2001

An Introduction to the Model Standards of Practice for Family and Divorce Mediation

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I. Overall Significance

On February 19, 2001, upon the recommendation of both the Family Law (FLS) and Dispute Resolution Sections, the American Bar Association's House of Delegates adopted the *Model Standards of Practice for Family and Divorce Mediation* ("*Model Family Mediation Standards*" or "*Model Standards*"), which are published in this issue of the *Family Law Quarterly.*

The aim of the *Model Family Mediation Standards* is to promote public confidence in an evolving, interdisciplinary profession by defining good mediation practice. The family mediation profession (which includes many lawyers) created the *Model Family Mediation Standards* in consultation with the family law bar and experts on family violence.

The ABA's approval of the *Model Standards* means that the legal profession formally recognizes that family mediation is a valuable partner with courts and lawyers in the process of resolving family disputes. It is thus a further step in the realization of the vision of the ABA's landmark 1976 Pound Conference which encouraged the profession to think of a court as not simply "a courthouse, but a dispute resolution center where the grievant . . . would be directed to the process (or sequence of processes) most appropriate to a particular type of case."[1]

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1. Frank E.A. Sander, *Varieties of Dispute Processing,* 70 F.R.D. 111 (1976) (vision

The *Model Family Mediation Standards* also signify that the family mediation profession accepts the responsibility of conducting high quality practice that meets the special needs of participants and children involved in family and divorce disputes. Children exposed to continuing parental conflict are predictable casualties of family disputes; in no other area is the welfare of so many morally innocent and socially important nonparticipants so regularly at stake. Important legal rights such as custody, child support, and property distribution are affected by agreements reached in mediation. Family disputes, however, often involve participants under especially intense emotional stress which can cloud their judgment. The context of a family dispute can include domestic violence, child abuse, participant incapacity due to mental illness or substance abuse, cultural differences between family members, and between participants and the mediator. For the first time, the *Model Family Mediation Standards* provides mediation practitioners with generally agreed upon recommended approaches to performing their role in these especially challenging circumstances.

This article has a modest aim—to introduce the *Standards* to those in the legal and mediation community not familiar with them. It discusses the significance of the *Standards,* the process of developing them, what I regard as the most important issues they address and their most significant innovations. The article closes with a vision of the future role of family lawyers in mediation.[2]

II. The Importance of Family and Divorce Mediation

The *Standards* begin with a definition of mediation and an affirmation of its importance in the process of family dispute resolution:

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statement by Reporter for the ABA's follow-up Task Force for its landmark 1976 Pound Conference). *See* Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management,* 22 U. ARK. LITTLE ROCK L. REV. 395, 407–08 (2000) (describing influence of the Pound Conference on the development of child custody mediation) [hereinafter Schepard, *Evolving Judicial Role*].

2. Some disclaimers are in order. These comments are my own; they have not been approved by the American Bar Association or any of the other groups or individuals who participated in the development of the *Standards.* They do, however, result from my participation in what was, in effect, a multi-year seminar on family and divorce mediation practice with some of most dedicated dispute resolution professionals anywhere, a learning experience for which I am deeply grateful. Furthermore, family and divorce mediation is a complex and evolving field; this comparatively brief article simply cannot touch on all of the issues and problems addressed by the *Mediation Standards.* My footnotes, furthermore, are not a comprehensive compilation of all the relevant cases and literature but contain references to sources which influenced my own thinking or where readers can go for further information on a particular topic.

> Family and divorce mediation ("family mediation" or "mediation") is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.
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> Family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy. Nor is it appropriate for all families. However, experience has established that family mediation is a valuable option for many families because it can:
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> - increase the self-determination of participants and their ability to communicate;
> - promote the best interests of children; and
> - reduce the economic and emotional costs associated with the resolution of family disputes.[3]

The *Model Family Mediation Standards* go on to recognize that "[s]elf-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions."[4]

Mediation serves vitally important social goals by promoting participant self-determination and voluntary settlement of family disputes. Overall, voluntary settlements reduce the emotional and economic transaction costs of resolving family disputes which, in turn, reduce the capacity of participants to function as parents, employees, and citizens. Voluntary settlements limit intrusion into family autonomy which result from judicial decrees and allow participants to shape their agreements to reflect their own cultural values. They reduce prolonged parental conflict which causes great damage to children. They give participants "voice" in their dispute settlement process, which makes them more likely to adhere to agreements reached and feel more respect for the process and the society from which the agreement resulted.

The available data supports the conclusion that family mediation is generally successful, not only in resolving disputes, but also in furthering the values of self-determination on which the *Standards* are premised. Mediation helps parents resolve large numbers of disputes that might otherwise be litigated. "In California, about 20–30% of the total population of separating families file in court to resolve their disputes over care and custody of their children and are mandated to use

3. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, *Overview and Definitions* (2001) [hereinafter MODEL FAMILY MEDIATION STANDARDS].

4. MODEL FAMILY MEDIATION STANDARDS Standard I.A.

. . . mediation."[5] "This kind of issue-focused mediation attains full resolution in one-half, and partial resolution in two-thirds, of all custody and access disputes that enter into court. This solidly researched 'success rate' of mediation supports the philosophy that most couples have the capacity to re-order their lives in a private, confidential setting, according to their personal preferences, with the relatively limited help of a mediator who focuses on specific issues."[6]

In addition to resolving disputes, mediation generally results in greater consumer satisfaction, less expense, and better parent-child and parent-parent relationships compared to adversary litigation. Consumer satisfaction with custody mediation is not a surprising finding, given parents' highly negative views of their experiences in family courts. Parents often feel that after the litigation process starts, it quickly caroms out of control. Decisions are made for them—by lawyers and judges and custody evaluators—rather than by them. They have little or no "voice" in the courtroom process.[7]

A national commission recently reported survey results in which 50–70 percent of parents characterized the legal system to be "impersonal, intimidating and intrusive."[8] A recent empirical study of a sample of divorcing parents and their children about their attitudes toward their lawyers confirmed these findings. It reported "an overall consensus that the attorney's roles and responsibilities in the divorce process are not translating into actual practice. The parents and children did not feel they had adequate representation through guidance, information, attention or quality of service."[9] Parents in the survey felt the process was too long and never finalized, too costly, inefficient, and took control of their lives. "Many of the parents did recognize that they were already feeling angry and hostile, but 71 percent of them maintained the legal process pushed those feelings to a further extreme."[10] Higher

5. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 471, n.50 (2000), *citing* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137 (1992) [hereinafter Johnston, *Multidisciplinary Partnerships*].

