem that courts have frequently overridden privilege claims in custody litigation by requiring mental health professionals who have helped promote settlement or marital reconciliation between the parents to testify in subsequent litigation. Courts often reason that they must

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<sup>130</sup> See *supra* text accompanying notes 61-90.

<sup>131</sup> N.Y. CIV. PRAC. LAW § 4503(a) (McKinney Supp. 1983-1984). See 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961) ("The mere fact that the services are rendered by an attorney does not necessarily establish that he was acting in such capacity so as to render the communications as privileged.") *Id.* § 2303 (Supp. 1983).

Under the Model Rules of Professional Conduct, it is possible to "act as an intermediary" without disclaiming the attorney-client relationship. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983). However, the comment to that section explicitly recognizes that "the prevailing rule is that as between commonly represented clients the [attorney-client] privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications and the clients should be so advised." *Id.* comment.

<sup>132</sup> N.Y. CIV. PRAC. LAW. § 4507 (McKinney Supp. 1983) (psychologist/patient privilege); N.Y. CIV. PRAC. LAW. § 4508 (McKinney Supp. 1983) (social worker/client privilege). See 8 J. WIGMORE, EVIDENCE § 2286 (Supp. 1983).

<sup>133</sup> PROPOSED RULES OF EVIDENCE § 408 (N.Y. Law Rev. Comm. 1982). See J. WIGMORE, EVIDENCE § 1061 (McNaughton rev. 1961).

<sup>134</sup> See *White v. Old Dominion S.S. Co.*, 102 N.Y. 660, 662, 6 N.E. 289, 291 (1886) (admissions of fact, even though made during an offer of settlement, are admissible); *Comeaux*, *supra* note 3, at 89 (factual admissions are admissible to show bias or prejudice, to impeach a witness or if otherwise discoverable).



hear the otherwise privileged information to determine the best interests of the child. The court's duty as *parens patriae* has been held in such cases to override any confidentiality claim.<sup>135</sup>

Thus, we were uncertain whether communications made during the mediation and the work product of our attorneys and mental health professionals would be deemed confidential in any subsequent court proceedings. Our confidentiality dilemma could be solved if the New York legislature enacted a statute, similar to statutes existing in other jurisdictions, specifically making both public and private mediation confidential.<sup>136</sup> In the absence of such a statute and in the face of the uncertainty in the case law, we asked the parents to sign a specific pledge to respect the confidentiality of the proceedings. While we were unsure that such a promise would be held binding in a courtroom struggle,<sup>137</sup> we believed that it would augment any arguable legal claim of confidentiality and make the parents and their attorneys recognize that an attempt to breach the mediation's confidentiality would be strenuously resisted.<sup>138</sup>

Additionally, because we would be receiving confidential informa-

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<sup>135</sup> *Barth v. Barth*, 74 A.D.2d 1002, 427 N.Y.S.2d 98 (1980); *New York ex rel Hickox v. Hickox*, 64 A.D.2d 412, 410 N.Y.S.2d 81 (1978); *Perry v. Fiumano*, 61 A.D.2d 512, 517-18, 403 N.Y.S.2d 382, 385-86 (1978). *Cf. M. v. K.*, 186 N.J. Super. 363, 452 A.2d 704 (Ch. 1982) (involving a marriage counselor privilege).

<sup>136</sup> See CAL. CIV. CODE § 4607(c) (West Supp. 1983) (mediation proceedings are confidential, and communications during mediation are "official information"); CAL. EVID. CODE § 1040 (West 1966) ("official information" is privileged). *Cf. N.J. STAT. ANN.* 45:8B-29 (West 1978) (marriage counselor privilege); *but cf. M. v. K.*, 186 N.J. Super. 363, 452 A.2d 704 (Ch. 1982) (marriage counselor privilege overridden by the court in best interests of the child).

A detailed discussion of the potential applicability of various evidentiary privileges is beyond the scope of this article. The discussion in the text is intended only to suggest some of the problems that a statute dealing with the confidentiality of mediation must address.

<sup>137</sup> See *Perry v. Fiumano*, 61 A.D.2d 512, 516-17, 403 N.Y.S.2d 382, 385 (1978); 8 J. WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961) (at common law no pledge or oath of privacy could avail against the demand for truth in court).

<sup>138</sup> The ABA Standards of Practice for Family Mediators place a duty of confidentiality on the mediator. They also require the mediator to ask the parties to agree not to require the mediator to disclose statements made during the mediation to third parties. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. II(A), *supra* note 18, at 456. We have no disagreement with the Standards on this point. The Standards go on, however, to require the mediator to inform the participants of the mediator's inability to bind third parties (presumably courts and lawyers for the parties) to the confidentiality pledge. *Id.* art. II(B), at 457. They also imply that the mediator must warn the participants that statements made in mediation could come back to haunt them in later litigation. *Id.* art. II(C), at 457. On these points, we part company with the Standards. They require the mediator to deliver to the participants a mixed message about the confidentiality of the process that can be interpreted cynically by those who hear it. Moreover, since the law in this area is new and developing, it is entirely plausible to argue that statements made in mediation will be held confidential by a court, especially if the mediator vigorously resists any attempts by third parties to compromise that confidentiality.

tion from both parents during the course of the mediation, we disclaimed any representation of the child or either of the parents in any possible future dispute.<sup>139</sup> We also asked the parents to pledge that their counsel, with whom we envisioned communicating directly,<sup>140</sup> would respect the confidentiality of the mediation process. We presumed that, as clients, they could control their lawyers' conduct on this issue.<sup>141</sup>

### *F. Candor Within The Mediation Process*<sup>142</sup>

Despite our belief in the need for absolute confidentiality as against the outside world, we expressly disclaimed confidentiality within the mediation process, either between the parents themselves or between the parents and the Clinic staff. Only a general rule of candor during mediation could promote the open atmosphere we believed essential for facilitating agreement.

