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# Kramer vs. Kramer Revisited: A Comment on The Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution With Their Clients

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***Kramer vs. Kramer* Revisited:  
A Comment on *The Miller Commission  
Report* and the Obligation of Divorce  
Lawyers for Parents to Discuss Alternative  
Dispute Resolution with Their Clients**

**Andrew Schepard\***

The *Miller Commission Report* is a useful blueprint for New York to create a divorce dispute resolution system to fit the needs of twenty-first century families.<sup>1</sup> A central recommendation is greater use of mediation in parenting disputes. "The Commission concludes that, when used appropriately, ADR [alternate dispute resolution],<sup>2</sup> particularly mediation, is an effective method of reducing the delay, expense and trauma to children often experienced during divorce."<sup>3</sup> With that sentence, the Miller Commission became the first governmental body in New York in recent years to recognize as New York's public policy what other states recognized long ago—mediation

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1. MATRIMONIAL COMMISSION, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), <http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf>; reprinted here as Appendix A [hereinafter MILLER COMMISSION REPORT].

2. *Id.* at 28. According to the Commission,

Alternative dispute resolution represents a variety of dispute resolution processes through which people may resolve or manage disputes. The traditional view of ADR is that the processes range from face-to-face negotiations to formal, binding arbitrations. Today, however, ADR practitioners recognize that litigation need not be the standard against which all other processes are deemed 'alternative.' Instead, the process of litigation occupies a place among a spectrum of 'appropriate dispute resolution.' Furthermore, several hybrid processes or services, particularly those related to divorce, have evolved in recent years including collaborative law and parenting coordination which many consider to be forms of ADR as well.

*Id.*

3. *Id.* at vii.

works, and parents and children generally benefit from it. That conclusion is long overdue.<sup>4</sup> Because of it, the Miller Commission appropriately recommends that New York's judges should have authority to order parents to mediation on a case-by-case basis.<sup>5</sup> As will be discussed later, the empirical evidence is overwhelming that mediation is a cost-effective dispute resolution process that helps parents work out a parenting plan so that children can have safe relationships with both parents after they divorce. It has documented positive effects that continue long after the mediation ends.

My purpose is not, however, to tout the virtues of mediation for the children of divorce or to discuss how the Miller Commission proposes to implement mediation in New York divorces. Rather, I want to focus on a larger question—what is the role of the lawyer in the twenty-first century dispute resolution system for divorcing families that the Miller Commission envisions. At present in New York, a lawyer for a parent can entirely ignore the evidence documenting mediation's effectiveness for parents and children. He or she has no obligation to even utter the word "mediation" to clients. I believe that to change the adversary culture for a child that surrounds New York divorces, a lawyer for a parent should have an affirmative obligation to advise his or her client about mediation and about other alternatives to litigation—an "ADR discussion requirement."

The Miller Commission recognizes the importance of lawyer-client communication about ADR. It recommends that the *Statement of Client's Rights*,<sup>6</sup> which New York divorce lawyers must passively provide to clients as a condition of being retained, be amended to provide that clients be told that they are entitled to ask their attorneys about alternatives to litigation that "might be appropriate in pursuing their objectives."<sup>7</sup> There is, however, a significant difference between putting the burden on a client to ask the lawyer about mediation and placing an affirmative burden on the lawyer to raise the subject and dis-

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4. Andrew Schepard, *Law and Children: Revisiting the 1985 Law Revision Commission Report and Custody Mediation in New York*, N.Y. L. J., Jan. 12, 2005, at 3, col. 1.

5. MILLER COMMISSION REPORT, *supra* note 1, at vii.

6. N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.2 (2007).

7. MILLER COMMISSION REPORT, *supra* note 1, at 33.

cuss it with clients. In many other states, lawyers have such an obligation in all cases (not just divorce cases) mandated by ethical obligations and/or court rules.<sup>8</sup> New York should do the same, and quickly.

An important word at the outset is required to make clear exactly what is *not* being proposed here. A rule mandating that a New York divorce lawyer and a parent-client discuss mediation and alternatives to litigation does not mandate that a lawyer endorse mediation, just that the lawyer be informed about its benefits and costs and convey that assessment to clients. Just like litigation, mediation is not appropriate for all parents in all circumstances. For example, mediation may not be appropriate in cases involving serious allegations or a history of domestic violence or child abuse and neglect, a threat of child abduction or a parent who is mentally ill or troubled by substance abuse.<sup>9</sup> A lawyer should certainly explain these limitations of mediation to a client during their required discussions of the subject. The Miller Commission recommended that the Office of Court Administration provide informational materials to assist the bar in discussions of ADR with clients, materials which should certainly balance the pros and cons of mediation and ADR, and assist the bar to fulfill the ADR discussion requirement.<sup>10</sup>

### I. *Kramer vs. Kramer* Revisited

An interesting way of illustrating how lawyer and client conversations are changed and children are served by an ADR discussion requirement is to rewrite the lawyer-client dialogue in *Kramer vs. Kramer*, the well-known movie which won the Academy Award for Best Picture in 1979.<sup>11</sup> *Kramer vs. Kramer*

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8. California, Connecticut, Georgia, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Texas and Virginia all impose mandatory duties on attorneys to discuss alternatives to litigation with their clients via court rule. See N.J. Ct. R. 5:4-2(h); Marshall J. Berger, *Should An Attorney Be Required Be Required to Advise a Client of ADR Options*, 13 GEO. J. LEGAL ETHICS 427, Appendix I-II (2000) (comprehensive listing of court rules, state statutes and ethics provisions).

9. See Nancy Ver Steegh, *Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 201 (2003).

10. MILLER COMMISSION REPORT, *supra* note 1, at 33.

11. KRAMER VS. KRAMER (Columbia Pictures 1979).

is described by a leading scholar of law and popular culture as “an outstanding and definitive film that treats all the elements of the divorce process seriously and which pointed the way for divorce-related films of the present.”<sup>12</sup>

Representations of lawyers and clients in popular culture are powerful metaphors that influence public understanding of the role of lawyers and the legal system.<sup>13</sup> *Kramer vs. Kramer* sends the message that the New York divorce lawyer in a custody case is an adversarial gladiator and that there are no options for resolution of custody disputes other than litigation.

The dramatic core of the film is a child custody dispute between Ted (Dustin Hoffman), whose wife, Joanna (Meryl Streep), decides to end the marriage and move to California, leaving Ted to raise Billy, their six-year-old son, by himself. Much of the first part of the movie focuses on Ted’s gradual evolution into a devoted single parent to Billy, and Billy becoming accustomed to Ted as the nurturing and supportive figure in his life. On the legal front, Joanna and Ted are divorced in an uncontested action in which Ted receives custody of Billy in their divorce decree.

Joanna returns to New York a year and a half later and arranges a meeting with Ted in a restaurant. The discussion begins warmly. Then, Joanna says that “she wants [her] son” and an argument ensues. Ted says “you can’t have him” and accuses Joanna of abandoning Billy. She states that she has her life together now and never stopped loving Billy. In anger, Ted breaks a glass against a wall. As he departs he tells Joanna that she should “do what she has to do” and so will he.

