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Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility

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Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility

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TABLE OF CONTENTS

I. INTRODUCTION	768
II. PREVENTIVE PUBLIC HEALTH AND THE LEGAL SYSTEM	770
III. THE MANDATORY PRE-DIVORCE PARENTAL EDUCATION PROGRAM	772
IV. CHILDREN OF DIVORCE INTERVENTION PROGRAMS..	776
V. AMENDING THE CODE OF PROFESSIONAL RESPONSIBILITY TO PROMOTE SENSITIVITY TO CHILDREN	777
A. <i>Proposed EC 7-40</i>	779
B. <i>Comment</i>	779
C. <i>Proposed EC 7-41</i>	780
D. <i>Comment</i>	780
E. <i>Proposed EC 7-42</i>	780
F. <i>Comment</i>	781
VI. CONCLUSION	781

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I. INTRODUCTION

Divorce is one of the greatest challenges that American children face. The numbers affected are enormous. In 1951, a rate of 6.1 children per thousand were involved in a divorce. In 1981, the rate reached 18.7 children per thousand. Since then, the rate has fallen back somewhat to 16.8 children per thousand in 1986, the last year for which statistics are available.¹ This number translates to about 1.2 million children each year who experience the divorce of their parents. If current rates of divorce continue, we can expect that a significant percentage of all American children will become children of divorce by age eighteen.²

All children of divorce experience difficult transitions: dissolution of the image of a "normal" family; absence of one parent and, in many cases, grandparents and other extended family;³ loss of traditions; loss of socio-economic status;⁴ divided loyalties;⁵ and the emotions associated with these losses.⁶

For some percentage of the children of divorce, however, the risks are greater. Prolonged sadness and deep depression are relatively common.⁷ So is serious educational decline.⁸ There is also evidence of in-

1. See IRA ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 203 (1991).

2. Jane E. Brody, *Personal Health: Easing the Impact of Divorce on Children*, N.Y. TIMES, July 24, 1991, at C10; Jane E. Brody, *Children of Divorce: Steps to Help Can Hurt*, N.Y. TIMES, July 23, 1991, at C1.

3. See Joanne L. Pedro-Carroll & Emory L. Cowen, *The Children of Divorce Intervention Program: Implementation and Evaluation of a Time Limited Group Approach*, in 4 *ADVANCES IN FAM. INTERVENTION, ASSESSMENT & THEORY* 282 (JAI Press Inc. 1987).

4. The Census Bureau has reported that children are almost twice as likely to live in poverty after parental divorce or separation than before dissolution. Jason DeParle, *Child Poverty Twice as Likely After Family Split, Study Says*, N.Y. TIMES, March 1, 1991, at A8. After a breakup, family income declined by 37 percent, which equates to a 26 percent drop in per capita income. *Id.* Within four months of a separation or divorce, the percentage of children living in poverty jumped to 36 percent from 19 percent. *Id.* After 16 months, the initial income drop declined to 29 percent as women made up some of the difference through additional work and improved collection methods from absent fathers. *Id.*

5. JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 49 (1980).

6. See *id.* at 45-51, 169-73, 177, 232-33.

7. Judith Wallerstein and Joan Kelly, in their landmark study of the effects of divorce on the family, report that the possible effects of parental separation on children include deep depression. WALLERSTEIN & KELLY, *supra* note 5 at 169-73, 232-33. This

creased risk of teenage suicide,⁹ drug use and criminal involvement.¹⁰ It has been suggested that some percentage of these children of divorce have difficulty forming long-term relationships and attachments with the opposite sex.¹¹ Overall, children of divorce tend to be much less optimistic about their capacities to master life's opportunities and problems, a state of mind that tends to reduce their capacities for achievement and physical and mental health.¹²

Divorce is not, however, inevitably an insurmountable crisis of childhood. In fact, some percentage of children may emerge stronger after divorce than before it.¹³ Research is accumulating that indicates

depression was sometimes associated with a decreased capacity to function in school, difficulties in social adjustment, and involvement in delinquent behaviors. *Id.* at 177. Anger, apparently related to underlying depression, was reflected in drug involvement and delinquent behavior, including arson, stealing, and breaking and entering. *Id.* at 232-33.