6. *Id.* at 471–72 (citing numerous studies).

7. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATION AND STATES 30–43 (1970)

8. *See* UNITED STATES COMMISSION ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTERESTS OF THE NATION. A REPORT TO THE PRESIDENT AND CONGRESS 38–39 (1996).

9. 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, 284 (1999).

10. *Id.* at 298.

number of ethics complaints seem to be filed against divorce lawyers than lawyers in many other fields of practice,[11] another rough reflection of public dissatisfaction with the adversary process and the emotional difficulties associated with lawyer-client relationships in the family law area. The Oregon Task Force on Family Law, a legislatively authorized interdisciplinary reform group, summed up public dissatisfaction with the adversary process to resolve family disputes after extensive public hearings on that state's divorce system:

> The divorce process in Oregon, as elsewhere, was broken and needed fixing. Lawyers, mediators, judges, counselors and citizens in Oregon agreed that the family court system was too confrontational to meet the human needs of most families undergoing divorce. The process was adversarial where it needn't have been: all cases were prepared as if going to court, when only a small percentage actually did. The judicial system made the parties adversaries, although they had many common interests.
>
> The Task Force found that the sheer volume of cases was causing the family court system to collapse. Too often, children were treated like property while the parents clogged the courts with bitter fights over money, assets and support. The combative atmosphere made it more difficult for divorcing couples to reach a settlement and develop a cooperative relationship once the divorce was final.[12]

Mediation looks very good to the public in contrast to its reaction to the adversarial litigation system. Studies report that mediation parents reach resolution of their disputes more quickly than litigation parents, taking less than half the time and less cost to produce a parenting plan. Even mediation parents who fail to reach agreement are more likely to settle prior to trial than litigation parents. Mediated agreements also tend to be more specific and detailed than those negotiated by attorneys alone.[13] Studies also report that mediated agreements result in higher rates of children's contact with both parents following divorce and higher rates of compliance with parenting plans and child support

11. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 22.2, at 330–33 (3d ed. 1989) (citing statistics collected by ABA's National Legal Malpractice Data Center indicating that "family law practitioners account for a significant percentage of all claims. Client relationship errors are much greater than average, the highest in all areas of law"); Stephen Labaton, *Are Divorce Lawyers Really the Sleaziest?*, N.Y. TIMES, Sept. 5, 1993, § 4 (Week in Review) at 5, col. 4.

12. OREGON TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 2 (1997). Working in tandem with the Future of the Courts Committee, the Oregon Legislature established the bipartisan interdisciplinary Task Force on Family Law, which can well serve as a model for other states considering divorce and custody reform. *See* William Howe III & Maureen McNight, *Oregon Task Force on Family Law: A New System to Resolve Family Law Conflicts*, 33 FAM. & CONCIL. CTS. REV. 173 (1995).

13. *See* Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 FAM. & CONCIL. CTS. REV. 373 (1996)(short summary of research results with citations).

agreements compared to agreements reached by negotiations in the shadow of the adversarial process.[14]

The ABA's approval of the *Model Family Mediation Standards* recognizes that most of the participants in most family disputes benefit from mediation as does the court system. That judgment, however, is not a blanket condemnation of litigation, but a call for a diversified dispute resolution system that carefully directs participants in family disputes to a process that best serves their needs. Litigation serves vital social purposes. Even the *Model Standards* recognize that mediation is not appropriate for all family disputes, particularly those involving domestic abuse.[15] Courts articulate and apply principles of law and resolve factual conflicts. They provide a measure of predictability in outcome by application of precedent and procedures rooted in due process. They can require discovery of information that one side wants to keep from the other. They protect the vulnerable and weak against the manipulative and powerful by orders that can be enforced with sanctions. Participants and children in some family disputes need these benefits despite the heavy emotional and financial costs that litigation imposes.

Recognizing that some disputes should be litigated, however, does not mean all of them should be. The overall social policy question is how to balance mediation and litigation, not to eliminate one or the other. Our available data (which is limited) indicates, for example, that a small number of highly conflicted parents engage in repetitive litigation for many years after a divorce is granted.[16] Carefully structured mediation programs for high conflict may benefit even these families.[17] Such programs, however, are very intensive and have to be carefully designed and administered to minimize the risks that high conflict parents create for each other.[18] No one, furthermore, can realistically contend that high conflict parents should always mediate their disputes and never appear before a judge. Indeed, the coercive power of court orders is often required to compel high conflict parents to attend education,

14. *See* Peter Dillon & Robert Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long Term Effects,* 66 AM. J. ORTHOPSYCHIATRY 131 (1996).

15. *See infra* text at note 65–79 .

16. Some of the available data is summarized in Schepard, *Evolving Judicial Role, supra* note 1, at 412-18. *See also High-Conflict Custody Cases: Reforming the System for Children,* 39 FAM. CT. REV. 146 (2001) (report and action plan of national multidisciplinary conference sponsored by the ABA Family Law Section and the Johnson Foundation) [hereinafter *Wingspread Conference Report*]. The Wingspread Conference Report is also published at 34 FAM. L. Q. 589 (2001).

17. Johnston, *Multi-Disciplinary* Partnerships, *supra* note 5, at 471–72.

18. *See Wingspread Conference Report, supra* note 16, at 151–53 (describing a comprehensive plan for screening, management and service delivery to high-conflict families in custody cases).

mediation, and evaluation programs and to prevent them from inflicting violence on each other or abducting their children.