Ted consults a lawyer, John Shaunessy (played by the late Howard Duff). Ted begins the discussion by stating that he thinks he has a strong case, as Joanna abandoned Billy. The following dialogue ensues:

*Attorney Shaunessy:* Well, uh, first Mr. Kramer there is no such thing as an open and shut case where custody is involved. While I’m willing to bet your ex-wife has already found a lawyer and he has advised her to move back to New York to establish residency,

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12. Michael Asimow, *Divorce in the Movies: From the Hays Code to Kramer vs. Kramer*, 24 LEGAL STUD. FORUM 221, 222 (2000).

13. MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE 6-8 (2004).

the burden is on us to prove your ex-wife is an unfit mother. And that means that we will have to play rough. Can you handle that Mr. Kramer?

*Ted:* Yes . . .

*Shaunessy:* Now, how old is the child again?

*Ted:* My son is 7.

*Shaunessy:* Uh, huh. [with a skeptical tone]

*Ted:* Why?

*Shaunessy:* That's tough. Well, in most cases involving a child that young the court tends to side with the mother.

*Ted:* But she signed over custody!

*Shaunessy:* I'm not saying we don't have a shot. But it won't be easy . . .

Shaunessy ends their interview by informing Ted that fighting Joanna for Billy's custody will cost him \$15,000, a figure that obviously shocks Ted. Shaunessy tells Ted to go home and make a list of pros and cons of a custody fight. If he decides to go forward, they will "beat the pants off of them" (meaning Joanna and her lawyer).

A subsequent scene shows Ted making a list with many cons but no pros. Nonetheless, he decides to fight for custody because of his love for Billy and retains Shaunessy. The result is a bitter trial in which both Ted and Joanna are vigorously cross-examined about their personal lives and fitness to be a parent. Indeed, after Joanna's cross-examination Ted asks Shaunessy, who has accused Joanna of failing at every one of her relationships, "[d]id you have to be so rough on her?" Shaunessy answers: "Do you want the kid or don't you?"

The judge awards Joanna custody. For reasons unexplained in the movie, despite her legal victory, Joanna decides that Billy should continue to live with Ted.

#### A. *Shaunessy's Advice and Billy's Best Interests*

Shaunessy's counseling session with Ted does not mention the word mediation (or parent education or family therapy). He does not mention the possibility of a negotiated settlement with Joanna, or the importance of involving Joanna in Billy's life. These omissions are directly contrary to Billy's best interests.

In the years since *Kramer v. Kramer* captured the popular imagination and critical acclaim, a great deal of empirical research has shed light on the needs of the children of divorce and what methods of dispute resolution are likely to produce better outcomes for them. Here is some of what this research shows:

1. Mediation promotes the best interests of children

Mediated agreements are good for children. Compared to agreements reached in the shadow of litigation alone, mediated agreements increase the probability that both parents will be involved with their children following divorce and decrease the intensity of parental conflict.<sup>14</sup> These outcomes are vital in helping a child adjust to divorce.

Children exposed to high levels of inter-parental conflict are at [a higher] risk for developing a range of emotional and behavioral problems, both during childhood and later in life . . . [S]ome of the adverse effects attributed to divorce can be traced to the conflict [between the parents] . . . rather than the marital separation per se.<sup>15</sup>

The lower the conflict level between parents, the more the child benefits from contact with the non-custodial parent and the more regularly child support is paid.<sup>16</sup>

Parents who are mandated to mediate are significantly more likely to be involved in the life of their children following divorce as compared to parents who litigate. That result holds true even many years after the mediation is over.<sup>17</sup> For example, a recent twelve-year follow-up study of seventy-one divorcing families, randomly assigned in the late 1980s to either a mediation group or a litigation control group, shows the important long-term benefits of only five hours of mediation some twelve years later.<sup>18</sup> Non-custodial parents who mediated their dispute were far more likely to be involved in their children's

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14. ANDREW SCHEPARD, CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 62-67 (2004) [hereinafter SCHEPARD].

15. John H. Grych, *Interpersonal Conflict as A Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 97 (2005).

16. The research is summarized in SCHEPARD, *supra* note 14, at 30-36.

17. The data is summarized in SCHEPARD, *supra* note 14, at 62-67, 75-77.

18. See Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 26-31 (2005).

lives and see their children every week than non-custodial parents who litigated their dispute.<sup>19</sup> The non-custodial parents who litigated generally followed the national trend of dropping out of their children's lives.<sup>20</sup> Additionally, at statistically significant levels, the study found that custodial parents who mediated described the non-custodial parent (who also participated in mediation) as more involved with discipline, school and church activities and problem-solving in their children's lives than non-custodial parents in the litigation control group.<sup>21</sup>

2. Parents—both mothers and fathers equally—like mediation much more than litigation

Mothers and fathers share an unfavorable view of litigation and a favorable view of mediation, as both genders prefer the mediation conference room to the courtroom for resolving parenting disputes approximately equally.<sup>22</sup> Parents dislike litigation because of the time, emotion and expense it requires and because they feel the adversary nature and formalities of the courtroom process do not give them an adequate voice in the decision making about their children. Parents give mediation high marks for fairness and responsiveness to their needs and concerns, and the needs of their children, even when their participation is mandated.

3. Mediation produces durable settlements

Parents are more likely to honor the terms of a mediated agreement than one imposed by a court, largely because they

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19. *Id.* at 30.

20. *Id.* at 30-31.

21. *Id.* at 31.

22. The research is summarized in SCHEPARD, *supra* note 14, at 65-66. See also Elizabeth Ellen Gordon, *What Role Does Gender Play in Mediation of Domestic Relations Cases?* 86 JUDICATURE 135, 137-39 (2002) (summarizing a Georgia study of five court-ordered mediation programs involving a sample of 509 litigants, 249 women and 257 men, and finding that on the dimensions of feelings of exclusion from the process, intimidation by the other party, unfair treatment and dissatisfaction with the process and perhaps the outcome of mediation, women and men showed "no significant differences in their evaluations of their own mediation experiences" and "female and male litigants indicated no significant differences in feeling like an important part of the mediation, getting to tell their side of the story, or helping determine the mediation's outcome").



feel they have a voice in its formulation. Parenting plans resulting from mediation also tend to be more detailed than those resulting from negotiations alone or imposed by a court, reducing the likelihood of future disputes.<sup>23</sup>

#### 4. Mediation is cost-effective for parents

Studies report that mediating parents reached resolution of their disputes more quickly than did litigating parents, with mediation taking less than half the time and less cost to produce a parenting plan.<sup>24</sup>

The findings summarized above have been replicated in many studies over many years. There is always more to learn, but the conclusion that mediation is a good idea for most divorcing parents and children is unlikely to change and should be impossible to ignore in lawyer-client counseling sessions.

Given this research, here is what Shaunessy could and should have said to Ted instead of what was depicted on screen:

*Shaunessy:* I understand that you are angry with Joanna for abandoning Billy and that you strongly feel that you are the better parent. I am worried, however, Ted, about the effect a custody trial might have on Billy. I know you are too. Children can really be hurt if caught in the middle of their parents' battles. Do you really want a judge deciding how you and Joanna should parent Billy? You and Joanna should do that. You know Billy best and are both going to be his parents forever no matter what you think of each other. Custody fights cost serious time, emotion and money. They leave parents bitter towards each other. I know parents who have spent a year's worth of college tuition on a custody fight. A trial may be worth it and I will advocate vigorously for you if we have to go down that road, but we should also think about whether we have any reasonable alternative before we go to war.