8. *Id.* at 177. A 1980 study conducted by the National Association of Elementary School Principals (NAESP) compared the academic achievement of children in one- and two-parent households. NAESP Staff Report, *One-Parent Families and their Children*, 60 PRINCIPAL 31 (1980). In the surveyed elementary schools, 23 percent of two-parent children and 38 percent of one-parent children were classified as low achievers. Only 17 percent of the children from one-parent households were classified as high achievers, while 30 percent of the children from two-parent households held that distinction. These patterns were similarly reflected in the secondary schools. *Id.* at 33. A national study of children in the schools, conducted by Guidubaldi et al., reports that children from divorced families scored more poorly than those from intact families in reading and math test scores and class grades. Children from divorced families tended to be absent from school more often, and were more likely to be placed in special reading classes. Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, in 30:3 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 349, 356 (1991).

9. Divorce has been reported to be a seemingly major factor in youth suicide, "the second leading cause of death in the 15-to-24 year old age group." Nicholas Davidson, *Life Without Father*, 51 POL'Y REV. 40, 41 (1990).

10. WALLERSTEIN AND KELLY, *supra* note 5 at 232-33. A UCLA study published in 1987 reports that children of an inadequate family structure are more likely to resort to drug use as a means of coping with their depression and anxiety. Davidson, *supra* note 9, at 43.

11. Ten years after their parents' divorce, a significant number of young adults studied by Wallerstein and Kelly confronted issues of love, marriage, and commitment with anxiety. In response, many young men were likely to avoid relationships with the opposite sex, and young women were likely to engage in short-lived sexual relationships. Wallerstein, *supra* note 8, at 353.

12. MARTIN SELIGMAN, *LEARNED OPTIMISM* 145-49 (1991).

13. Some children are fortunate in that after the initial period of instability, the post-divorce family provides the same supports as those of the intact family. Children

that responsible parenting, a sensitive court system, family therapy and school-based intervention programs can significantly help children to deal with divorce-related problems.¹⁴

II. PREVENTIVE PUBLIC HEALTH AND THE LEGAL SYSTEM

Experience suggests that divorce-related risks to children are increased if parents engage in a protracted custody dispute. Normal divorce-related adjustment problems are magnified by ongoing parental conflict.¹⁵ Divorce alone for children is traumatic; a custody dispute is potentially devastating.

Adversarial courtroom combat and the indeterminate, unpredictable legal standard of the "best interests of the child," however, encourage custody fights.¹⁶ Warring goes on endlessly, with final resolution often emotionally elusive and expensive (it is not unknown for a parent to spend several years of potential college tuition on a custody lawyer).¹⁷ The adversarial process encourages parents to degrade each other rather than cooperate around the essential tasks of childrearing.

of such families are able to forge "ahead under these conditions, strengthened by their ordeal during the separation and their pride in their own capacity to weather the acute crisis." WALLERSTEIN AND KELLY, *supra* note 5, at 217. Evidence shows that children exposed to open conflict are less well adjusted than children from divorced families, because "[a] divorce undertaken thoughtfully and realistically can teach children how to confront serious life problems with compassion, wisdom, and appropriate action." JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 305 (1989). Many children are able to master their fears of repeating their parents' mistakes, "to choose better and to resolve the unresolved issues of a childhood that included the trauma of divorce." *Id.* at 14-15.

14. See Pedro-Carroll & Cowen, *supra* note 3, at 286-87, 300-03.

15. WALLERSTEIN & KELLY, *supra* note 5, at 37.

16. The adversarial process works against the best interests of the child by encouraging delay in settlement, increasing antagonism between parents, and stressing the child's loyalties to each parent. The present system encourages settlement negotiations to link custody and money issues, and encourages parents to put their financial interests ahead of the child's interest in a healthy relationship with both parents. The antagonism generated tends to decrease the degree of parental cooperation in the child's post-divorce future. The process is in the hands of the parents' lawyers, who are trained in adversarial combat, and may have a questionable commitment to the welfare of the child. See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 726-28, 736-39 (1985).

17. The authors have not done a survey of custody case fees. The statement is based on the experience of the lawyer-authors in years of matrimonial practice and teaching.