Such high conflict parents, however, must be carefully distinguished from the great majority of divorcing parents. Most divorcing parents are capable of adjusting to divorce and separation without the intensive interventions and court orders required for high conflict families. These parents should be encouraged to mediate their disputes to conserve their own emotional and economic resources for the adjustments that are required during the reorganization of their families and to prevent low level conflict from escalating into high conflict warfare.[19]

III. The Model Family Mediation Standards

The *Model Family Mediation Standards* seek to capture the benefits of mediation in family disputes by articulating consensus standards for good mediation practice, a concrete but concise role definition for a new and still evolving profession. They consist of thirteen general principles followed by detailed specific practice considerations implementing each principle. They are designed to provide guidance to family and divorce mediators on problems that have been encountered in their day-to-day practice and for training current and future mediators. The *Model Family Mediation Standards* are also designed to help the public and allied professionals in the courts, law offices, therapy centers and community groups define what they and their clients can expect from a family mediator.

The *Model Standards* apply to mediators in both private practice and in court-based mediation programs, with a special appendix of provisions specially applicable to court-based programs. They also apply to all mediators—lawyers and therapists alike—regardless of the mediator's profession of origin. The *Model Standards* do not attempt a comprehensive definition of "family disputes" to which they are applicable. Most mediation in court-based programs to date occurs in disputes between parents arising out of divorce and separation. Private mediation practitioners often mediate divorce and separation related financial issues in their practices. The *Model Standards* can also apply to mediation in grandparent visitation disputes, child protection mediation, etc.[20]

A standard was included in the *Model Family Mediation Standards* only if Symposium participants reached a consensus that it encapsu-

19. *See* Schepard, *Evolving Judicial Role, supra* note 1, at 422–23.

20. *See* Matthew Kogan, *The Problems and Benefits of Adopting Family Group Conferencing for PINS (CHINS) Children,* 39 FAM. CT. REV. 207 (2001).

lated desirable practice norms. As a result, the *Model Standards* do not address some controversial questions such as the appropriate balance between "facilitative" and "evaluative" mediation, a subject of much discussion in the mediation community.[21] The essence of this debate revolves around the questions whether, when, and in what form a mediator should, even with the participant's consent, express an opinion about the range of potential outcomes of a disputant's claim in court. To some extent, this debate is impacted by the *Standards* which authorize a family mediator "to provide the participants with information that the mediator is qualified by training or experience to provide."[22] The *Standards* do not, however, require or prohibit a mediator from providing any particular kind of information, such as an evaluation of the probable outcome of a claim by a lawyer-mediator, or the projected emotional benefit or harm to a child by a therapist-mediator. The *Standards* leave this and similar practice issues on which the mediation community has reached no consensus to the marketplace in which consumers choose mediators, hopefully wisely and with information about their approach to mediation. When a consensus develops, old *Standards* can be modified and new ones created.

The *Model Family Mediation Standards* are aspirational rather than regulatory. They are not a "restatement" of the law of family mediation for purposes of determining malpractice liability in civil or regulatory proceedings.[23] Legislatures, courts and voluntary professional organizations that do regulate mediation practice may, of course, find the *Model Standards* a useful starting point for creating their own standards.

A. Creation of the Model Family Mediation Standards

Mediators and lawyers are especially concerned with the quality of the process that leads to standards governing the way they practice their craft. The *Model Family Mediation Standards* were developed through a process inspired by the Family Law Section that was collaborative, consultive, and infused with substantial expertise. The process of draft-

21. For a brief summary of the debate with citations, *see* L. Randolph Lowry, *To Evaluate or Not, That is the Question!*, 38 FAM. & CONCIL. CTS. REV. 48 (2000), and James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 29 FLA. ST. L. REV. 919 (1997). *See generally* Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996) (presenting a four quadrant grid describing the varieties of mediator behavior as facilitative-broad, facilitative-narrow, evaluative-broad, and evaluative-narrow); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

22. MODEL FAMILY MEDIATION STANDARDS Standard VI.A. *See infra* text at notes 40–42 for further discussion of this provision.

23. MODEL FAMILY MEDIATION STANDARDS, *Overview and Definitions.*

ing and redrafting the *Standards* included consultation with as many interested constituencies as was feasible.[24] The process encouraged communication and bridged differences between the family mediation community, the bar, and domestic violence advocates.

The process of creating the *Model Family Mediation Standards* built on a historical legacy. They are, in effect, the latest milestone in a nearly twenty year old effort by the family mediation community to develop and refine standards of practice. Between 1982 and 1984 AFCC convened three national symposia on divorce mediation standards. The result of the efforts was the 1984 *Model Standards of Practice for Family and Divorce Mediation* (*"1984 Model Standards"*)[25] which have served as a resource document for state and national mediation organizations whose members included many nonlawyer family mediators and those in court-based programs.

In tandem with the process convened by AFCC, the Family Law Section promulgated *Standards of Practice for Lawyer Mediators in Family Law Disputes* in 1984 (*"1984 ABA Standards"*).[26] The *1984 ABA Standards* were developed for lawyers who wished to be mediators, a role at that time some thought inconsistent with governing standards of professional responsibility for lawyers.[27] The *1984 ABA Standards* helped define how lawyers could serve as family mediators and still stay within the ethical guidelines of the profession.[28]

Following promulgation of the *1984 Model Standards* and *1984 ABA Standards,* interest in mediation in all fields, and family mediation in particular, burgeoned. Interested organizations promulgated their own standards of practice.[29] Other efforts were made by concerned organizations to establish standards of practice for mediation generally.[30]

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24. The development of the *Model Family Mediation Standards* was entirely an unfunded, volunteer effort.

25. SYMPOSIUM ON STANDARDS AND PRACTICE FOR FAMILY AND DIVORCE MEDIATION, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (1984).

26. AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984).

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

28. Several members of the Committee who worked on the *1984 Model Standards,* particularly Jay Folberg and Tom Bishop, participated in the drafting of the *1984 ABA Standards.* As a result the *1984 ABA Standards* were basically compatible with the *1984 Model Standards.*

29. The Academy of Family Mediators, for example, promulgated its own standards of conduct based on the *1984 Model Standards.* Several states and courts have also set standards. *See, e.g.,* FLA. R. CERT. & CT. APPTD. MEDIATORS; KAN. SUP. CT. R. 901–904, APPENDIX KANSAS STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1996).

30. For example, a joint task force of the American Arbitration Association, Amer-

In 1996, the Family Law Section concluded that a fresh look at the *1984 ABA Standards* was in order. It created a Task Force on Standards of Practice for Divorce Mediation, later renamed the Committee on Mediation, ("ABA Committee") to review the *1984 ABA Standards* and make recommendations for changes and amendments.[31] From the outset, the project was conceived of as a collaboration with other interested groups; membership of the ABA Committee included nonlawyer mediators and liaisons from AFCC, AFM, and SPIDR. After intensive review and study, the ABA Committee concluded that while the *1984 ABA Standards* were a major step forward in the development of divorce and family mediation they had to be replaced by a new set of standards.

First, the *1984 ABA Standards* did not address many critical issues in mediation practice that arose since 1984. They applied only to mediators whose profession of origin was as a lawyer when many nonlawyers also practiced mediation. They made no distinction between mediators in private practice and mediators in court connected programs. They did not address many critical issues in mediation practice that have been identified since they were initially promulgated. They did not, for example, deal with domestic violence and child abuse and did not address the mediator's role in helping parents define the best interests of their children in their post-divorce parenting arrangements. They made no mention of the need for special expertise and training in mediation or family violence, or the need for sensitivity to cultural diversity.

Second, the *1984 ABA Standards* used different language in some areas than guidelines for the conduct of mediation subsequently promulgated. The ABA Committee believed that uniformity of mediation standards among interested groups is highly desirable to provide clear guidance for family mediators and for the public. Uniformity and clarity could not, however, be provided within the framework of the *1984 ABA Standards.*

The ABA Committee then examined all available standards of practice, conducted research, and consulted with a number of experts on family and divorce mediation. It particularly focused on consultations

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ican Bar Association, and the Society of Professionals in Dispute Resolution (SPIDR) published *Model Standards of Conduct for Mediators* in 1995. AMERICAN ARBITRATION ASS'N, SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION & AMERICAN BAR ASSOCIATION, THE STANDARDS OF CONDUCT FOR MEDIATORS (1995).

31. Nancy Palmer and Phyllis Campion chaired the ABA Committee. I served as its Reporter.

with experts in domestic violence and child abuse about the appropriate role for mediation when family situations involved violence or the allegations thereof. The Council of the ABA's Family Law Section reviewed the ABA Committee's first draft of new standards of practice in November of 1997. It reaffirmed the conclusion that the *1984 ABA Standards* should be replaced and other interested mediation organizations should be included in the process of drafting new standards. It specifically requested that the ABA Commission on Domestic Violence be included in the consultation process.

In 1998, AFCC offered to reconvene the Model Standards Symposium which last met in 1984 using the draft Standards of Practice created by the ABA Committee as a beginning point of discussion. The aim of reconvening the Model Standards Symposium was to develop a single set of revised standards of practice applicable to *all* family mediators, regardless of profession of origin. The Family Law Section and the National Council of Dispute Resolution Organizations (an umbrella organization which includes the Academy of Family Mediators, the American Bar Association Section of Dispute Resolution, AFCC, Conflict Resolution Education Network, the National Association for Community Mediation, the National Conference on Peacemaking and Conflict Resolution, and the Society of Professionals in Dispute Resolution) joined AFCC in co-convening the Model Standards Symposium.

In October 1998 the Model Standards Symposium met in Orlando to review the draft standards created by the ABA Committee. Representatives of more than twenty family mediation and legal organizations reviewed the ABA Committee draft line by line during a full day session. A draft of revised *Model Family Mediation Standards* resulted, which was published in the *Family and Conciliation Courts Review* (since renamed the *Family Court Review*).[32] It was also posted on the websites of AFCC and the ABA Family Law and Dispute Resolution Sections. Presentations about the Draft *Model Standards* were made at numerous national conferences. In addition, the Draft *Standards* were mailed to more than ninety local and national mediation interested groups for comment.

In response, the Symposium received comments and more than eighty proposals for changes in the Draft *Model Family Mediation Standards* and met again in February 2000 in New Orleans and August 2000 in Chicago to consider them. Attendees at these meetings again

32. *Draft Model Standards of Practice for Divorce and Family Mediators*, 38 FAM. & CONCIL. CTS. REV. 106 (2000).

included family mediators and family lawyers and judges in family court from across the nation with years of experience in the field. Many of the participants are leaders in national or local family bar, mediation, and dispute resolution organizations. In addition, the American Bar Association's Commission on Domestic Violence participated as an expert consultant.[33]

The *Model Family Mediation Standards* were revised yet again and submitted to the governing Councils of the Family Law Section and the Section of Dispute Resolution which unanimously approved and submitted them to the House of Delegates. AFCC and other family mediation organizations also deliberated upon and approved them.

B. Entry into Mediation

The *Model Family Mediation Standards* rely on a model of "informed consent" for a participant's entry into the process. They contain provisions that require participants be fully informed about the nature of the process and consent to participate. Thus, *Standard III* requires the mediator to "facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate."[34] The mediator is required to have an overview session with the participants before they begin mediation which includes a detailed description of what mediation is, how it differs from other dispute resolution processes. The mediator is required to inform participants that they are entitled to seek independent advice from lawyers and other professionals of their choice during the mediation process.[35] The *Model Standards* also encourage the participants to sign a written agreement to submit their dispute to mediation within a reasonable time after submitting their dispute to mediation.[36]

C. Who Should Mediate?

The *Model Family Mediation Standards* are premised on the assumption that mediation is a dispute resolution process, not to be confused with mental health therapy, counseling, or legal representation. Mediators, under the *Model Family Mediation Standards,* have a special

33. The *Model Standards* were also published in the FAMILY COURT REVIEW. A list of the sponsoring organizations and names of the Symposium participants can be found at the end of the *Reporter's Foreword to the Model Standards of Practice for Family and Divorce Mediation,* 39 FAM. CT. REV. 121, 124–26 (2001).