*Ted:* But Joanna and I can't talk to each other. And won't she think we are weak if we propose mediation?

*Shaunessy:* Many of my other clients start by feeling the same way. Their relationship with their ex changes over time. It's not

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23. SCHEPARD, *supra* note 14, at 63.

24. See CONNIE J.A. BECK & BRUCE SALES, FAMILY MEDIATION: FACTS, MYTHS AND FUTURE PROSPECTS 99-121 (2001); Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 FAM. & CONCILIATION CTS. REV. 373, 376-77 (1996) (describing numerous studies).

a sign of weakness, but of strength to make proposals about what is best for your child. If we have to go to trial, and Joanna rejects our offer to mediate, we will feel like we've tried everything first. Many of my clients have had good experience with mediation even though they are very angry with the other parent. We don't lose anything by trying, because mediation is confidential. You don't have to agree to anything and it may be worth trying it to see if you and Joanna have a basis for agreement about Billy. A mediator can help you and Joanna develop a parenting plan for Billy. The mediator is a facilitator; she doesn't tell you what to do about Billy or order you to do anything. She simply tries to help you reach an agreement.

## II. Zealous Advocacy and Problem Solving Advocacy in Custody Disputes

### A. *The Tradition of Zealous Advocacy*

It is important to understand that even though Shaunessy does not give the advice above, what he does say is perfectly consistent with current notions of professional responsibility. Shaunessy is a zealous advocate for Ted – an able lawyer putting decision making into the hands of his client, and then doing whatever he is able to do within the bounds of the law to serve his client's objectives. In effect, what Shaunessy tells Ted is:

You are about to embark on a courtroom fight where I will have to 'play rough' to win. You have a chance, but there will be costs—economic and emotional. The decision to take that chance is entirely yours. Make your decision thoughtfully. If you do decide to fight, I will stand behind you and do whatever it takes within the bounds of the law to win.

Shaunessy's world view is similar to that described by Henry Lord Brougham, a British lawyer and member of Parliament, in his classic statement of the duty of the zealous advocate in 1820 in the famous divorce trial known as *Queen Caroline's Case*:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty;

and in performing that duty he must not regard the alarm, the torments, the destruction which he may bring upon others.<sup>25</sup>

Brougham defended Queen Caroline against a charge of adultery by her husband King George IV.<sup>26</sup> Had the charge been sustained, Caroline would have been divorced and lost her crown. Caroline was chosen as George's wife by his father, whom George hated. George, then Prince of Wales, was already illegally wed to a Roman Catholic widow, Maria Fitzherbert. Once the royal couple—who were first cousins—conceived a legal heiress only days into the marriage, George abandoned his wife for his mistresses.

Sexually frustrated, socially snubbed and parsimoniously financed, Caroline lapsed into reckless and disreputable conduct. George tried for two decades and more to shed her, even after their only child, Charlotte, died in childbirth. This left no heirs except George's dissolute brothers, none of whom had legal children.

George charged Caroline with adultery with her handsome Italian servant in a public trial of great scandal to the British monarchy. Caroline rallied support from a population increasingly unhappy with King George, including many members of the army, and even from women's right's advocates. The adultery charge was dropped after Brougham threatened to make the King's secret marriage public. Had his marriage to a Roman Catholic been exposed, George IV would have lost his crown and civil war might have resulted.<sup>27</sup>

Brougham's description of the role of a lawyer in this tumultuous case captures an important ideal and a long and venerable tradition. My colleague Monroe Freedman states that: "[i]nspired by Brougham almost two centuries ago, the 'traditional aspiration' of zealous advocacy remains *the* 'fundamental principle of the law of lawyering' and 'the dominant

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25. Quoted in Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319, 1322 (2006) (quoting 2 TRIAL OF QUEEN CAROLINE 3 (1821) (emphasis added)).

26. This paragraph is a brief summary of a complex history of Queen Caroline's case and is briefly set forth in Freedman, *supra* note 25, at 1320-21. For more detail, see JANE ROBBINS, *THE TRIAL OF QUEEN CAROLINE: THE SCANDALOUS AFFAIR THAT NEARLY ENDED A MONARCHY* (2006).

27. See *id.*

standard of lawyerly excellence' among lawyers today."<sup>28</sup> Brougham's words bring to mind great zealous advocates in American history such as John Adams' defense of the British soldiers after the Boston Massacre<sup>29</sup> and Alexander Hamilton's defense of John Peter Zenger.<sup>30</sup> In fiction and on the screen, when we hear Brougham's words, we think of Atticus Finch in *To Kill A Mockingbird*.<sup>31</sup> These are noble role models for the profession, lawyers willing to sacrifice all to defend their clients and help justice prevail for the individual in heroic struggles against the state, and they set important precedents for meaningful ideals.

### B. *Custody Disputes and Zealous Advocacy*

The problem is that the custody dispute in which Shaunessy advises Ted is not the kind of dispute in which Brougham, Atticus Finch, John Adams or Alexander Hamilton represented clients. Custody disputes between parents over children are not generally heroic struggles by an individual against oppression, but destructive struggles between the two most important people in a child's life. Choosing one parent over the other is fundamentally at odds with modern notions of what is in the best interests of children after divorce. Empirical research and common sense suggest that both parents make equal, if different, contributions to the development of a child. They also suggest that, if safe, a child benefits from strong post-divorce relationships with both parents.<sup>32</sup> Rules of law, which prioritize one parent's "rights" over another's (e.g. father should be presumed to have custody of adolescents because he can provide financial support and moral guidance; mother should be presumed to have custody of infants because, as the primary caretaker, she has the most important relationship with the child), have generally been discredited. Claims of "rights" in custody cases en-

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28. Freedman, *supra* note 25, at 1319 (emphasis in original) (citations omitted).

29. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1063 (2006).

30. Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895, 906-07 (2005).

31. HARPER LEE, *TO KILL A MOCKINGBIRD* (1962).

32. SCHEPARD, *supra* note 14, at 27-37.

courage parents to be more rigid and adversarial, at a time when children generally need parents to be flexible and to compromise.

Dissenting in *Troxel v. Granville*, the Supreme Court's recent grandparent visitation decision, Justice Stevens observed that:

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual whose interests are implicated in every case . . . the child . . . . A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. . . . The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation . . . of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.<sup>33</sup>

Justice Steven's observations apply even more pointedly to parents in custody disputes.

There are rare divorce cases like *Queen Caroline's Case* in which the very future of the nation or a great principle is at stake; *Loving v. Virginia*<sup>34</sup> is one example. In those cases zealous advocacy as described by Brougham is called for. In most custody disputes, however, divorce lawyers who take Brougham's statement to heart that "in performing that duty he [the zealous advocate] must not regard the alarm, the torments, the destruction which he may bring upon others"<sup>35</sup> ignore the best interests of the children. We should, as a profession, be able to make a distinction between cases in which zealous advocacy is appropriate and when it is not appropriate without diminishing the noble tradition that Brougham speaks for.