In line with this philosophy, we informed each parent that we would make available to both parents any legal advice or evaluative report that we provided to either of them.<sup>143</sup> Conversely, we informed each parent that we might reveal to the other parent anything either of them told us during an individual session if such disclosure would further the purposes of the mediation.<sup>144</sup> We did not oblige ourselves to recount every trivial or painful fact revealed to us by either parent. For example, if the husband shared his perceptions of the wife's parents with us in an individual session, we would not necessarily repeat his criticisms to his wife unless, of course, the subject became

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<sup>139</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1981) ("After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(c) (1983) ("Upon withdrawal [as an intermediary], the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation."). See N.Y.C. Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 80-23, *supra* note 67; Crouch, *supra* note 69, at 249; STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. III(A), *supra* note 18, at 457 (discussed and quoted *supra* note 66).

<sup>140</sup> See *supra* text accompanying notes 91-100.

<sup>141</sup> 8 J. WIGMORE, EVIDENCE § 2321 (McNaughton rev. 1961).

<sup>142</sup> See Appendix A, ¶ 8 for the portion of the retainer agreement reflecting our positions on the issues discussed in this section of the article. Many of the concepts discussed in this section are reflected in a retainer agreement developed by Richard A. Gardner, M.D. (unpublished papers), author of FAMILY EVALUATION IN CHILD CUSTODY LITIGATION (1982), THE PARENTS' BOOK ABOUT DIVORCE (1979), and THE BOYS' AND GIRLS' BOOK ABOUT DIVORCE (1971).

<sup>143</sup> See N.Y.C. Bar Ass'n, Comm. on Professional and Judicial Ethics, Op. 80-23, *supra* note 67, at 249.

<sup>144</sup> Cf. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. I(7), *supra* note 18, at 456 (requiring mediator to discuss issue of separate sessions with participants).

relevant to the mediation. We believed, however, that we should have the discretion to reveal such communications if we felt it appropriate.

Similarly, we reserved the discretion to reveal to the parents communications made by their child. Again, we did not feel bound to disclose to the parents every communication that the child made to us or to our mental health professionals.<sup>145</sup> For example, we would not feel obligated to report a child's statement to us that he loved his mother better than his father if we feared that such a revelation could only hurt the father's feelings unnecessarily and poison his future relationship with his child. In general, however, we believed it important to be free to share the child's concerns with his parents.

We also informed the parents that we would expect them to be candid with the mediators and with each other by supplying information, particularly about their finances, to the other spouse and to us upon our request.<sup>146</sup> We worried about the possibility, for example, that one parent might have hidden assets from the other that would increase his or her ability to pay child support. Furthermore, even if the parents knew each other's financial situation, we would need to become familiar with their finances to help advise them of appropriate levels of child support.

We imposed the same requirement of complete disclosure on the parents that a New York court would have imposed.<sup>147</sup> This decision was prompted in part by the special responsibility to protect the child that we had assumed by becoming custody mediators. It was also motivated by our belief that the negotiations on child support would be more rational if they were grounded in actual facts and figures. More importantly, imposing a norm of full disclosure seemed essential to building the atmosphere of trust, confidence and cooperation between the parents that we deemed necessary to develop an agreement with which each parent would be reasonably satisfied and to which each would therefore be likely to adhere.<sup>148</sup>

Significant nonparental figures in the child's life often have important information on how to maximize the child's well-being in developing custody arrangements. Therefore, if we had been appointed by

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<sup>145</sup> See *supra* notes 74-76 and accompanying text.

<sup>146</sup> Cf. O.J. COOGLER, *supra* note 40, at 122 (full disclosure of finances and other relevant information required during mediation); STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. IV(A), *supra* note 18, at 458 (same).

<sup>147</sup> See N.Y. DOM. REL. LAW § 236(B)(4) (McKinney Supp. 1983) (compulsory financial disclosure in equitable distribution/maintenance/child support controversies); 22 N.Y.C.Ct. R. § 117.2 (1983) (outlining the detailed "statement of net worth" required).

<sup>148</sup> See *supra* text accompanying notes 37-54.

a court as law guardian for the child, we would have wanted to review the child's school and medical records and talk to the child's teachers and doctors if necessary for the zealous representation of the child. As mediators, however, we felt such extensive intrusion into family autonomy and privacy was unjustified without specific parental consent, which we would not seek absent a significant indication during the mediation that further investigation was necessary.<sup>149</sup> We thus chose not to include a provision in the retainer agreement requiring the parents, before beginning mediation, to consent to our review of the child's records and consultation with other professionals.

### *G. Withdrawal from Mediation*<sup>150</sup>

The fundamental assumption underlying the mediation retainer agreement was the voluntariness of both the parents' and the Clinic's involvement in the process. For the parents, the knowledge that they could terminate the process at any time made the whole endeavor both more palatable to them and more fragile; an otherwise reluctant parent might be encouraged to try mediation because of the assurance that he could withdraw at any time, but the same knowledge might encourage him to leave the mediation if it became at all uncomfortable. Although we certainly did not endorse unilateral, arbitrary termination of mediation by one parent, we realized that it would be useless to attempt to force a parent to participate in mediation against his will; some commitment by both parents would be necessary for the process to work. We therefore made it clear to the parents that they could withdraw from the mediation at any time without prejudice.

As mediators, we expressly reserved a right to terminate the mediation if further sessions would be unproductive. One parent's abuse of the process to delay a final resolution of the issues would obviously be detrimental to the child's interest in stabilizing his custodial arrangements as quickly as possible. We hoped that the threat of our withdrawal would deter this strategy. If the deterrence was not successful, however, the retainer agreement provided a mechanism for ending the process.

We also reserved the right to withdraw from the mediation if necessary to avoid facilitating an agreement that might be contrary to the child's interests. Preservation of this right was the ultimate pro-

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<sup>149</sup> See *supra* text accompanying notes 83-86 & 120-21.