34. MODEL FAMILY MEDIATION STANDARDS Standard III.

35. MODEL FAMILY MEDIATION STANDARDS Standard III.A.1–9.

36. MODEL FAMILY MEDIATION STANDARDS Standard III.B.

responsibility to make participants aware of the distinction between the mediator's craft and that of other professionals who might be involved in the family dispute resolution process.[37]

Even if a mediator is a therapist and some of the techniques used in mediation can be found in therapy textbooks, mediation is different from therapy. The mediator aims to facilitate negotiation between participants focused on the resolution of a dispute rather than on long term behavioral change. Even if a mediator is a lawyer, the mediator does not represent anyone or provide legal advice to a client. He or she is a neutral facilitator of negotiations without special allegiance to a participant. A client who wants individual therapy or independent legal advice must retain a separate professional to do so.

The *Model Standards* define the qualifications for family mediators in functional terms, not by professional background. The qualifications start from the premise that family disputes have legal, mental health, dispute resolution, and cultural dimensions and that a mediator must be familiar with all of them. The *Model Standards* identify four basic qualities a mediator should possess: (1) knowledge of family law; (2) knowledge of and training in the impact of family conflict on parents, children, and others, including knowledge of child development, domestic abuse, and child abuse and neglect; (3) education and training specific to the process of mediation; and (4) the ability to recognize the impact of culture and diversity.[38]

These provisions of the *Model Standards* establish that the family mediation community itself believes that mediators must meet stringent qualifications; they should alleviate any remaining fear among lawyers and courts that mediators are unqualified and untrained to facilitate negotiations to resolve family disputes. In an *Appendix of Special Policy Considerations,* the *Model Standards* go even further and urge states and local courts to set standards and qualifications for family mediators including procedures for evaluations and handling grievances against mediators, in consultation with appropriate professional groups, including professional associations of family mediators.[39]

37. MODEL FAMILY MEDIATION STANDARDS Standard III.A.2 & 4.

38. MODEL FAMILY MEDIATION STANDARDS Standard II.A.1–4. Culture and diversity are particularly important elements to emphasize in mediation training. It may be, for example, that Latino families expect and need a different model of mediation than Anglo families. *See* Steven Weller, John A. Martin & John Paul Lederach, *Fostering Culturally Responsive Courts: The Case of Family Dispute Resolution for Latinos,* 39 FAM. CT. REV. 185 (2001).

39. MODEL FAMILY MEDIATION STANDARDS, *Appendix of Special Policy Considerations for State Regulation of Family Mediators and Court Affiliated Programs, Consideration A.*

The *Model Standards* do not directly address the question whether a nonlawyer mediator is practicing law or a lawyer mediator practices therapy, leaving that subject to regulatory bodies and future task forces.[40] They do, however, prohibit a mediator from providing therapy or legal advice.[41] The *Model Standards* then rely on the distinction between a mediator's providing individually applicable advice (whether legal or therapeutic) and the mediator's providing general information to participants in stating: "Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide."[42] Thus, a lawyer mediator would be able to provide the participants with legal information while a mediator whose profession of origin is as a mental health professional would be able to provide participants with information which he or she is qualified to provide.

The *Model Standards* also permit the mediator to "document the participants' resolution of their dispute" with the agreement of the participants. Thus, the participants can agree that a mediator will prepare a first draft of a written settlement resulting from their deliberations. The *Model Standards* go on, however, to remind the mediator "to inform the participants that any agreement should be reviewed by an independent attorney before it is signed."[43]

D. Mediator's Responsibility for Insuring Minimum Fairness in Facilitated Negotiations

The *Model Family Mediation Standards* articulate standards of practice that define the mediator's responsibility to insure fundamentally procedurally fair bargaining between the participants. The mediator, for example, "should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and through-

40. *See* Joshua R. Schwartz, Note *Laymen Cannot Lawyer, But Is Mediation the Practice of Law?*, 20 CARDOZO L. REV. 1715 (1999); Jonathan A. Beyer, *Practicing Law at the Margins: Surveying Ethics Rules for Legal Assistants and Lawyers Who Mediate,* 11 GEO. J. LEGAL ETHICS 411 (1998). This subject was central to the ABA's recent and continuing debate on multi-disciplinary practice. *See generally* ABA Commission on Multidisciplinary Practice, Report to the House of Delegates (visited Dec. 28, 1999) <http://www.abanet.org/cpr/mdpfinalreport.html>; Linda Galler, *"Practice of Law" in the New Millennium: New Roles, New Rules, But No Definitions,* 72 TEMPLE L. REV. 1001 (2000).

41. MODEL FAMILY MEDIATION STANDARDS Standard VI.A.

42. MODEL FAMILY MEDIATION STANDARDS Standard VI.A.

43. MODEL FAMILY MEDIATION STANDARDS Standard VI.E.

out the process."[44] This provision is designed to insure that the mediator makes an overall judgment that participants are willing and able to mediate before the process begins and throughout.

The *Model Standards* also require the mediator to "facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts."[45] The purpose of this provision is to insure participants' roughly equal access to information (such as information about financial status and medical information about children) essential to fair negotiations. It does not mean, however, that participants must receive exactly the same information during mediation that they do through the discovery process in litigation. The *Standards* require only that the mediator insure minimum disclosure for fairness; participants are entitled to decide, with the advice of outside counsel if they wish, that the costs of additional disclosure are too great to warrant it. Similar judgments are made in lawyers' offices every day.