Embattled parents demand, and sometimes seek to buy, the loyalty of their hopelessly torn children.¹⁸

Efforts to improve the legal standards by which custody disputes are decided and the procedures for adversarial combat are important, but to some extent represent misplaced priorities. They can intensify the negative impact of divorce on children, not contain it. A principle aim of reform should be to prevent as many child custody cases from reaching the courtroom as possible by promoting voluntary parental settlements and responsible parenting. Reform pointed towards promoting parental settlement has an additional salutary benefit. It reinforces the truly basic value that parents, not the state, are responsible for making important decisions about their children,¹⁹ even after divorce. The less state intrusion in family life that divorce causes, the better and the more functional the reorganized, post-divorce family will be in parenting children.

Reams of law review articles have been written about how adversarial court procedures can be reformed to encourage parental settlement for custody cases already filed.²⁰ That debate is important and

18. Parents are aware the child's views may be important in the custody determination and may attempt to influence what the child says to the judge. The general rule is that the child's preference may be considered by the judge, but is not dispositive. See *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765 (1982). For an empirical study of judicial attitudes in interviewing children in custody cases, see Fredericka K. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study* 17 U.C. DAVIS L. REV. 807 (1984).

19. In an intact family, parental decisions regarding child-rearing are given a large measure of autonomy from state interference. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that Amish parents have a right under the First Amendment to keep their children out of the public schools after the eighth grade, despite the state's interest in universal compulsory education); see, e.g., *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (holding that the Fourteenth Amendment protects the right of parents to choose schools where their children will be educated); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the Fourteenth Amendment protects the right of parents and teachers to instruct children in a foreign language).

20. See, e.g., Schepard, *supra* note 16 at 743-70; *Recommendation of the Law Revision Commission to the 1985 Legislature: Relating to the Child Custody Decision-Making Process*, 19 COLUM. J.L. & SOC. PROBS. 105, 121-128 (1985) [hereinafter *Recommendation*]; see also Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 YALE L.J. 1126

should continue. The purpose of this article, however, is to suggest three relatively cost-free measures that the lawyers and legal system of each state can take that might help custody disputes from becoming a judicially cognizable "dispute" requiring resolution by adversarial procedure. They are: (1) creating a mandatory program of education for parents involved in a custody dispute; (2) supporting school-based intervention programs for children experiencing parental divorce and custody problems; and (3) amending the *Code of Professional Responsibility* or *Model Rules of Professional Conduct* to require lawyers to advise parents in a custody dispute of the harm they are doing to their children and of conflict resolution methods to reduce that harm.

III. THE MANDATORY PRE-DIVORCE PARENTAL EDUCATION PROGRAM

It is possible for parents to mitigate the effects of divorce on their children by assuring them that the divorce is a rational response to conflict between the spouses for which the children are not to blame.²¹ Children *need* to be assured that a relationship with both parents will continue after one physically leaves the house. Loyalty battles *can* be avoided. Parents *need not* bad mouth each other. Parents *can* cooperate in decision making about their children. Visits with the parent with whom the child does not primarily reside *can* be non-conflicted and provide the foundation for a meaningful parent-child relationship. Therapy and support groups *can* help the child of divorce adjust, as can sympathetic teachers and adult figures. Child support *can* be paid regularly. In short, parents can create a post-divorce environment which holds out hope for better outcomes for children. What they need to be advised of is how and why.

Research and common sense suggests that early intervention to reduce conflict and educate parents is essential to prevent harm to children. The earlier in the divorce process that the parents understand the harm that a protracted custody dispute can do to their children and them, and steps they can take to reduce that harm, the more likely it is that they will minimize conflict and coexist as parents.²²

(1978) (advocating the need for separate legal representation for children).

21. WALLERSTEIN & BLAKESLEE, *supra* note 13, at 286.

22. See Carol Lawson, *Requiring Classes in Divorce*, N.Y. TIMES, January 23, 1992, at C1; see also *Recommendation*, *supra* note 20, at 123-28 (mediation as an effective process for the resolution of child custody disputes).

Several states (California, Connecticut, Georgia, Minnesota and Texas are examples) have supported this proposition by instituting educational programs for divorcing parents.²³ By alerting parents to the negative consequences their children will face as the result of a spiteful custody fight and how the child's post-divorce environment can be strengthened, these programs attempt to educate parents so that their children need not become one of the casualties of a failed marriage.²⁴

It might be helpful to describe a parental educational program to provide a concrete idea about its content and functioning. Based on the models of other states, Hofstra University Law School, the Marriage and Family Counseling Program of the Hofstra School of Education and the Interdisciplinary Forum on Mental Health and Family Law, an umbrella organization of representatives from leading legal and mental health organizations, have designed a three-part educational program for divorcing parents in New York State given the acronym PEACE—Parent Education And Custody Effectiveness.