<sup>150</sup> See Appendix A, ¶ 9 for the portion of the retainer agreement dealing with this issue.

tection for the Clinic's professional integrity. If the parents insisted on a custody and support plan that we felt would be harmful to their child or if they were unwilling to comply with procedures we felt would be necessary for determining their child's best interests, we wanted to be able to withdraw from the mediation rather than become mere scriveners of the parents' agreement.

The Clinic's right to withdraw also provided us with a procedure for dealing with an overreaching spouse.<sup>151</sup> For example, the husband might persuade the wife to make child care or child support concessions that we thought were clearly not in her interests. Such an arrangement would also not be in the child's best interests, because the bitterness and acrimony that would probably result from such an unfair settlement would destabilize the agreement and reduce parental cooperation.<sup>152</sup> In this situation our continued involvement in the mediation would require us to choose between giving the wife legal advice that would be prejudicial to her husband and facilitating an agreement that would be prejudicial to the wife and potentially harmful to the child's interests. Both courses of action would be ethically problematic, and withdrawal would be our only alternative. Furthermore, although the Clinic's withdrawal would represent a drastic step given the parents' emotional investment in the mediation, it would pose no formal ethical concerns because the retainer agreement did not establish a lawyer-client relationship with any mediation participant.<sup>153</sup> Whatever real prejudice the parents suffered as a result of our withdrawal would be a necessary cost of preserving our professional integrity and our right to make an independent assessment of the child's best interests.<sup>154</sup>

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<sup>151</sup> See J. HAYNES, *supra* note 5, at 63-70; STANDARDS OF PRACTICE FOR FAMILY MEDIATORS, art. V, *supra* note 18, at 458.

<sup>152</sup> See J. WALLERSTEIN & J. KELLY, *supra* note 5, at 181-94.

The Standards of Practice impose a duty on the mediator to withdraw if continuation of the process would harm or prejudice the *participants*. They make no specific mention about prejudice to the *child's* interests, an oversight that should probably be corrected. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. V(B), *supra* note 18, at 459. The Standards do, however, make the mediator responsible for assuring the reasonableness of "agreement being approached." *Id.* art. V(B), *supra* note 18, at 459. When combined with the duty the Standards impose on the mediator to promote the child's best interests, *see supra* note 28, the mediator's duty to withdraw from an approaching agreement that harms the child could easily be read into the Standards. We do not think, however, that such an important duty should be left to implication.

<sup>153</sup> See *supra* text accompanying notes 61-90.

<sup>154</sup> Arguably, even if an attorney-client relationship existed, withdrawal would be ethically permitted under the Model Code of Professional Responsibility:

Permissive Withdrawal from Employment.

If [withdrawal is not mandatory under DR 2-110(B)], a lawyer may not request per-

### *H. Signing the Retainer Agreement*<sup>155</sup>

Given the detailed nature of the retainer agreement and the complexity of the issues it addressed, we decided to advise the parents to wait several days and to seek the advice of outside counsel before deciding whether to proceed with the mediation. We believed that such procedures would help guard against one spouse's undue pressure on the other to enter mediation and would ensure that both spouses had ample information and opportunity for reflection before making the decision.

### *I. Formalizing the Custody and Support Agreement Reached in Mediation*<sup>156</sup>

We planned to draft the parents' eventual custody and support agreement and to review the draft with the parents to ensure that it accurately embodied the oral agreement that they reached during mediation. Before signing the final agreement, the parents would again be orally encouraged to consult with independent counsel.<sup>157</sup>

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mission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

- (1) His client . . .
- (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(e) (1980).

Under the Model Rules of Professional Conduct the attorney may withdraw from the representation of a client if no material adverse effect will result or if the client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983). If the lawyer were acting as an intermediary under the Model Rules of Professional Conduct, withdrawal would be permitted if the attorney felt that his or her responsibilities to "any of the clients" would be improperly affected. *Id.* Rule 2.2(a)(3), (c).

The Standards of Practice for Family Mediators do not explicitly impose a requirement that the participants or the child not be materially prejudiced by the mediator's unilateral withdrawal. The only condition on the mediator's withdrawal right in the Standards seems to be the exhortation that "[i]f the mediator has suspended or terminated the process, the mediator should suggest that the participants obtain professional services as may be appropriate." STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. V(F), *supra* note 18, at 459. We suggest that the Standards be amended to require the mediator to consider and minimize the prejudice to the participants or the child that might result from her withdrawal.

<sup>155</sup> See Appendix A, ¶¶ 11 & 12 for the text of the retainer agreement discussed in this section.

<sup>156</sup> See Appendix A, ¶ 10 for the text of the retainer agreement discussed in this section.

<sup>157</sup> See *supra* text accompanying note 70 and Appendix A, ¶ 3.

The result of our deliberations on the appropriate ground rules for custody mediation was a three-page, single-spaced, fairly comprehensive retainer agreement. Although we realized that such a formal document might discourage would-be clients from proceeding and that the numerous disclaimers and warnings could be interpreted as undercutting the cooperative spirit of mediation, we felt that full disclosure of the limitations and drawbacks of the process was required to make the parents' consent to participation in mediation meaningful.<sup>158</sup> Moreover, we felt that we could ameliorate the problem of excessive "legalese"<sup>159</sup> by explaining our concept of our role and objectives to the parents orally and in deliberately nontechnical language at the first meeting,<sup>160</sup> before giving them the formal retainer agreement to read over and discuss with us. We also left open the possibility of making some limited revisions to the retainer agreement at the outset of the mediation in accordance with the parents' wishes.

### III. PROVISIONS FOR MODIFICATION OF CUSTODY ARRANGEMENTS<sup>161</sup>

The mediation of the custody arrangements described in Part II is only the first step in helping separated or divorced parents cooperate in caring and planning for their child. To further the child's best interests, the parents must also commit themselves to resolve future disputes through a process that promotes continuing cooperation between them. We attempted to ensure such a commitment by creating a future dispute resolution process through specific language in the custody agreement.