The *Model Standards* also require the mediator to consider suspending or terminating the mediation process "if the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable."[46] This provision imposes a requirement on the mediator to insure that an agreement that results from mediation is not so unfair that it shocks the conscience in the manner it was entered into (physical threats by one party or another are an example) or because the substantive terms are so wildly unfair that no reasonable person would enter into them. This standard should be applied with great restraint, recognizing the importance of maintaining stability in settlement agreements.[47] This standard is designed to insure that the mediator recognizes that a settlement agreement must satisfy minimum standards of fairness; it does not require that the terms of a mediated agreement

44. MODEL FAMILY MEDIATION STANDARDS Standard III.C.
45. MODEL FAMILY MEDIATION STANDARDS Standard VI.A.
46. MODEL FAMILY MEDIATION STANDARDS Standard XI.A.4.
47. *See* Riehle v. Tudhope, 765 A.2d 885, 886 (Vt. 2000) (recognizing the importance of finality of settlements and stating that a separation agreement should be set aside only when "the normal boundaries of compromise and negotiation are exceeded"). New York courts, for example, have held that antenuptial agreement provisions on distribution of property may be reviewed only under traditional equity standards of unconscionability or overreaching. *See* Goldman v. Goldman, 500 N.Y.S.2d 111, 113 (App. Div. 1986); Pennise v. Pennise, 466 N.Y.S.2d 631, 633–34 (Sup. Ct.1983). Under this standard, the agreement will not be enforced if it shocks the conscience and confounds the judgment of any man or woman of common sense, *Pennise*, 466 N.Y.S.2d at 633, or if no person in his or her senses would make it and no honest and fair person would accept it. Clermont v. Clermont, 603 N.Y.S.2d 923, 924 (App. Div. 1993).

be identical to those that would be achieved in a court order after years of discovery and litigation.

The *Model Standards* are particularly concerned with assuring that the mediator informs family mediation participants of their right to consult independent counsel and to have counsel participate in mediation if the participants so desire. The *Model Standards* build on the research-based insight that the more that lawyers participate in the mediation process, the more that they support it by developing more problem-solving attitudes, and filing fewer motions.[48] The *Model Standards* should end any lingering belief in the family law bar that mediators are anti-lawyer. They provide, for example, that "[b]efore family mediation begins a mediator should . . . infor[m] the participants that they may obtain independent advice from attorneys . . . during the mediation process."[49] The mediator "should recommend that the participants obtain independent legal representation before concluding an agreement"[50] and "[i]f the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions."[51]

Concern has been expressed that mediation is not in the best interests of women because they have fewer economic resources and are more likely to make compromises for the sake of their children than men and thus are easy targets for unscrupulous manipulation.[52] The *Model Standards* cannot, of course, provide guarantees that any particular mediator will live up to them. Nor can any dispute resolution process—mediation or litigation—remedy fundamental preexisting inequities in power or legal entitlements between participants. That job is for legislatures or courts. While mediators have some responsibility under the *Model*

48. *See* Craig McEwen et al, *Bring in the Lawyers: Challenging the Dominant Approaches to Insuring Fairness in Divorce Mediation,* 79 MINN. L. REV. 1317, 1367–68 (1995) (comparative study of Maine lawyers who participate in that state's mandatory mediation program with New Hampshire lawyers who are not mandated to participate in that state's program). *See also* Sondra Williams & Sharon Buckingham, *Family Court Assessment: Dissolution of Marriage in Florida—Preliminary Assessment Findings,* 39 FAM. CT. REV. 170, 181 (2001) (reporting on survey of Florida lawyers and judges in which the participants stated that a "less adversarial system of and increased utilization of mediation and other forms of alternative dispute resolution as key to a model family court. Ninety-one percent of the members of the Family Law Section described the impact of mediation on family court as positive, whereas 8% viewed it as positive and negative, and only 1% saw mediation as negative").

49. MODEL FAMILY MEDIATION STANDARDS Standard III.A.4.

50. MODEL FAMILY MEDIATION STANDARDS Standard VI.C.

51. MODEL FAMILY MEDIATION STANDARDS Standard VI.D.

52. *See* Penelope Eileen Bryant, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation,* 28 FAM. L. Q. 177 (1994); Trina Grillo, *The Mediation Alternative: Process Dangers for Women,* 100 YALE L.J. 1545 (1991).

Standards to help insure minimum fairness in both the process of bargaining and substantive outcomes, mediators are not insurers that agreements that result from mediation satisfy the preferences of any participant or that the agreement as a whole parallels what a court would award. The tradeoffs between issues and preferences in settlement of a family dispute are too complex, and most substantive family law standards too discretionary, to allow for such routine second guessing of mediated settlements.

What *Model Standards* can do, however, is provide assurances to the public and the legal community that the family mediation profession is willing to assume responsibility for insuring fundamental fairness in facilitated negotiations. While preserving the mediator's role as a neutral, the *Model Family Mediation Standards* codify good practices in mediation that make it less likely (though, of course, not impossible) that unscrupulous participants will take advantage of the mediation process.

There are case histories to support the concern that women are exploited in mediation, as there are case histories of women (and men) being traumatized by courts and unscrupulous lawyers.[53] There is, however, little systematic empirical evidence that women fare worse in mediation than litigation or negotiations in the adversarial system. Indeed, in most studies, men and women express approximately equal satisfaction with mediation as a dispute resolution process. Furthermore, women report that mediation is helpful to them in "standing up" to their spouses, and rated themselves more capable and knowledgeable as a result of participation in mediation.[54]

Despite whatever economic disadvantages women suffer in divorce, women significantly outnumber men as the petitioners in divorce actions.[55] Thus, both they—and their children—have a significant inter-

53. *See* COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS, REPORT 30–31 (1993) (Report to Chief Judge of New York detailing instances in which matrimonial lawyers took advantage of female clients through devices such as taking nonrefundable retainers and liens on their houses).

54. *See* Kelly, *supra* note 13, at 377–78 (1996) (describing numerous studies); Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap,* 73 ST. JOHN'S L. REV. 375, 441 (1999) (summarizing the results of a survey of mediation participants in two Ohio judicial districts by reporting that "[t]he data [from the study] does not support the fears that women feel disadvantaged in mediation").