The PEACE program consists of three sessions, all of which include an educational component and group discussion for processing the information. The first session, led by a judge, a lawyer, or both, informs parents about what process (e.g., preliminary hearings, forensic evaluations, possible appointment of a lawyer for the child) the legal system will use to decide their dispute if they do not settle the problems themselves and how long the process may take. The first session also describes the substantive standards which will be applied by the judges to determine contested custody disputes. The second session, led by a mental health professional, focuses on the emotional aspects of the divorce experience for parents. The final session, also led by a mental health professional, looks at the problems of divorce from the perspective of the child and describes methods of parental interaction that facilitate positive outcomes for children.

PEACE is entirely an educational program; no discussion is allowed of how the participants' individual cases can be settled. PEACE is thus distinguishable from a mediation or arbitration program. In addition, PEACE is not therapy; common emotional patterns and problems are presented, not explored in individual cases.

23. See CAL. R. APP. DIV. 1 J. ADMIN. § 26(b); Super. Ct. Cobb County, Ga., Seminar for Divorcing Parents, Order 8850845-99 (August 17, 1988); see also Lawson, *supra* note 22, at C1 (Cobb County, Georgia requires participation in a four-hour seminar for divorcing parents).

24. See Lawson, *supra* note 22, at C1.

The content of the PEACE program is determined by an advisory board of lawyers and mental health professionals to ensure that the material presented is neutral and based on the best research available. Presenters receive a detailed PEACE curriculum and training sessions. All presenters are unpaid volunteers. Professionals who lead PEACE sessions cannot take referrals from participants. Participation is confidential.

PEACE participants are referred by judges from court dockets, and by lawyers and mental health professionals knowledgeable about the program.²⁵ At present, participation is voluntary.

However, in other states, such as Georgia, participation is mandatory for custody litigants.²⁶ Court rules authorize and implement the educational program, as well as require litigant participation.²⁷ In such mandatory programs, participants pay an affordable fee graded on ability to pay to cover program costs.²⁸

A strong case can be made for a mandatory parent educational program on both philosophical and practical levels. If a driver violates speeding laws too often, he or she can be required to take a mandatory driver's education course as a condition of maintaining the privilege of a license to drive.²⁹ Like the license to drive a car, divorce is not a constitutional right. Liberal divorce laws give parents with children the privilege of divorce and the legislature can restrict that privilege reasonably.³⁰ Indeed, some commentators have even proposed that parents with children not be permitted to divorce during the children's minor-

25. A strong case can be made that parents thinking about divorce should attend a program like PEACE before any filings are made with a divorce court. By the time pleadings are filed, parental positions have hardened and child-oriented compromise is more difficult to promote. Educational programs for mental health professionals, educators and lawyers should promote such pre-filing parent participation.

26. Super. Ct., Cobb County, Ga., Seminar for Divorcing Parents, Order 8850845-99 (August 17, 1988); *see also* Lawson, *supra* note 22, at C1.

27. Super. Ct., Cobb County, Ga., Seminar for Divorcing Parents, Order 8850845-99 (August 17, 1988).

28. *Id.* (Participants pay a \$30.00 fee, which is waived if the party meets indigency criteria).

29. *See* N.Y. VEH. & TRAFFIC LAW § 530(1) (McKinney Supp. 1992) (allowing Commissioner of Motor Vehicles to require a driver whose license has been suspended or reduced to "attend a driver rehabilitation program specified by the Commissioner").

30. "The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (quoting *Penoyer v. Neff*, 95 U.S. 714, 734-35 (1878)).

ity.³¹ Certainly, the best interests of children, the fundamental aim of state intervention in the post-divorce family, can support the requirement that parents, at this most stressful and emotional time of their lives, learn about ways to minimize harm to their children as a condition to divorce.

In this sense, a required educational program for divorcing parents is a moral statement to parents about the state's priorities in resolving their family problems. Just as the driver who drinks or speeds puts lives at risk, parents who divorce put their children at emotional risk. Both should learn how to prevent harm to others from reoccurring before being granted a privilege by the state.