The purpose of the dispute resolution procedure that we created was to minimize the likelihood that the parents would use litigation to enforce, interpret or modify the terms of the custody and support agreement. If the parents could not resolve their disagreement privately, the dispute would be referred to mediation and then, perhaps,

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<sup>158</sup> See Crouch, *supra* note 69, at 248. Cf. STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. I(A)(4), *supra* note 18, at 456 (requiring the mediator to "assess the ability and willingness of the participants to mediate").

<sup>159</sup> Other mediators recommend a much less formal style, thereby reducing the "tone" problem inherent in more legalistic documents. See Pearson, *supra* note 6, at 8-9.

<sup>160</sup> The Standards of Practice for Family Mediators require a mediator to conduct an orientation session before the actual sessions begin "to give an overview of the process and to assess the appropriateness of mediation for the participants." STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. I(A), *supra* note 18, at 455.

<sup>161</sup> See Appendix B for full text of the provisions of the custody agreement discussed in this section.

to arbitration. Each dispute resolution step would involve a more intrusive, coercive power in the family's affairs.

We hoped and expected that the parents could resolve minor disputes regarding day-to-day custodial care informally, outside of the dispute resolution process described in their written agreement. Research indicates that couples that successfully reach mediated custody agreements are "more confident about their ability to work out problems, generate modifications with their ex-spouses and avoid returning to court than couples [that] try mediation and do not reach an agreement or couples that rely solely on the traditional adversary process for custody dispute resolution."<sup>162</sup>

Nevertheless, in drafting what we hoped would be a lasting custody agreement, we had to anticipate that the parents might be unable to reach agreement between themselves on major issues concerning their child. The dispute resolution clause would give them a mechanism for resolving their disagreement without resort to the courtroom by providing for a sequential process that would begin with an informal conference, proceed to mediation, and conclude, if necessary, in arbitration.<sup>163</sup>

The dispute resolution procedure was also designed to provide the parents with a way of reevaluating the agreement if either of their circumstances or the circumstances of the child changed materially. We provided that the agreement would be automatically reevaluated in the event of a contemplated move by either parent more than a certain distance from the area where both resided when the agreement was signed; cohabitation or pending remarriage of either parent; major illness, disability, or extended hospitalization of either parent or of the child; or significant financial changes. These predictable events in the reconstituted family's life could undermine many of the basic assumptions upon which the custody agreement was initially premised and thus necessitate its reevaluation.<sup>164</sup>

### *A. Private Negotiations Between the Parents*

We chose to begin with the most informal means of dispute resolu-

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<sup>162</sup> Pearson & Thoennes, *supra* note 97, at 63 ("[O]ne stable characteristic of the successful mediation client is his or her orientation to the autonomous resolution of future custody and visitation problems.").

<sup>163</sup> See Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); O.J. COOGLER, *supra* note 40, at 171.

<sup>164</sup> Cf. Pearson, *supra* note 6, at 8-9 (sample mediated custody agreement outlining similar renegotiation-triggering events).



tion — a meeting between the parents alone. By requiring face-to-face discussion at the beginning of the dispute resolution process, we emphasized the importance of private negotiations and ongoing communications between the parents concerning their child.<sup>165</sup>

The informal conference procedure that the agreement created was not without risk. It raised the possibility of overreaching by a “dominant” spouse, since a neutral outsider would not be present in the meetings to protect the interests of the child or the other spouse. We hoped, however, that the parents would be sufficiently influenced by their favorable mediation experience to work together fairly for their child’s sake. If so, requiring the participation of a third party would be unnecessarily expensive and intrusive. On the other hand, if the parents had not evidenced a cooperative spirit during mediation, the meet-and-confer procedure might be inappropriate.

The modification clauses required, however, that a lawyer draft any changes to which the parents agreed at their informal meetings. This requirement, by serving as a check against an overreaching spouse who might pressure the other spouse to accept a change, would help protect the best interests of the child.<sup>166</sup> We hoped that the parents would ask their lawyer not only to draft the changes to their agreement but also to give them an independent evaluation of the wisdom of their proposed modification.

Another reason we mandated lawyer drafting of changes was that the parents’ custody and child support agreement was complex and many of its clauses were interdependent. Levels of child support paid by each parent, for example, were tied to the parents’ respective child care responsibilities, present and projected income levels, and tax brackets. Thus, if the parents agreed to change one section of the agreement to increase or decrease one parent’s time with the child, other sections of the agreement might require modification. The parents, moreover, might not be aware of the necessity of such modifications without the advice of counsel.

Under recent New York case law,<sup>167</sup> one lawyer can draft a separation agreement, and presumably a modification to a custody agreement, for both spouses without it being *per se* invalid; some other evidence of unconscionability in the agreement is required to make it unenforceable. We took advantage of this case law in an attempt to minimize the expense of future dispute resolution for the parents.

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<sup>165</sup> See *supra* text accompanying notes 31-37.

<sup>166</sup> See *supra* text accompanying note 151.

<sup>167</sup> *Levine v. Levine*, 56 N.Y.2d 42, 48, 436 N.E.2d 476, 478-79, 451 N.Y.S.2d 26, 28-29 (1982).

The potential costs of mandating that each parent independently retain a lawyer seemed to us unjustified, especially given what we knew of the financial circumstances of the parents and our belief that they would deal fairly with each other in the future. We also were concerned that involving lawyers for each parent in the drafting risked encouraging the parents to view the modification process as adversarial and "zero-sum" rather than as a continuation of their post-separation cooperation in the best interests of their child.<sup>168</sup>

### *B. Private Mediation*

The modification clauses provided that problems that could not be resolved in a private meeting between the parents with any necessary drafting help and advice from one lawyer would be subject to a somewhat more formal phase of dispute resolution — mediation. These particular parents agreed that, if a future dispute arose, the Clinic should continue as mediator under the same terms and conditions as in the initial mediation retainer agreement. Given our extensive knowledge of the family, the Clinic was well-equipped to continue performing the mediator's role. Agreeing to remain on call as mediators also reflected our philosophy that we had an ongoing obligation to help the family adjust to the post-divorce environment. We had to limit our commitment to the family to a one-year period, however, because the law students who conducted the initial mediation would not be affiliated with the Clinic beyond that time. The agreement provided that, if new Clinic personnel were unable to undertake the mediation after the one-year period expired and the parents could not agree on a mediator themselves, the Clinic would designate a mediator for them.