55. *See* Williams & Buckingham, *supra* note 48, at 174 (women are petitioners in 58% of marital dissolutions, men in 42% in survey of Florida court filings); Margaret F. Brinig & Douglas W. Allen, *"These Boots Are Made for Walking": Why Most Divorce Filers Are Women,* 2 AM. L. & ECON. REV. 126 (2000) (arguing that the best explanation for the differential in divorce filings is that women are encouraged to file for divorce because they believe they are likely to receive custody of the children).

est in reducing the transaction costs associated with divorce and maximizing the values of self-determination that mediation promotes.[56] Both genders should want to improve the quality of the mediation process. Both should welcome the creation of the *Model Family Mediation Standards.*

IV. Mediation and the Best Interests of Children

Prolonged parental conflict arising from divorce or separation can seriously damage children emotionally, economically, and educationally.[57] A major innovation of the *Model Family Mediation Standards* is that they impose an obligation on the mediator "to assist participants in determining how to promote the best interests of children" caught in the middle of such family conflict.[58]

Mediation is generally in the best interests of children because it emphasizes self-determination, voluntary agreements and contains conflict by parents. Most children benefit from a continuing relationship with both parents after divorce if it is safe for parents and children to have one; mediation is perhaps the best dispute resolution process available to help parents achieve that goal through self-determined agreements.[59]

The *Model Family Mediation Standards* provide concrete suggestions for how mediators can help parents best utilize mediation to promote the best interests of children. They do not, however, endorse any particular kind of post-divorce or separation parenting plans (e.g., joint custody, sole custody, or some variation). That decision is for the parents to make with the help of the mediator and their advisors.

Thus, the *Model Standards* suggest that the mediator encourage parents to seek information about child development and helpful com-

56. *See* Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents,* 27 U. MICH. J. L. REF. 131, 190–92 (1993) (discussing interests of women in having more access to information about an increasingly expensive and time consuming divorce litigation process).

57. A short summary of the data can be found in Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective,* 32 FAM. L. Q. 95, 103–05 (1998). *See also* H. Patrick Stern et al, *Battered Child Syndrome: Is It a Paradigm for a Child of Embattled Divorce,* 22 U. ARK. LITTLE ROCK L. REV. 335, 337–40 (2000).

58. MODEL FAMILY MEDIATION STANDARDS Standard VIII.

59. *See* Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce,* 64 TEX. L. REV. 687, 756–59 (1986), for a discussion of the benefit of mediation to children of divorce.

munity resources. They suggest that parenting plans resulting from mediation should contain appropriate levels of detail in provisions for a child's residence and decision-making responsibilities. They should suggest that the participants should address the need to revise a parenting plan over time as a child's developmental needs change, and to provide a process to resolve future disputes.[60]

Other provisions of the *Model Family Mediation Standards* address the questions of whether and how the children should participate in the mediation process. The *Model Standards* do not definitively answer these sensitive questions, leaving them for determination by parents in consultation with the mediator. They reinforce parental authority by stating that, except in extraordinary circumstances, children should not participate in the mediation unless both parents and the court-appointed representative of the child consents.[61] The *Model Standards* also provide that the mediator should inform the parents about the full range of options available for how children participate (e.g., personally, an interview with a mental health professional or the mediator, a videotape statement) and the costs and benefits of each.[62]

One of the most difficult questions in drafting the *Model Family Mediation Standards* was to define the relationship between the mediation process and the representative of the children. Many states do not require representatives to be appointed for children in all disputes. In some states, nonlawyers can serve as children's representatives and their obligations of confidentiality to the child are somewhat undefined. In many states, furthermore, lawyers for children in child custody disputes have ambiguous roles. They may represent the child's best interests (and thus have no obligations of confidentiality to the child) or may serve as a traditional advocate for the preferences of the child with confidentiality obligations to the child.

In light of this complexity and confusion about the role of the child's representative, the *Model Family Mediation Standards* do not take a position on whether the child's representative must be included in the mediation process. They simply impose an obligation on the mediator to inform the child's representative of the mediation. If the representative of the child participates, the *Model Standards* also impose an obligation on the mediator to discuss the effect of the representative's participation on the confidentiality of the process with the participants.

60. MODEL FAMILY MEDIATION STANDARDS Standard VIII.A.1–5.
61. MODEL FAMILY MEDIATION STANDARDS Standard VIII.D.
62. MODEL FAMILY MEDIATION STANDARDS Standard VIII.E.

If agreements result, the mediator should provide the child's representative with them, in so far as they relate to the children.[63]

V. Domestic Abuse, Child Abuse and Neglect, and Family Mediation

Another major innovation of the *Model Family Mediation Standards* is their concrete guidance for family mediators who confront domestic abuse and child abuse and neglect in their practices. While there is disagreement about the extent, there is little doubt that such serious family dysfunctions are part of the context of many family disputes that find their way to a mediator's office.[64] Abuse of a participant and danger to children creates significant challenges for the mediator to shape the process to protect safety.

The *Model Standards* embody the general principle that "[w]hile [mediators] are neutral about the particular agreement reached (provided it is reached voluntarily), [mediators] are not neutral about the safety of our clients and their children."[65] The *Model Standards do not* require any victim of violence or abuse to enter into mediation.[66] Indeed. they define "domestic abuse" more broadly than physical violence, the typical legal definition of domestic violence, to include "is-

63. MODEL FAMILY MEDIATION STANDARDS Standard VIII.C.

64. *See* Schepard, *Evolving Judicial Role, supra* note 1, at 414–17, for a summary of some of the available data.

65. This principle was articulated by a group of prominent Canadian mediators at a Toronto forum reported in Nicholas Bala, *Spouse Abuse and Children of Divorce: A Differentiated Approach,* 13 CAN. J. FAM. L. 215, 282 (1996).