On a more practical level, a mandatory parent education program is justified to reduce the tension that often exists between divorce lawyers and parent clients. Every sensible lawyer who has participated in or witnessed a custody dispute knows that in the great percentage of cases parental settlement is far preferable to a court-imposed solution (excepting those cases involving child or spousal abuse or neglect).³² Yet the lawyer for the parents must often accommodate his or her client's desire to punish the other parent by using the children as a pawn in a custody dispute at the risk of losing the client. In addition, the lawyer for one spouse may be worried in counseling restraint that the lawyer for the other spouse is not providing the same sort of advice.

Making an education program mandatory will thus reduce the conflicting messages parents receive from lawyers, therapists and others whose opinion they value. The educational program will simply reinforce the advice a sensible lawyer should give a client anyway. Clients who do not receive such advice, and instead are advised to contest custody vigorously, will be reminded by a mandatory parental educational

31. See Judith Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together With Criticisms and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981); cf. Davidson, *supra* note 9, at 44 (advocating return to fault divorce for children's benefit). The rationale of a "marriage for minor children" is that the difficulty of obtaining divorce may encourage parents to reconcile. However, the children may not benefit if their parents are forced to remain married. The child's best interests may be better served if parents divorce quickly, rather than prolong parental conflict in the household. Furthermore, the problems of collusion and evasion that plague fault divorce laws would also plague the "marriage for minor children" concept. Schepard, *supra* note 16, at 744-45.

32. A custody plan resulting from self-determination may be more creative, flexible, and enduring than a plan imposed by the court. Costs are reduced to the extent that lengthy custody litigation is avoided. *Recommendation*, *supra* note 20, at 124.

program of the childhood that may be lost as a result.

Despite its attractions, parental education is not a panacea. It will not transform deeply embittered parents into models of cooperation, nor will it cure severe psychological problems which may be the cause of some custodial disputes.³³ More intensive, structured, programs are needed for these purposes. An education program can, however, help such troubled parents by advising them of the availability of more intensive programs and encouraging participation. Nor will an education program clear crowded court dockets of custody cases. It can, however, be an efficient beginning to a coordinated program that could funnel custody disputes into appropriate forms of alternate dispute resolution that diverts these cases from adversarial combat.³⁴

Mandatory parental education, then, is a modest but important beginning toward setting the proper tone for a custodial dispute, which should always be focused on the needs of the children rather than the "rights" or "grievances" of the parents. It encourages some parents to settle their differences through presentation of accurate information. For those who do not settle, mandatory education is a moral statement of the importance of responsible parenting, a value in and of itself. Furthermore, like an introductory lecture at the beginning of a college course, parental education can serve as the foundation for more intensive interventions and referrals to community services for the divorcing family.

IV. CHILDREN OF DIVORCE INTERVENTION PROGRAMS

Educational programs such as PEACE are directed at parents. The problem is that children caught in the emotional maelstrom of parental divorce and custody problems need a program sensitive to their needs as well.

Many primary schools have appropriately recognized this need. This is not surprising, since parental divorce and separation is often associated with serious educational decline in children.³⁵ The children's educational progress often deteriorates in proportion to their emotional

33. See Judith Wallerstein, *The Overburdened Child: Some Long-Term Consequences of Divorce*, 19 COLUM. J. LAW & SOC. PROB. 165, 177-79 (1985).

34. See Schepard, *supra* note 16, at 753-80 (describing a system of judicial administration that maximizes cooperative parenting after divorce); see *generally Recommendation*, *supra* note 20. (New York State Law Revision Commission Report with proposed Legislation).

35. See *supra* note 8.

condition. Parents in crisis have difficulty providing support for their children's educational efforts.

A number of school-based intervention programs have been developed to help children of divorce cope with their time of turmoil. An example is the twelve-session Children of Divorce Intervention Project, whose curriculum was created at the University of Rochester. The curriculum addresses common issues and concerns of children of divorce in early adolescence and uses a variety of innovative teaching techniques such as journals and children-produced simulated television programs.³⁶ Empirical research has demonstrated the effectiveness of such programs in helping children cope with the divorcing process.³⁷

These programs need to be made more widely available. Lawyers who represent parents have a special responsibility to become knowledgeable about them, and to encourage parent/clients to refer their children to them. Also, lawyers—especially the family law bar organizations—must take some responsibility for lobbying education officials to promote these programs and fund them.