Moreover, a moral case can be made for a requirement that lawyers discuss mediation with parents regardless of how the lawyer behaves in a courtroom. Children are not represented in

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33. *Troxel v. Granville*, 530 U.S. 57, 86, 88, 90 (2000) (Stevens, J., dissenting).

34. *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring anti-miscegenation statutes unconstitutional).

35. Freedman, *supra* note 25, at 1322.

the divorce lawyer's office and have a moral claim on what a lawyer says to a client.

The governing legal standard, after all, is the "best interests of the child." Another moral claim for an ADR discussion requirement is based on the idea of "informed consent." We expect a doctor treating a patient for cancer to discuss the benefits and costs of all reasonable treatment options before securing a patient's consent to treatment.<sup>36</sup> The lawyer-client relationship is also based on the client's informed consent to the course of action that the lawyer proposes.<sup>37</sup> Mediation and other forms of ADR can be analogized to a viable treatment option in custody disputes. A strong argument can thus be made that Shaunessy had a moral duty to discuss the benefits and costs of ADR with Ted as part of securing Ted's informed consent to representation.<sup>38</sup>

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36. *Kuperstein v. Hoffman-Laroche, Inc.*, 457 F. Supp. 2d 467, 472 (S.D.N.Y. 2006) (stating New York's informed consent cause of action as defined by section 2805(d) of the New York Public Health Law, reads, in relevant part: "Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation"); Paula Walter, *The Doctrine of Informed Consent: To Inform or Not to Inform?* 71 ST. JOHN'S L. REV. 543, 547-48 (1997) (explaining that the "doctrine [of informed consent] imposes two independent duties on the medical provider: first, the medical practitioner has a duty to disclose information; and second, the practitioner has an obligation to obtain an informed consent from the patient. In order to grant an informed consent, the patient (1) must be competent, (2) must understand the information conveyed, and (3) must voluntarily give his consent free from coercion. The informed consent doctrine envisages a joint decision-making process in which the physician digests the technical information for the patient and transmits this information in a manner comprehensible by a layperson. The patient, in turn, asks questions, evaluates the information conveyed, and agrees to either proceed or not to proceed with the recommended treatment.").

37. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (2007) ("A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations."). MODEL RULES OF PROF'L CONDUCT R. 1.4 (b) (2004) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). See also Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics Commission Proposal and Other Professional Responsibility Standards*, 25 FORDHAM URB. L. J. 895 (2001).

38. See generally, Nicole Pedone, *Lawyer's Duty to Discuss Alternative Dispute Resolution in the Best Interests of the Children*, 36 FAM. & CONCILIATION CTS. REV. 65 (1997).

C. *The Lawyer as Problem Solver/Counselor*

Indeed, there is a tradition describing the role of a lawyer which better fits the nature of custody disputes than the zealous advocate as defined by Brougham. It is the tradition of the lawyer as counselor, and the lawyer as client problem-solver captured by one of the greatest trial lawyers who ever practiced, Abraham Lincoln:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.<sup>39</sup>

That same tradition was also captured nearly one hundred years later by another of the greatest lawyers to ever practice, Mohandas Gandhi, when reflecting on his experience encouraging a settlement by a client of a commercial dispute:

My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul.<sup>40</sup>

The tradition of the lawyer as problem solver in divorce cases is also captured in the American Academy of Matrimonial Lawyers' (AAML) *Bounds of Advocacy*, a supplementary code of aspirational standards for divorce law specialists who are members of the AAML.<sup>41</sup> The *Bounds of Advocacy* states "the emphasis on zealous representation [used] in criminal cases and some civil cases is not always appropriate in family law matters" and that "[p]ublic opinion [increasingly supports] other models of lawyering and goals of conflict resolution in appropri-

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39. ABRAHAM LINCOLN, LIFE AND WRITINGS OF ABRAHAM LINCOLN 329 (Philip V. D. Stern ed., 1940).

40. MOHANDAS GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 168 (1948).

41. AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS (2000), available at <http://www.familylawfla.org/pdfs/boundsRevised.pdf> [hereinafter BOUNDS OF ADVOCACY].

ate cases.”<sup>42</sup> The *Bounds of Advocacy* contrasts the “[overly] zealous representation” model of divorce representation with a problem solving approach (which the *Bounds of Advocacy* calls “constructive advocacy”):

‘[Constructive advocacy is a] counseling, problem-solving approach for people in need of help in resolving difficult issues and conflicts within the family . . . .’ Matrimonial lawyers should recognize the effect that their words and actions have on their clients’ attitudes about the justice system, not just on the ‘legal outcome’ of their cases. As a counselor, the lawyer encourages problem solving in the client . . . . The client’s best interests include the well being of children, family peace and economic stability. Clients look to attorneys’ words and deeds to model for how they should behave while involved with the legal system. Even when involved in a highly contested matter, [divorce lawyers] should strive to promote civility and good behavior by the client towards the parties, lawyers and the court.<sup>43</sup>

Furthermore, the *Bounds of Advocacy* identifies aspirational duties that a divorce lawyer owes to the children of clients including the duty to “consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.”<sup>44</sup>

D. *Shaunessy’s Advice and the Ethical Responsibilities of Divorce Lawyers*

The current ethics rules for lawyers in New York (and elsewhere) emphasize zealous advocacy and do not mention problem solving or constructive advocacy. Shaunessy might argue in his defense that it is unfair to measure the quality of the advice given by a lawyer in 1979 against the knowledge gained from empirical research and the growth of mediation in the decades since the movie was released. In response, however, I would note that at least in New York, nothing really has changed; current rules of professional responsibility for lawyers in New York in 2007 still do not require a change in anything that Shaunessy said to Ted.

Current professional responsibility rules in New York do not mandate that a divorce lawyer give problem solving advice

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42. *Id.* at Preliminary Statement.

43. *Id.*

44. *Id.* at R. 6.1.



in a custody case. All they do is allow a lawyer who would like to give such advice to do so. They define a divorce lawyer's responsibilities as representing parents, and only in the adversarial system. In effect, the New York rules of professional responsibility, which are representative of national rules on the subject, apply the same zealous advocacy framework to divorce lawyers as for lawyers representing corporations in business litigation, victims of sexual harassment and those accused of crimes. The rules do not address the special needs of children for peace between parents and parental stability of relationships.

Professor Linda Elrod has usefully summarized the current state of the ethical obligations of the divorce lawyer to the child:

The Model Rules of Professional Conduct contemplate adversarial proceedings.<sup>45</sup> Zealous representation of a client in a custody dispute is complicated by the fact that the end result (residential placement) will have profound consequences on a third party – the child. The Model Rules of Professional Responsibility do not specifically address the duty of a lawyer for a parent to not harm the child. Rule 2.1<sup>46</sup> requires a lawyer to exercise independent professional judgment and render candid advice and Rule 1.4 (b)<sup>47</sup>

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45. The citations in the text refer to the ABA Model Rules, as most states have adopted this form, but cross references are provided to the New York Code of Professional Responsibility. See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 999 (2007 ed.) (explaining that “New York has not yet adopted the ABA Model Rules of Professional Conduct but has instead retained a version of the old ABA Model Code of Professional Responsibility. New York is thus the last state clinging to the ABA Model Code . . . the New York Code of Professional Responsibility consists of three main categories: Canons, Ethical Considerations, and Disciplinary Rules. These three categories are described in the Code’s Preliminary Statement as follows: Canons state ‘axiomatic norms’; Ethical Considerations (ECs) are ‘aspirational’; and Disciplinary Rules (DRs) are ‘mandatory’”).