### *C. Arbitration*

We provided that those problems that could not be resolved by mediation would be referred to arbitration. We envisioned the mediator as a "gatekeeper" to the arbitration process. Before arbitration could begin, the mediator would have to certify that the parents had reached an impasse and that further mediation efforts would be unproductive. We hoped that the mediator could thus deter a parent who, out of frustration or bad faith, wanted to terminate the media-

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<sup>168</sup> See *supra* text accompanying notes 48-52.

tion unilaterally before either the mediator or the other parent thought that chances for a negotiated settlement were hopeless. Conversely, we hoped that vesting this power in the mediator would prevent a parent from exploiting the mediation phase for delay purposes when no real progress was being made. A mediator presumably would not continue her efforts if both parents thought the process had no chance of success or if one parent was being intransigent.<sup>169</sup> By asking the mediator to function as a gatekeeper to the arbitration phase, however, we sought to encourage the parents to reach an agreement voluntarily.

If the mediator felt it necessary to invoke the arbitration process, we hoped that the parents could choose the arbitrator themselves. The agreement provided, however, that if the parents were unable to agree on an arbitrator, they would have to refer the dispute to the American Arbitration Association.<sup>170</sup> This mandatory reference was designed to initiate the arbitration procedure without the undue delay and procedural wrangling that disserve a child's interests in the speedy resolution of custody questions.

We decided to provide that the arbitrator should both consult the child during the arbitration process and resolve the dispute in accordance with the law, including the governing legal standard of the child's best interests. The American Arbitration Association's rules do not require its arbitrators to base their custody awards on considerations of the child's best interests and permit, but do not require, the arbitrator to interview the child.<sup>171</sup> An arbitrator, however, would honor a couple's specific written agreement to consult with the child and apply the "best interests" standard.<sup>172</sup> Requiring the arbitrator

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<sup>169</sup> See *supra* text accompanying notes 150-54.

<sup>170</sup> The American Arbitration Association's Family Dispute Services has promulgated specially designed "Arbitration Rules for the Interpretation of Separation Agreements" and makes available arbitrators trained in marital dispute resolution. American Arbitration Association, Family Dispute Services, Arbitration Rules for the Interpretation of Separation Agreements (1982) [hereinafter cited as Arbitration Rules] (available from the American Arbitration Association). The American Arbitration Association is only an example of an organization willing to arbitrate this type of dispute and we do not necessarily endorse their procedures over any others. We chose to mention it in the clause because of the availability of their arbitration services in the community where the parents resided. The Family Mediation Association also provides arbitration services under their "Marital Arbitration Rules." See O.J. COOGLER, *supra* note 40, at 131-44.

<sup>171</sup> The American Arbitration Association's Rule 10 permits the arbitrator to seek a professional opinion regarding the child's interests. Rule 9 gives the arbitrator a right to interview the child. Arbitration Rules, *supra* note 170, at 5. However, these rules have been criticized because they omit an explicit "best interests" standard for custody determinations. Spence & Zammit, *Reflections on Arbitration Under the Family Dispute Services*, 32 ARB. J. 111, 117 (1977).

<sup>172</sup> See Spence & Zammit, *supra* note 171, at 117.

to listen to the child's wishes and to resolve disputes according to governing law and the "best interests" standard would ensure that appropriate child-related factors would be considered and would also enhance the likelihood of the arbitration award's enforcement in any subsequent court proceeding.<sup>173</sup> These provisions would thus make it less likely that a dissatisfied parent would try to challenge the arbitrator's award in court.

The custody agreement provided that the parents would share the costs of future dispute resolution equally. At the informal conference stage, the costs would presumably be negligible, but they would obviously increase as more formal processes were triggered. This gradation in costs would be an incentive to early dispute resolution. On the other hand, if settlement were not reached at the informal conference stage, the relatively higher cost of mediation and arbitration could deter the less affluent parent from pursuing a valid claim. This financial deterrent is minimal, however, compared with that presented by litigation; parents who lacked informal dispute resolution options and who were forced to face the much greater expense of lawyer-assisted litigation whenever informal negotiations failed would be even less likely to pursue a valid claim.<sup>174</sup> Additionally, if there were an acknowledged disparity in wealth at the time of the initial agreement or one were projected for the future, the allocation of dispute resolution costs could easily be adjusted accordingly.

#### *D. Litigation*

Under the dispute resolution mechanism we proposed, the parents' disagreement would not be subject to litigation, the most adversarial and coercive process of all, until and unless both parents had exhausted all three alternative dispute resolution mechanisms (informal conference, mediation, and arbitration). Arbitration awards in most contexts are subject only to very limited, mostly procedurally-oriented judicial review:<sup>175</sup> for example, to ensure the absence of fraud

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<sup>173</sup> See Philbrick, *Agreements to Arbitrate Postdivorce Custody Disputes*, 18 COLUM. J. LAW & SOC. PROBS. — (1984) (forthcoming).

<sup>174</sup> In describing the families surveyed during their follow-up study, Wallerstein and Kelly noted, "[o]nly if a woman was able to afford the legal fees entailed in going back to court for a cost-of-living adjustment in child support was any change possible, and even then, there was no assurance that such a request would be granted. Most women could neither afford the legal fees nor did they relish the idea of entering into battle once again with their ex-spouses. And so, many women lived on considerably less income than their ex-spouses." J. WALLERSTEIN & J. KELLY, *supra* note 5, at 151.