If children of divorce intervention programs exist in a community, a mandatory parent education program would be an excellent opportunity to advise parents of that fact and to encourage them to let their children participate. Assuming wide-spread availability of divorce intervention programs, one could, conceivably, envision a day when parents must certify that their children have been enrolled in a school-based intervention program and that they have attended educational seminars like PEACE before a divorce is granted. This educational approach is consistent with society's desire to give adults the power to terminate an unhappy marriage while still insuring that they give appropriate consideration to the needs of the child. It promotes parental autonomy and responsibility and is preferable to an approach which would make parental divorce more difficult to obtain.³⁸

V. AMENDING THE CODE OF PROFESSIONAL RESPONSIBILITY TO PROMOTE SENSITIVITY TO CHILDREN

Requiring parents to be educated about the effects of divorce on their children is not, however, enough. As mentioned above, parents often do not want to hear sensible advice to reduce conflict over their

36. Pedro-Carroll & Cowen, *supra* note 3, at 287-89.

37. *See id.* at 286-87.

38. *See supra* note 30.

children from their lawyers. And some lawyers do not provide such advice. Even a small number of "bomber" lawyers who use children as a weapon to extract financial concessions could undermine the message which the mandatory education program tries to promote. So can lawyers who advise clients that the parent education program is simply a formality to be endured and completed as quickly as possible, rather than an important learning experience to be participated in seriously for the benefit of children.

To combat these problems, the requirement that lawyers advise parents of the effects prolonged custody conflict can have on their children should be made a requirement of professional responsibility. Lawyers who give child-sensitive advice to parents who do not wish to hear it will find their inclinations reinforced by specific provisions of the lawyer's code; lawyers who do not give such advice will face appropriate professional censure if they do not.

The American Academy of Matrimonial Lawyers (AAML) has already adopted such child-oriented provisions in their recently approved *Bounds of Advocacy*, a supplementary code of aspirational standards for divorce law specialists.³⁹ The Academy is to be commended for its recognition of the harm that custody litigation can do to children. The inclusion of these provisions in the AAML *Bounds* is the first institutional recognition by the family law bar of this inescapable fact.

However, the general rules regulating professional responsibility of all lawyers should be expanded to include the concepts in the AAML *Bounds*. First, many lawyers who handle custody disputes do not belong to the AAML (a voluntary and selective national organization of divorce specialists) and are not bound by its aspirational guidelines. In most jurisdictions any lawyer, without any special training or experience, can represent a parent in a divorce. The same child-protective ethical standards should be applicable to all lawyers who represent parents in child custody disputes.⁴⁰ More importantly, the AAML ethical

39. See AMERICAN ACADEMY OF MATRIMONIAL LAWYERS STANDARDS OF CONDUCT 2.23 (1991) (an attorney should consider the welfare of the children in his representation of the parent); AMERICAN ACADEMY OF MATRIMONIAL LAWYERS STANDARDS OF CONDUCT 2.14 cmt. (1991) (the attorney should advise the client of the effects of a meritless custody claim to the child and should withdraw if the client persists in asserting the claim).

40. The Code of Professional Responsibility already contains provisions concerning divorce law or other specialized fields of practice. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1986) (disfavoring contingent fees in domestic relations cases); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-17 (1986)

standards do not carry the force of the state-created machinery (such as continuing education requirements, disciplinary sanctions and potential malpractice liability) to enforce the professional responsibility obligations of counsel. If lawyers are to make money from representing parents, the lawyer's ethical code and its enforcement mechanisms should recognize the unique interests the children have in the lawyer's advice.

Thus, a state where lawyer conduct is regulated by the *Code of Professional Responsibility* might add the following ethical considerations under Canon 7 (Zealous Representation) under a subheading "Duty of the Lawyer in A Child Custody Action." The proposed new ethical considerations would supplement Disciplinary Rule 7-102(A)(1), which prohibits a lawyer from "assert[ing] a position, conduct[ing] a defense, delay[ing] a trial, or tak[ing] other action on behalf of the client when the lawyer knows or it is obvious that such action will serve merely to harass or to maliciously injure another."⁴¹ The commentary is provided for states which follow the Model Rules format for their regulation of a lawyer's professional responsibility. (Other minor adaptations of these proposals will no doubt be required for Model Rules states).

A. *Proposed EC 7-40*

An attorney representing a client in an action against the other parent concerning their child shall advise the client of the potential harm a protracted custody battle will have on the client's child.