46. Equivalent to New York’s Ethical Consideration EC 7-8, *MODEL CODE OF PROF’L RESPONSIBILITY* EC 7-8 (2007) (providing, in relevant parts “Advice of a lawyer to the client need not be confined to purely legal considerations . . . . A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer’s objective viewpoint. In assisting the client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.”).

47. Equivalent to New York’s Ethical Consideration EC 7-8, *MODEL CODE OF PROF’L RESPONSIBILITY* EC 7-8 (2007) (providing, in relevant part, “[a] lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate

suggests that the lawyer explain “a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Although these can be read as requiring the lawyer to inform the client as to why the lawyer believes the client’s course of conduct is not in the child’s best interests, the rules do not specifically require a lawyer to consider the child’s interest.<sup>48</sup>

Cases in which a parent or child have brought suit against a divorce lawyer for malpractice support Professor Elrod’s analysis.<sup>49</sup> They generally reject the notion that a lawyer for a parent has any duty to a child. Their rationale is that the parent’s lawyer would not be able to represent his or her client effectively if required to advocate for another party—the child—with adverse interests. A child’s representative can represent the child<sup>50</sup> so that his or her best interests are protected.

The policy that litigation must come to an end also supports the “no duty to the child” conclusion. Courts perhaps unconsciously fear that recognizing a duty for a divorce lawyer to consider the child’s best interests will encourage repetitive litigation of the same facts and bitterness underlying custody disputes in subsequent satellite litigation about whether the lawyer fulfilled that duty.

#### E. *How Do Divorce Lawyers Actually Counsel Parents?*

The argument can be made that Shaunessy can and will provide Ted with the responsible advice to try mediation and avoid litigation without a requirement that he do so in either a court rule or an ethics obligation. Indeed, responsibility to children does have a small, but entirely voluntary, outlet in the ethical rules. As Professor Elrod notes, provisions of the *Model Rules* (and their New York equivalents) encourage, but do not

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this decision-making process if the client does not do so . . . . A lawyer should advise the client of the possible effect of each legal alternative . . . .”).

48. Linda D. Elrod, *A Minnesota Comparative Family Law Symposium: Reforming the System to Protect Children in High Custody Cases*, 28 WM. MITCHELL L. REV. 495, 539 (2001).

49. See, e.g., *Lamare v. Basbanes*, 636 N.E.2d 218 (Mass. 1994); *Rhode v. Adams*, 957 P.2d 1124 (Mont. 1998); *Strait v. Kennedy*, 13 P.3d 671 (Wash. Ct. App. 2000).

50. See, e.g., American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131 (2003).

require, broad based counseling by the lawyer on non-legal factors relevant to a client's situation, which certainly should include the threat to a child's well-being resulting from a client's proposed course of action, such as aggressive litigation.<sup>51</sup> The relevant rules, however, are a general statement about the possibility of providing broader advice to clients. They do not focus specifically on custody disputes or children or ADR. While they could be construed to invite Shaunessy to have a broad discussion with Ted about Billy's best interests and ADR, they certainly do not require or even help ensure that conversation will occur.

We can certainly speculate that some "Shaunessys" will have a sensitive conversation with Ted and might even threaten to withdraw from representing him if he chooses to vigorously litigate solely out of anger or spite toward Joanna. We can also speculate, however, that other lawyers will choose not to do so. These lawyers may believe that their job is to stick to legal issues and they have no expertise about the best interests of children. They may also believe that since Ted's decision to litigate is perfectly legal, they have no obligation to try to talk him into doing something else. Their job, after all, is to represent Ted and, if he has his mind made up, it is not their place to try to change it. A lawyer's reluctance to broadly counsel Ted might be reinforced by a fear that a frank counseling session will create friction between lawyer and client and a risk that Ted might discharge the lawyer.

There is some evidence that parents believe that divorce lawyers encourage adversarial attitudes and behavior rather than problem solving. A recent survey of divorcing parents reports that:

the overwhelming majority of responses [from parents] pertaining to the court process and the attorney's role in it were negative . . . . Even when parents felt they had fared better in the process than their ex-spouse, they had some difficulties with the ways in which attorneys worked within a system perceived to be inefficient, at best, and corrupt at worst . . . . The role of the attorneys was perceived as contributing to parental rivalry and conflict by creating and encouraging less communication between parents.

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51. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2004). For New York equivalent see New York's Ethical Consideration EC 7-8, *supra* note 46.

Parents were told not to communicate directly, but rather, to speak through attorneys in order to reduce manipulations by the other party.<sup>52</sup>

Other empirical evidence from which inferences can be drawn about the attitudes of the divorce bar is mixed. Some suggest that a significant percentage of the divorce bar seeks to be “reasonable” in seeking negotiated settlements.<sup>53</sup> Other research, however, suggests that the divorce bar has a reputation among other lawyers for being more adversarial and less problem solving in orientation than other segments of the bar.<sup>54</sup>

Whatever the research and inferences that are drawn from it, the question that has to be faced is whether we want to leave the decision about how divorce lawyers should address alternative dispute resolution and the best interests of children to their individual consciences and discretion. There are good reasons to be concerned about how that discretion will be exercised. Few law schools provide systematic training for lawyers on the needs of children and the role of mediation in the divorce dispute resolution process.<sup>55</sup> In New York, as in most jurisdictions, a lawyer does not need any special training or experience to represent a parent in a divorce and can do so right after being admitted to the bar. There is no requirement of any special training in the needs of the children of divorce or alternatives to litigation. Even a small number of “bomber” lawyers who consciously or unconsciously use children as a weapon in the divorce wars can undermine the best interests of many children in a community.

### III. Strategies for Implementation in New York - Court Rule and Ethical Obligation

The New York State Legislature has been labeled the most dysfunctional of any large population state by a Brennan

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52. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, their Young Children, and their Attorneys*, 33 FAM. L.Q. 283, 295, 298 (1999).

53. LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 48-56, 87-109 (2001).

54. See Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers are Really Doing When They Negotiate*, 44 FAM. CT. REV 602 (2006).

55. Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV 524, 527, 532 (2006).

Center study at New York University School of Law.<sup>56</sup> As my colleagues Herbie DiFonzo and Ruth Stern describe elsewhere in this issue, the New York State Legislature also does not have a good history of encouraging progressive innovation in divorce law and practice.<sup>57</sup> That history may change if it takes the *Miller Commission Report* seriously and if New York's new Governor adopts divorce reform as part of his agenda. For the moment, however, the likelihood that the New York Legislature will pass a statute requiring lawyers to discuss ADR with divorcing parents must be regarded as remote.