<sup>175</sup> A court becomes involved in arbitration issues only when a party: "(1) questions the arbi-

in the presentation of evidence or of misconduct or bias on the part of the arbitrator.<sup>176</sup> In the context of custody disputes, however, some state courts have reasoned that substantial deference to the arbitrator's decision cannot be squared with the state's *parens patriae* obligation to protect the child's best interests and have therefore insisted upon *de novo* review of arbitration awards involving child custody issues.<sup>177</sup> Although we could not guarantee that a dispute between the parents would never be tried *de novo* in a courtroom, we designed the arbitration clause to make this prospect as unlikely as possible.<sup>178</sup>

#### IV. TOWARD A STANDARD OF JUDICIAL REVIEW OF MEDIATED CUSTODY AGREEMENTS

Our experience has made us optimistic that mediation of custody disputes can promote post-separation parental cooperation and thus serve the best interests of children. Similar conclusions have been reached by those states that have legislatively enacted custody mediation programs.<sup>179</sup> The American Bar Association's Family Law Section has recently made a significant step forward in the profession's recognition of the increasingly important role mediation will play in resolving child custody disputes by publishing for comment its Standards of Practice for Family Mediators.<sup>180</sup>

Although significant work remains to be done in refining standards

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trability of a dispute and seeks to stay arbitration pending litigation; (2) seeks to compel arbitration; (3) challenges the enforceability of an agreement to arbitrate; or (4) attempts to enforce an arbitration award." Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467, 475 (1979).

<sup>176</sup> For example, the New York arbitration statute provides that:

The award shall be vacated on the application of a party who . . . participated in the arbitration . . . if the court finds that the rights of that party were prejudiced by:

- (i) corruption, fraud or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) an arbitrator . . . [who] exceeded his power or so imperfectly executed it that a final award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

N.Y. CIV. PRAC. LAW § 7511(b)(1) (McKinney 1980). See generally Meroney, *supra* note 175, at 475.

<sup>177</sup> E.g., *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982); *Agur v. Agur*, 32 A.D.2d 16, 298 N.Y.S.2d 772 (1969); *Sheets v. Sheets*, 22 A.D.2d 176, 178-80, 254 N.Y.S.2d 320, 323-26 (1964).

<sup>178</sup> See Philbrick, *supra* note 173.

<sup>179</sup> See *supra* note 3.

<sup>180</sup> See *supra* note 18.

of practice and procedure for lawyers conducting custody mediation, another issue will merit particular attention in the days ahead. As mediation becomes more widespread and more and more mediated custody agreements find their way into courtrooms in proceedings to modify the custody arrangements they contain,<sup>181</sup> it will become increasingly important to begin addressing new questions: What weight should courts accord to the mediated custody agreement? Should they review the custody arrangements in the agreement *de novo*? Or should they place a high evidentiary threshold in the path of the challenging parent by requiring that parent to prove dramatically changed circumstances? The answers to these questions will send a message to divorcing parents, their attorneys and their children about the value society attaches to the interests furthered by mediation.

Courts have long viewed themselves as the institution in society best suited to protect the welfare of children in custody and other child-related disputes.<sup>182</sup> More recent New York cases have suggested that the state's courts will give significantly less weight in the custody modification process to an arrangement that the parents reached voluntarily than to an arrangement that a court has imposed on the family following an adversarial hearing.<sup>183</sup> In part, this judicial tendency to review private custody agreements *de novo* probably reflects an understandable and well-motivated fear that parents will not consider their child's best interests in formulating voluntary custody arrangements to the extent that a court reviewing the parents'

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<sup>181</sup> See Pearson & Thoennes, *supra* note 97, at 64 (discussing the empirically documented experience of the Denver Mediation Project, which indicates that successful custody mediation clients are slower to begin filing for modification of agreements than couples who mediate unsuccessfully or utilize the adversary process, but that all couples eventually show comparable rates of increased filing for modifications in court). But cf. Ilfeld, Ilfeld & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCH. 62 (1982) (empirical study of 414 Los Angeles County custody cases over two years suggests that relitigation rate for families in joint custody arrangements is significantly lower than relitigation rate in traditional sole custody/visitation arrangements).

<sup>182</sup> *Finlay v. Finlay*, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925) (The judge "is to put himself in the position of a 'wise, affectionate, and careful parent,' and make provision for the child accordingly.") (Cardozo, J.) (citation omitted).

<sup>183</sup> In *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982), for example, the New York Court of Appeals implied that it would accord greater deference in a custody modification proceeding to a custody arrangement derived from a trial than to a custody plan entered into through an uncontested stipulation. *Id.* at 94-95, 432 N.E.2d at 768, 447 N.Y.S.2d at 896. See *Eschbach v. Eschbach*, 56 N.Y.2d 167, 172, 436 N.E.2d 1260, 1263, 451 N.Y.S.2d 658, 661 (1982). See also *Nessia v. Nessia*, — Misc. 2d —, 467 N.Y.S.2d 1011, 1013-14 (Sup. Ct. 1983) (court must undertake an independent review of uncontested applications to confirm that changes in custody serve the best interests of the child).

agreement is obliged to do.

These recent cases, however, seem to assume that there are only two methods for resolving a custody dispute — negotiations between the parents, who may or may not be represented by counsel, and litigation. In reality, there are many methods of settling custody disputes, including self-help techniques such as child snatching (which we vigorously oppose),<sup>184</sup> negotiations with or without counsel, mediation, arbitration, and, of course, litigation. Each of these processes, moreover, has innumerable variations that make categorical appraisal difficult.

Some out-of-court custody dispute resolution processes may protect the child's best interests as well as or even better than an adversarial struggle supervised and coercively resolved by a court. Mediation, in particular, has several advantages over litigation: it helps reinforce parental decision-making authority, encourages compromise and cooperation between the parents, and resolves the child's status quickly and privately. Because it results in voluntary agreement, moreover, it has the potential advantage of promoting certainty and stability in the child's life; a mediated agreement is presumably one to which both parents are more willing and more likely to adhere than a custody and support plan imposed on the parents by a court.