B. *Comment*

Divorce is a traumatic situation for the involved spouses. Evidence, however, has mounted in recent years that children are the most significant casualties of divorce and custody battles. Parental separation and divorce is traumatic in and of itself, but when accompanied by an acrimonious and prolonged custody dispute the damage to the children is especially severe. The evidence shows that children who experience such events can suffer developmental problems, serious emotional distress and scholastic setbacks. Any attorney involved in a custody pro-

(representation of multiple defendants in a criminal case or co-plaintiffs in a tort action).

41. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1986).

ceeding has an ethical obligation to inform the client as to how such a proceeding will affect the client's children. The attorney must keep the children's best interests in mind while advising the client how to proceed.

C. *Proposed EC 7-41*

An attorney representing a client in an action against the other parent concerning the children shall not contest child custody for purposes of financial leverage or vindictiveness.

D. *Comment*

Ethical Consideration 7-41 goes hand in hand with Ethical Consideration 7-40. Initiating a custody contest to hurt the other party invariably hurts the children more by placing them in the middle of the conflict like pawns on a chessboard. Genuine issues of custody should, of course, be resolved, but custody contests begun for malicious reasons must be discouraged. The attorney has an ethical obligation to attempt to dissuade the client from pursuing such a course of action, and if the client is unpersuaded, may withdraw from representation.

E. *Proposed EC 7-42*

An attorney representing a client in an action against the other parent concerning their children should encourage settlement of custody disputes through referrals for mental health therapy, negotiation, mediation or arbitration,⁴² except where domestic violence or child abuse is involved. In those instances, an attorney should seek consulta-

42. Colorado is apparently considering an amendment to its Code of Professional Responsibility which would require lawyers "in a matter involving, or expected to involve litigation, [to] . . . advise the client of an alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute, or to reach the legal objective sought." Letter from Frederick K. Conover II, President, Colorado Bar Association, to Chief Justice Luis D. Rovira, Colorado Supreme Court, June 18, 1991 (on file with the authors). Such general provisions mandating consideration or alternate dispute resolution by lawyers may well be desirable, and could supplement the specific child custody provisions proposed here. However, if a jurisdiction were not inclined to adopt a general mandate for ADR-oriented advice in all litigations, it should still adopt the narrower child custody provisions proposed here. While consideration of ADR may be good for all clients, it is essential for a parent who will foreseeably damage a child if he or she pursues litigation.

tion with appropriate experts in the area as to how to proceed.

F. *Comment*

In divorce and custody matters, prolonged litigation is financially and emotionally draining for the parties. The highly charged atmosphere and potential for emotional harm makes efficient resolution that encourages parental post-divorce cooperation concerning children a priority. Children placed in the middle of an acrimonious divorce are at risk of serious emotional, developmental and scholastic damage which may be alleviated by alternative dispute resolution methods as opposed to litigation. Additionally, there is evidence that parties to a voluntary, mutually arrived at agreement are more willing to abide by such an agreement than an agreement imposed by a court following litigation. It is the responsibility of the attorney involved to make the client aware of all options available in addition to, or in lieu of, litigation.

Domestic violence and child abuse present special circumstances which may make alternative dispute resolution inappropriate, because such processes may encourage continued interaction with the abusive spouse. In cases involving these elements, the attorney should seek advice from appropriate experts as to how best to protect the child's interests.

VI. CONCLUSION

Mandating parental education, expanding school-based children of divorce intervention programs, and amending the lawyers' rules of professional responsibility are part of an overall preventive services program that recognizes the effects of divorce and parental separation for what it is—a major public health problem facing many of our children. This is not to say that parents should not divorce, or that divorce is inevitably a catastrophic event for children. What is important, however, is that parents recognize that divorce and separation put their children at risk and that the state create procedures and a social climate to help parents define responsible behavior and to conduct themselves accordingly.

Millions of children are affected by divorce in this country annually. The effects of divorce on them are well documented. Mandatory parental divorce education, school-based intervention programs for the children of divorce and changes in the lawyers' rules of professional conduct are appropriate and socially symbolic recognitions of the po-

tential harm parents do to children when they divorce. Creating such a coordinated program of preventive services can be the beginning of a large-scale effort—among judges, lawyers, mental health professionals and others concerned with the welfare of children—to redefine the responsibilities of parents and to reassert the authority and competence of the family in the modern era.