That leaves two, not necessarily inconsistent, avenues for creating an ADR discussion requirement between divorce lawyers and clients – enacting a court rule or making it an ethical obligation on the lawyer. While most of the authority for regulating procedure in New York is constitutionally delegated to the state legislature,<sup>58</sup> the court system can enact rules pursuant to its authority to regulate the conduct of disputes that come before it.<sup>59</sup> Enacting a court rule for an ADR discussion requirement would, in effect, create a rule of procedure mandated and enforced by the courts as part of its management plan for child custody disputes. The rule would be enforced as part of the litigation process on a case-by-case basis.

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56. JEREMY M. CREELAN & LAURA M. MOULTON, *THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM* (2004), available at [http://www.brennancenter.org/dynamic/subpages/albanyreform\\_finalreport.pdf](http://www.brennancenter.org/dynamic/subpages/albanyreform_finalreport.pdf).

57. J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559 (2007) (appears concurrently with this article).

58. See N.Y. CONST. art. VI, § 30:

The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts. The chief administrator of the courts shall exercise any such power delegated to him or her with the advice and consent of the administrative board of the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or general rules.

59. See *id.* See also *AG Ship Maint. Corp. v. Lezak*, 503 N.E.2d 681 (N.Y. 1986); N.Y. JUD. LAW. § 211 (1)(b) (McKinney 2006) (providing legislative authority for the Chief Judge, after consultation with the Administrative Board, to adopt court rules regulating practice and procedures in the courts).

An alternate method of reform is to make the ADR discussion requirement part of the New York *Code of Professional Responsibility*,<sup>60</sup> the rules governing the professional responsibility obligations of lawyers. These rules are enacted by the Appellate Divisions<sup>61</sup> and enforced by the administrative procedures for discipline of lawyers.<sup>62</sup> Violations carry potentially severe sanctions such as disbarment and public reprimands.<sup>63</sup> Violations also carry the risk of malpractice suits by clients against the offending attorney.<sup>64</sup>

A variation on this strategy is for the court system and the bar to enact an aspirational code of conduct for the divorce bar, which includes an ADR discussion requirement, and a statement of a divorce lawyer's obligations to children. Such aspirational statements are intended to be educational tools for current and future lawyers and the public rather than enforceable obligations.<sup>65</sup> For example, the *Lawyers Standards of Civility in New York* are:

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60. New York's Disciplinary Rules are codified as court rules: see N.Y.COMP. CODES R. & REGS. tit. 22, § 1200 *et. seq.* (2007).

61. Steven C. Krane, *Endgame*, N.Y. ST. B. A. J. 5, 6 (2001).

62. See N.Y. JUD. LAW § 90 (McKinney 2006).

63. See *id.* See also *Brashich v. Brashich*, 680 N.Y.S.2d 214 (1st Dept. 1998) (public censure was appropriate SANCTION where respondent attorneys, in Surrogate's Court proceeding, violated the Code of Professional Responsibility DR 1-102(A)(4), (5) and (8) and DR 5-101(A) by improperly terminating a trust, charging excessive fees, and failing to obtain court's approval before taking fee; in addition to respondents' previous good record and cooperation with disciplinary committee, the primary mitigating factor was that respondents' clients supported them and felt that they were not taken advantage of by the fee charged).

64. See, e.g., Kathleen J. McKee, *Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action*, 50 A.L.R. 5th 301, 301 (1997) (noting "some courts have held that a violation of professional ethical standards establishes a rebuttable presumption of legal malpractice comparing a violation of ethical standards to a violation of statutes and ordinances"); *Roy v. Diamond*, 16 S.W.3d 783 (Tenn. 1999) (stating prior findings of fact and judgment from a disciplinary proceeding against attorney by client were relevant to issue of the standard of care in legal malpractice action, and their probative value was not substantially outweighed by the danger of unfair prejudice, where there was also expert testimony that attorney violated the applicable standard of care); *Lipton v. Boesky*, 313 N.W.2d 163 (Mich. App. Ct. 1981).

65. The *New York Code of Professional Responsibility's* Preliminary Statement provides, "[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 6 (2006).

not intended as rules to be enforced by sanctions or disciplinary action, nor are they intended to . . . modify the . . . Code of Professional Responsibility and its Disciplinary Rules . . . . Instead they are a set of guidelines intended to encourage lawyers . . . to observe principles of civility and decorum, and to confirm the profession's rightful status as a honorable and respected profession . . . .<sup>66</sup>

The AAML's *Bounds of Advocacy* are also aspirational, not regulatory.

A court rule requiring lawyers to discuss ADR with parents is, in popular parlance, a "no-brainer." It can be enforced through checking boxes on a court form: standardized procedures and standardized information approved by the court system on the different types of ADR, their benefits, and their drawbacks in custody cases (as the Miller Commission has already proposed). Association of the Bar of the City of New York subcommittees proposed the core of what could be a workable procedure.<sup>67</sup> Under their proposal, an attorney is required to give a client an ADR notice approved by the Court that contains information about different ADR processes. Both the attorney and the client are then required to return a certification indicating receipt of the ADR notice and a questionnaire indicating willingness to participate in ADR (even if not ordered by the court to do so) a short period after the defendant answers the complaint or makes a motion. New Jersey has just adopted a very similar proposal by court rule, which provides:

The first pleading of each party shall have annexed thereto an affidavit or certification that the litigant has been informed of the availability of complimentary dispute resolution ("CDR") alternatives to conventional litigation, including but not limited to mediation or arbitration, and that the litigant has received [literature] regarding such CDR alternatives.<sup>68</sup>

Enforcement of a process such as this is relatively easy—the required certification either is or is not in the court file. There would have to be some kind of punishment, comparable

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66. See N.Y. COMP. CODES R. & REGS. tit. 22 § 1200 (App. A) (1998).

67. See City Bar, *Ready or Not: City Bar Drafts Uniform ADR Notice*, 16 ALTERNATIVES TO THE HIGH COST OF LITIGATION 93, 103, 108 (1998).

68. N.J. CT. R. 5:4-2(h).

to sanctions under Court Rule 130<sup>69</sup> for lying to the court. Exceptions to the questionnaire requirement would have to be made for emergencies. These are important details that can be worked through in the course of drafting a court rule.

Ideally, compliance with the court rule will engender a process of discussion about mediation and other forms of ADR between lawyer and parent to decide if it is appropriate in the particular case. There is always the risk that compliance by particular lawyers and clients will become *pro forma*, and the boxes will be checked off without information being conveyed or discussion about options taking place. Nonetheless, enactment of a court rule will ensure that every parent represented by a lawyer will get some information about ADR is a step forward in an imperfect world.

The creation of a court rule mandating an ADR discussion requirement will positively influence New York legal culture and practices. Their effect has been widely studied, particularly in three "M" states: Minnesota, Missouri and Maine (which mandates custody mediation, not discussion of ADR). Here is what is likely to happen over time if New York adopted a rule requiring lawyers to discuss mediation with clients:

- The perception that the lawyer who first broaches the subject of ADR and settlement with the other side is "weak" will be reduced;
- Motion practice in divorce cases will drop as the bar and clients incorporate the norms of ADR into their cases;<sup>70</sup>
- ADR use will increase;
- The quality of ADR programs will improve as lawyers demand high quality services for their clients;
- Continuing education programs and law school courses to educate lawyers about ADR processes will increase;<sup>71</sup>

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69. N.Y. COMP. CODES R. & REGS. tit 22, § 130 (2007).