These general advantages of mediation suggest that a court should think carefully before deciding to review *de novo* the custody arrangements reached through mediation. The legal community must begin to develop a more refined and discriminating standard to determine what weight to accord the mediated agreement. Such a standard should balance the state's historic *parens patriae* obligation against the public — and children's — interest in encouraging parents to make their own custody and child support arrangements.

We suggest that the primary focus of the judicial inquiry should be on how well the out-of-court settlement process was designed to protect and promote the best interests of the child. If the quality of the process gives the court significant assurance that it has promoted those interests, the court should give agreements resulting from the process substantial weight by placing a heavy evidentiary burden on the parent seeking change.

To assess the quality of the mediation process, the court might ask itself a wide variety of questions, including but not limited to the following: Did the mediators bind themselves to protect the best in-

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<sup>184</sup> See S. ABRAMS, *CHILDREN IN THE CROSSFIRE: THE TRAGEDY OF PARENTAL KIDNAPPING* (1983).

terests of the child in the mediation? Was the process structured to encourage the parents to step back from their purely personal concerns and to focus on the child's needs in developing their custody and support plan? Did the mediators talk to the child to determine his own wishes and, if so, in what depth? Did they independently evaluate the child's interests? How? Did they design the process to encourage the parents to cooperate in the future physical and emotional care and support of their child? Did the mediation also protect the parents' individual interests by encouraging them to seek outside legal advice? Was the mediation done by an interdisciplinary team? What were the background and experience, and the respective responsibilities, of each of the team members? How many total hours did the mediators spend on the case? How many mediation sessions were held? Was the resulting custody and support agreement individualized to the particular family circumstances rather than copied from standard forms?

Custody mediators might want to develop methods for making such procedural information easily available to reviewing courts without jeopardizing the essential confidentiality of what is said during the mediation process.<sup>185</sup> One possibility might be to describe the mediation procedures in some detail in contracts signed by both parents. A written retainer agreement describing the mediators' usual procedures and objectives would help educate a court about the quality of mediation services provided and the qualifications of the mediators without revealing the substance of any communications made during the mediation. The procedural details for the particular mediation process — for example, the number of hours spent interviewing each family member — could be set forth in the custody and support agreement's preamble or appendix. These two documents alone might give a reviewing court enough data to assess the quality of the mediation process and thereby make it unnecessary for the court or either party to subpoena the mediators or their private records.

We leave it to future mediators, commentators, lawyers and courts to continue the dialogue about how courts should treat custody and child support agreements reached through mediation processes that are conducted with varying levels of skill and sophistication. Serious treatment of this issue is essential to ensure that a wide spectrum of dispute resolution procedures is available to families involved in custody disputes.

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<sup>185</sup> See *supra* notes 129-41 and accompanying text.



## V. CONCLUSION

In our judgment, interdisciplinary custody mediation will and should be an ever-growing component of the diverse custody dispute resolution services available to parents and children. We also believe that it is practically and ethically feasible for lawyers to participate in custody mediation. We urge attorneys to help make such services more widely available in their communities, particularly to low- and middle-income families, and in the process to help refine our mediation ground rules and custody dispute resolution mechanism or to develop their own. We also urge the judiciary to recognize the value of thorough, professional custody mediation services by giving greater deference to the parental agreements that they facilitate. Ultimately, if the legal system takes mediation seriously, the beneficiaries will be the innocent and unintended victims of the courtroom custody struggle: the children of divorce.

## APPENDIX A

## FULL TEXT OF OUR MEDIATION RETAINER AGREEMENT

1. *Focus and agenda of mediation.* We agree to retain Morningside Heights Legal Services ("the Clinic") to mediate, free of charge, a dispute regarding the future care, parenting and support of our child. We understand that it is Clinic policy in mediating such disputes to focus primarily on the child's best interests while also taking into account the concerns and interests of both parents. We recognize that the Clinic believes that a child's best interests are generally served by the meaningful involvement of both parents in the child's life after separation and that the Clinic hopes to promote such involvement through the mediation process.<sup>186</sup>

2. *Mediation team.* We understand that Ms. Melissa D. Philbrick and Ms. Dvora Wolff Rabino will be conducting the mediation for the Clinic and that they are law students working under the direction of Mr. Andrew Schepard, Associate Professor at Columbia Law School and a Clinic supervisory attorney. We also understand that Ms. Philbrick and Ms. Rabino will have the assistance of Dr. Paul Nassar, a consulting psychiatrist to the Clinic and Lecturer in Law and Psychiatry at Columbia Law School, and Ms. Nina Freedman, Director of Social Services of the Clinic and a certified social worker.

3. *Legal advice.* We further understand that the Clinic will not serve as a lawyer for either or both of us during this mediation and we will not look to the Clinic to protect our individual interests in this matter or to counsel us about the advisability of any plan from either of our individual perspectives. We understand that if either of us should wish advice about the legal benefits or drawbacks of any particular course of action to him or her personally, he or she should consult with his or her own lawyer.

4. *Conflict of Interest.* We agree to allow the Clinic to work with both of us despite our potentially conflicting interests on this matter. We understand that the Clinic is permitted to work with both of us simultaneously only because we have consented to such an arrangement.

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<sup>186</sup> The statement expressing our joint custody orientation was not contained in our initial retainer agreement; instead, we had conveyed our philosophy to the parents orally at our first meeting. In retrospect, however, we believe that this perspective was so influential in our approach to the mediation that it should have been included in the retainer agreement. See STANDARDS OF PRACTICE FOR FAMILY MEDIATORS art. III(C), *supra* note 18, at 457 ("The mediator shall disclose to the participants any biases relating to the issues to be mediated.").