70. See MATHER ET AL., *supra* note 53, at 187.

71. See, e.g., Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002).



- The divorce bar's support for ADR will increase as lawyers develop more confidence in it.<sup>72</sup>

Adoption of an ethics rule creating a duty from the divorce lawyer to the child or to discuss ADR with a parent is a larger and more difficult step. It is possible to imagine the content of such a rule – it would incorporate the core idea of the *Bounds of Advocacy* that divorce lawyers have different ethical responsibilities than commercial, criminal or tort lawyers because of the impact their representation has on children and might provide:

An attorney representing a client in an action against the other parent concerning their child shall advise the client of the potential harm protracted conflict may have on their child and discuss how to contain and manage the dispute to reduce the impact on the child in a manner consistent with safety of the lawyer's client and the child. An attorney shall encourage settlement of parenting disputes through referrals for education, mental health therapy, negotiation, mediation or arbitration, except where domestic violence or child abuse or neglect or other serious contrary indication is present. In those instances, an attorney should seek consultation with appropriate experts in the area as to how to proceed. An attorney may emphasize to the client the child's long term interest in stability, family peace, and having a relationship with both parents consistent with safety of all family members. An attorney shall not allow a parent to contest child custody for purposes of financial leverage or vindictiveness.

Enactment of an ethics rule of this kind places the best interests of children at the moral core of divorce lawyering. It distinguishes the lawyer's obligations to clients in cases involving their children from their obligations to clients accused of a crime or seeking monetary compensation for harm done. An ethics rule will also have a maximum impact on the education of

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72. In a recent survey of the Family Law Section of the Florida bar (a state with a long history of requiring mediation of child custody disputes), for example: "ninety-one percent (91%) of [mediation participants] described the impact of mediation on family court[s] as positive, whereas eight percent (8%) viewed it as . . . positive and negative, and only one percent (1%) saw mediation as negative." Sandra Williams & Sharon Buckingham, *Family Court Assessment: Dissolution of Marriage in Florida—Preliminary Assessment Findings* 39 FAM. CT. REV 170, 181 (2001).

future lawyers, as it will be studied by virtually all of them before graduation.<sup>73</sup>

Unfortunately, however, ethics rules are enforced by the sometimes cumbersome and always threatening machinery of disciplinary violations and sanctions like reprimands or disbarment. Potential malpractice suits from clients, adversaries and children lurk in the background for violations. Enforcement of an ethics rule requiring discussion of ADR with clients could, ironically, create more outlets for contention in already endlessly contentious divorce cases. It is always difficult to know what a lawyer actually says to a client, since the conversations take place in private. Enforcement of an ethical rule requiring lawyers to inform clients about mediation could wind up requiring disclosure of usually privileged lawyer-client conversations.

These considerations counsel for an aspirational set of guidelines for lawyers representing parents in divorce cases on how to help their clients promote the best interests of their children. In May 2004 the Family Law Section of the Florida Bar adopted, *Goals for Family Lawyers in Florida*, an updated and revised version of *Bounds of Advocacy*<sup>74</sup> for the entire state's di-

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73. See E. Michelle Rabouin, *Walking the Talk: Transforming Law Students Into Ethical Transactional Lawyers*, 9 DEPAUL BUS. L.J. 1, 4, 20 (1996) (explaining that "every ABA-approved law school in the U.S. has incorporated some form of legal ethics into its LAW SCHOOL curriculum. The course, typically denominated "professional responsibility," usually involves the study of disciplinary rules and the Model Rules of Professional Conduct (Model Rules), or its precursor, the Model Code of Professional Responsibility . . . in addition to the BAR EXAM, law students in most states must now pass a multiple-choice, two-hour, ETHICAL test to complete their licensing requirements"); Deborah L. Rhode, *Symposium: The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 732-33 (1994) (stating "[i]n the mid 1970s, largely in response to lawyers' role in Watergate scandals, the ABA mandated that all accredited schools offer instruction in professional responsibility . . . . Most research indicates that well-designed ETHICS COURSES can improve capacities for moral reasoning, and that there is some modest relation between moral judgment and moral behavior."); Allison Martson, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 506-07 (1998) (noting "the importance of both codes of ethics and legal education to the professionalization of the practice continued into the twentieth century. In 1908, the ABA recommended that professional ethics be taught in all law schools and candidates for admission to the Bar be examined on the subject. By 1910, two years after the ABA had promulgated its Canons of Professional Ethics, they had been adopted in twenty-two states.").

74. STEPHEN SESSUMS ET AL., *BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS IN FLORIDA* (2004), available at <http://www.familylawfla.org/pdfs/boundsRevised.pdf>.

orce bar. It is hard to believe that New York's divorce lawyers and courts are less concerned about the welfare of children or are more wedded to the zealous advocacy model of divorce practice than their counterparts in Florida. It is also hard to believe that New York divorcing parents are inherently so much more competitive and aggressive than their Florida counterparts that they want only overly zealous advocacy from their divorce lawyers, regardless of the consequences to their children.

A New York *Bounds of Advocacy* would provide official support for the better instincts and practices of our divorce bar and a valuable tool to educate law students about the unique challenges of divorce practice. It will provide clarification for New York parents about what they should want and expect from their divorce lawyers. Finally, a New York *Bounds of Advocacy* would help ensure New York's children of divorce that their best interests are the central consideration of the adults who make the decisions that so profoundly affect their lives.

#### IV. Education, Education and Education

A court rule and an aspirational code of professional responsibility for divorce lawyers are necessary, but not sufficient, conditions to ensure that lawyers for parents will sympathetically discuss ADR with their clients. Changing the adversary culture of divorce in New York will take time, resources, and commitment from the court system, the divorce bar, and all those committed to a better future for New York's children, perhaps over several generations. It is not a sprint, but a marathon and is certainly not for the short winded.

The Miller Commission appropriately emphasizes the importance of education for judges, lawyers and court personnel in reforming the role of the divorce lawyer and upgrading the perception of the divorce process in New York.<sup>75</sup> Education of current practitioners is not enough to change the culture of practice in a pro-child direction; it must begin in law school where attitudes and values of future lawyers are shaped.

We have a long way to go. The Family Law Education Reform Project (FLER), a joint project of the Association of Family and Conciliation Courts (AFCC) and the Center for Children,

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75. MILLER COMMISSION REPORT, *supra* note 1, at v, vii, xiv, 15-17, 68.

Families and the Law of Hofstra Law School, recently issued a comprehensive report on the yawning gap between what is taught about family law in law school and how modern family law is and should be practiced.<sup>76</sup> A major emphasis of FLER is that future family lawyers require education regarding the needs of children of divorce, in ADR, and in the contributions of other disciplines to the resolution of family law disputes.

FLER's emphasis resulted in part from the findings of a comprehensive survey of stakeholders in the family law system, which presented a list of twenty-two skills, generated through consultation with law faculty and a review of relevant literature, thought important to family law practice.<sup>77</sup> Survey respondents were asked to rank each skill as "extremely important," "moderately important," or "not important at all."