5. *Investigation; use of mental health professionals.* We understand the following Clinic policies. The Clinic believes that its role as a mediator requires an understanding and investigation of the family situation so that the Clinic's suggestions to the parties can be fully informed. The Clinic, as an interdisciplinary endeavor, generally prefers to utilize the services of mental health professionals in the mediation process. For these reasons, the Clinic will want to meet with our child and may recommend that Clinic-affiliated mental health personnel meet with either or both of us and visit our child's home or homes.

6. *Child's participation.* We are aware that the Clinic may recommend that our child participate in some or all of the mediation sessions and that the reasons for that recommendation will be fully discussed with us when it is made.

7. *Confidentiality of the mediation process.* We recognize that the mediation efforts will be compromised if information disclosed during the course of mediation may be revealed to any outside parties or used in a court in any litigation that may ensue. We understand that the Clinic will respect the confidentiality of our discussions during the mediation process. And, accordingly, we enter the mediation with the mutual pledge that neither we, nor our agents, including our lawyers, will either individually or jointly:

(a) request anyone affiliated with the Clinic to represent either of us or our child in connection with this dispute after an agreement has been reached or the mediation has reached an impasse;

(b) either request or require anyone affiliated with the Clinic, including any mental health professionals retained by them, to provide testimony in court in connection with this dispute;

(c) use any written reports or evaluations (or any work product associated therewith) provided by anyone affiliated with the Clinic, including mental health professionals, in any litigation that may ensue; or

(d) use any statements made by either of us during the mediation sessions, whether or not in the presence of the Clinic staff, in a court of law.

It is our further pledge that any communication between the Clinic and either or both of our lawyers will also be privileged and may not be used in a court proceeding.

8. *Candor within the mediation process.* We understand that any legal advice that is provided by the Clinic will be given to both parties in one another's presence. We also understand that the Clinic may meet with us individually to discuss factual matters and that the

mediators may reveal the substance of those conversations to the parent who was not present. We realize, too, that, to facilitate a fair and workable agreement, we may be asked to disclose information and documents, including information about our finances, to each other and to the mediators. We further understand that any evaluations or reports prepared by the Clinic's mental health professionals will be disclosed to both of us and that the confidentiality of those evaluations or reports under paragraph 7 of this agreement will in no way be impaired by that disclosure.

9. *Right to withdraw from mediation.* We understand that either or both of us may terminate the mediation process at any time for any reason and that we may retract any oral agreements regarding the subjects of the mediation that we have made until that time. We recognize that the Clinic also reserves the right to withdraw from the mediation if the mediators feel that their defined role as mediators or the Clinic's stated policies would be compromised by their continued involvement or that further mediation would not be productive.

10. *Reviewing and signing agreements reached in mediation.* We understand that any agreement reached through the mediation will be reduced to writing by the Clinic and, when signed by both of us, will be binding on both of us and enforceable as a contract. We also understand that both of us will be encouraged to review any such written agreement with independent legal counsel before signing it.

11. *Undertaking the mediation.* We understand that we will be given several days to consider whether we wish to sign this retainer agreement and to discuss the provisions with our attorneys if we so desire. We further understand that we have been given duplicate originals of this agreement and that this agreement will not be effective until and unless each of us signs his or her original and mails it to the Clinic. The Clinic will notify us simultaneously by letter when it has received signed originals from both of us.

12. *Signatures.* Our signatures below indicate that we have read this retainer agreement and that we agree to proceed with the mediation in accordance with the policies described.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

## APPENDIX B

## TEXT OF THE CUSTODY AGREEMENT'S FUTURE DISPUTE RESOLUTION PROVISIONS

(1) *Modification of agreement.* The above provisions concerning custody and child support may be modified from time to time as the parents may agree. However, no such modification shall be construed to be a permanent modification of this agreement unless reduced to writing by an attorney chosen by the parents and then signed by both of them. Costs or expenses of drafting and executing modifications to this agreement, if any, shall be shared equally by both parents.

(2) *Reevaluation of agreement.* This agreement shall be reevaluated upon the occurrence of any one of the following events: (a) the remarriage of either parent; (b) cohabitation by either parent with an unrelated member of the opposite sex; (c) a move by either parent beyond a 20-mile radius of New York City; (d) major illness, disability or extended hospitalization of either parent or child; or (e) any substantial change in the financial or other circumstances of either parent that could significantly affect the child's best interests.

(3) *Renegotiation and dispute resolution mechanism.* If a reevaluation of this agreement pursuant to paragraph (2) above should be deemed necessary by either party or a significant controversy should arise with regard to this agreement or any alleged breach thereof, the following procedures shall be triggered:

(a) *Conference:* Father and mother shall first meet and confer within five days of either parent's request for such a meeting in a good-faith effort to come to an agreement. Any agreement reached shall be reduced to writing in accordance with paragraph (1) above.

(b) *Mediation:* If father and mother are unable to come to an agreement between themselves on any issue, the unresolved issue or issues shall be submitted to mediation for resolution. The Clinic shall serve as mediator for father and mother for one year from the execution of this agreement pursuant to the terms of the retainer agreement with the Clinic. Thereafter, mediation shall be conducted by any neutral third party upon whom both parents agree. If the parents fail to agree on a mediator, the Clinic shall designate a mediator for them. Costs or expenses of the mediation, if any, shall be shared by both parents.

(c) *Arbitration:* If, in the opinion of the mediator, mediation is unsuccessful in resolving any issues on which the parents disagree, the

unresolved issue or issues shall be submitted to binding arbitration, with the arbitrator to be agreed upon by both parents. In the event that the parents are unable to agree upon an arbitrator, the arbitrator shall be appointed by the American Arbitration Association Family Dispute Services. Such arbitration shall be conducted in accordance with the American Arbitration Association's Rules for the Interpretation of Separation Agreements, except that the arbitrator shall resolve issues involving the child's custody and support in accordance with the law and in a way that will further the child's best interests, giving appropriate weight to the child's preferences as ascertained after consultation with him. Costs or expenses of the arbitration shall be shared by both parents, except that each parent shall be responsible for his or her own attorney's fees.