Over ninety percent of respondents identified the following as "extremely important":

- listening;
- setting realistic expectations for clients;
- involving clients in decision-making; and
- identifying clients' interests.<sup>78</sup>

When asked to rank a list of areas of knowledge by importance to family law practice, respondents placed the second and third highest priority on understanding the impact of separation and divorce on children, and ethical dimensions of family law practice (financial issues were first).<sup>79</sup> Knowledge of relevant laws and court procedures followed next in importance and are certainly crucial for quality legal representation.<sup>80</sup>

The next three most frequent responses are, however, unique to family law and, like the impact of divorce and separation on children, are at the intersection of law, mental health and social science:

- the impact of separation and divorce on parents;
- the dynamics of domestic violence; and

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76. See O'Connell & DiFonzo, *supra* note 55.

77. Timothy Hadden & Peter Salem, *What Should Family Lawyers Know? Results of a Survey of Practitioners and Students*, 44 FAM. CT. REV 601 (2006).

78. *Id.* at 605.

79. *Id.* at 606.

80. *Id.*

□ the dynamics of child abuse and neglect.<sup>81</sup>

The survey also asked participants to identify the five topics most important to cover in a comprehensive family law curriculum. Participants were free to enter any titles or topics they chose. Not surprisingly, substantive law itself was mentioned more often than any other topic.<sup>82</sup> Negotiation, mediation, and other ADR processes were identified by more than three out of four respondents, as were courses on children's issues and experiences in family law.<sup>83</sup> Financial matters, the court process, and understanding the effects of abuse and domestic violence were the next three areas most often named.<sup>84</sup>

Law school family law courses, however, emphasize appellate case law to the virtual exclusion of everything else important to family law practice. The *FLER Report* analyzed family law casebooks, the source that best encapsulates what law teachers regard as the fundamentals of the family law curriculum. In a review of eight standard family law texts, the project discovered that seventy-nine percent of the pages were devoted to case material or statutes, with the vast bulk of those pages being case law.<sup>85</sup> Although family courts increasingly hear—and practitioners need—information on social science data, the mean family law text for classroom use contained 1,166 pages, only eighteen (1.5%) of which involved social science.<sup>86</sup> The course books contain very little material on interviewing, counseling, negotiation, ADR and ethics, much less anything on the impact of divorce and separation on children and child development.

The *FLER Report* also hopefully notes that efforts to modernize the family law curriculum are underway at a number of law schools. Loyola University Chicago's ChildLaw Center, for example, offers an innovative three-year fellowship for law students who are interested in providing effective legal representa-

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81. *Id.*

82. *Id.* at 607.

83. *Id.* at 607-08.

84. *Id.*

85. O'Connell & DiFonzo, *supra* note 55, at 527.

86. *Id.*

tion for children and families.<sup>87</sup> Northeastern University School of Law has partnered informally with the Child and Family Forensic Center of the University of Massachusetts Memorial Health Care Institute to have psychologists teach classes to law students, and law professors teach post-doctoral psychologists and psychiatrists interested in court based work with families and children.<sup>88</sup>

My own law school, Hofstra University School of Law, has created two programs targeted at educating law students for future family law practice, which are offered in collaboration with the Law School's Center for Children, Families, and the Law. The Child and Family Advocacy Fellowship attracts students interested in public service family law by offering them scholarships in return for practicing in a public service setting after graduation. Fellows are trained in an interdisciplinary educational environment of clinics, simulation courses, internships, public service projects and research and writing. Fellows also work with mental health and social service professionals to provide effective representation for children, while simultaneously participating in ongoing education and research, and improvement of services for children in need.<sup>89</sup>

Hofstra has also created an LL.M. program in family law, one of only three in the United States.<sup>90</sup> In addition to traditional courses, a thesis and a family policy seminar, the program requires that a student complete one of two intensive, interdisciplinary simulation courses offered in collaboration with the National Institute for Trial Advocacy (NITA). These courses, Training the Lawyer to Represent the Whole Child and Modern Divorce Advocacy, are designed to provide advanced skills training to students in critical areas of family law practice—interviewing, counseling, negotiation, mediation advo-

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87. See Loyola University Chicago School of Law: Child and Family Law Center, [http://luc.edu/law/academics/special/center/child\\_family.shtml](http://luc.edu/law/academics/special/center/child_family.shtml) (last visited Mar. 14, 2007).

88. O'Connell & DiFonzo, *supra* note 55, at 547.

89. See Hofstra University- School of Law- Fellowship- Child and Family Advocacy, <http://law.hofstra.edu/JDAdmissions/Fellowships/CFA/index.html> (last visited Mar. 14, 2007).

90. See Hofstra University- School of Law- LLM Admissions- Family Law, [http://law.hofstra.edu/LLMAdmissions/llmadm\\_fl.html](http://law.hofstra.edu/LLMAdmissions/llmadm_fl.html) (last visited Mar. 14, 2007).

cacy, and trial skills, especially those involving mental health and financial experts. Courses are taught in small groups where students receive extensive, individual feedback on their performance from experienced lawyers, judges, mental health professionals, financial planners, and mediators. LL.M. students also participate in Hofstra's Child and Family Advocacy Clinic or an externship tailored to their specific interests.

Despite the increasing volume of cases, the enormous challenges of modern practice, the high stakes for parents and children, and some efforts at improvement, the *FLER Report* documents that family law remains the stepchild of the law school curriculum. Concepts critical to the effective representation of clients and the welfare of children, such as the therapeutic role of the family court, mediation and alternatives to litigation, the changing roles of family lawyers in unbundled and collaborative representation, the role of interdisciplinary professionals, ethical obligations to children, civility and ethics, and basic child development, are simply not covered in most family law curricula. Few students are trained in essential representational skills, such as interviewing and counseling clients about emotional distress in family law courses.

Hopefully, the *FLER Report* will be a glass slipper to transform family law into a real life Cinderella of the law school curricular family. The efforts of the Miller Commission to change the adversary culture of divorce in New York will be immeasurably aided if that transformation occurs.

## V. The Soul of a Divorce Lawyer

*There can be no keener revelation of a society's soul than the way in which it treats its children.* - Nelson Mandela<sup>91</sup>

The way that the divorce process in New York treats children is a revelation not only of our state's soul but the souls of the divorce lawyers like John Shaunnessy who represent the divorce system to their clients. What is at stake in the implementation of the Miller Commission Report is not only the welfare of children, but a moral vision of the practice of law. The Miller Commission has begun the process of transforming the day to

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91. Nelson Mandela Quotes, [http://www.brainyquote.com/quotes/authors/n/nelson\\_mandela.html](http://www.brainyquote.com/quotes/authors/n/nelson_mandela.html) (last visited Mar. 14, 2007).

day practice of New York divorce law by Shaunessy and his real life divorce bar colleagues from an exclusive focus on zealous advocacy to a complimentary focus on problem solving. That transformation would be aided by a court rule creating an ADR discussion requirement and an aspirational code of conduct for New York divorce lawyers. Legal education too must play a major role in the process. The end result, over time, will be of great benefit to the children and parents in reorganizing families in New York.