66. There are policy arguments against allowing mediation if a participant is a victim of domestic violence. *See* Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women in Custody Mediation,* 7 MEDIATION Q. 317 (1990) (objective of mediation to resolve conflict while domestic violence is rooted in a struggle for power and control); Mary Pat Treuthart, *All That Glitters Is Not Gold: Mediation in Domestic Abuse Cases,* 1996 CLEARINGHOUSE REV. 243 (1996). Some domestic violence victims, however, want to mediate their post-divorce parenting relationships with their partner. They report as much, if not more, satisfaction with the mediation process as do women who do experience domestic abuse. Recent empirical studies of custody mediation in Ohio and Maine report higher levels of participation and satisfaction by victims of domestic violence in mediation as compared to attorney-negotiated settlements.

> More women [who are victims of domestic violence] reported feeling pressure to settle outside mediation than in mediation . . . Clearly, not all women felt a need to cut off all contact with [an abusive] former spouse. Adherence to such assumptions places all abused women into a single group and ignores evidence suggesting there is much variability among abused women as a class.

King, *supra* note 54, at 444, 446. *See* Roselle Wissler, *Family Law Mediation: Study Suggests Domestic Violence Does Not Affect Settlement,* 6 DISPUTE RES. MAG. 29 (Fall, 1999).

sues of control and intimidation"[67] and explicitly provide that: "Some cases are not suitable for mediation because of safety, control or intimidation issues."[68] What the *Model Standards* do require is that the mediator adapt a four-part approach to the problem of family violence: training, screening, safety measures, and reporting.

First, the *Model Standards* require mediators have special training in recognizing and addressing domestic violence and child abuse and neglect before undertaking any mediation in which those elements are present.[69] The family mediation community has thus imposed upon itself a higher obligation to understand and cope with family violence than the organized bar or the family court judiciary. While both have recognized that training in family mediation is desirable, neither has imposed a specific obligation on its membership to receive training in that area.

Second, the *Model Standards* require mediators to make reasonable efforts to screen for the presence of domestic abuse. There are recognized symptoms that characterize victims of domestic abuse, which is "a pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks, as well as economic coercion that adults . . . use against their intimate partners.[70] A family mediator should be trained to recognize those symptoms and respond with appropriate safety measures. A mediator is not required, however to follow any particular method of screening, as the drafters were not aware of any method that has attained universal validity and can be accomplished with reasonable effort by the mediator.

Nor do the *Model Standards* impose an obligation on the mediator to screen a family for child abuse and neglect, a conclusion which requires a professional with special expertise and which results from an in-depth evaluation of the family, particularly for sexual abuse. Children rarely participate personally in mediation sessions.[71] The drafters felt it was unreasonable to impose a screening obligation for child abuse and neglect on mediators when they do not usually personally have the opportunity to observe the physical and emotional condition of a child. The *Model Standards* do require, however, that if the mediator reason-

67. MODEL FAMILY MEDIATION STANDARDS Standard X.A.

68. MODEL FAMILY MEDIATION STANDARDS Standard X.C.

69. MODEL FAMILY MEDIATION STANDARDS Standards II.A.2 (overall training and qualification standard), IX.B (child abuse and neglect standard) X.A (domestic violence standard).

70. John W. Fantuzzo & Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence, in* 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 21, 22 (Winter 1999).

71. MODEL FAMILY MEDIATION STANDARDS Standard VIII.D.

ably believes that child abuse and neglect exists, the mediator must comply with applicable child protection laws.[72]

Third, the *Model Standards* require mediators to take steps to shape the mediation process to assure the physical safety of mediation participants and children. If domestic violence exists, the *Standards* give the mediator a list of possible ways to assure victim safety during the mediation process including:

1. establishing appropriate security arrangements;
2. holding separate sessions with the participants even without the agreement of all participants;
3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation sessions;
4. encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
5. referring the participants to appropriate community resources;
6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.[73]

The *Model Family Mediation Standards* do not require the mediator to take any of these alternative courses of action. Rather, they require the mediator to consider these alternatives, and any other that might be appropriate, to respond to domestic abuse by insuring safety. They also require the mediator to facilitate the development of parenting plans that "protect the physical safety [of participants] and psychological well-being of themselves and their children."[74]

The *Model Standards* provide fewer options for a mediator to respond to a situation where the mediator reasonably believes child abuse or neglect exists. The mediator, as mentioned above, is obligated to comply with applicable child protection laws. The mediator is also asked to encourage the participants to explore appropriate services and to consider suspending or terminating the mediation process in light of the allegations of child abuse and neglect.[75]

Finally, the *Model Family Mediation Standards* modify the guarantees of confidentiality of the mediation process in light of the vital public policy to protect against family violence. They require mediators to inform participants of any ethically or legally mandated reporting requirements, such as the obligation to report child abuse and neglect,

72. MODEL FAMILY MEDIATION STANDARDS Standard IX.C.
73. MODEL FAMILY MEDIATION STANDARDS Standard X.D.1–6.
74. MODEL FAMILY MEDIATION STANDARDS Standard X.E.
75. MODEL FAMILY MEDIATION STANDARDS Standard IX.C.1–2.

before mediation begins.[76] The *Model Standards* also require the mediator to report a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon and the disclosure is otherwise permitted by law.[77] Finally, the mediator should consider suspending or terminating the mediation process if "the safety of a participant or the well-being of a child is threatened" by its continuation.[78]

VI. Lawyers and the Future of Family Mediation

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 peace-maker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

—Abraham Lincoln (1846).[79]

I realized the true function of a lawyer was to unite parties riven asunder. . . I lost nothing thereby- not even money, certainly not my soul.

—Mohandas Gandhi (1957).[80]

Despite being separated by over a century and by differences in culture and background, two of the greatest lawyers who ever lived both recognize that it is a central function of the legal profession to encourage rational compromise by clients. The problem solving attitude for lawyers championed by Lincoln and Gandhi has a rich tradition deeply rooted in the ethics of the profession. It is a tradition of civility and rational discourse that sometimes seems to get lost in the contentiousness of modern American society.

The ABA's approval of the *Model Family Mediation Standards* creates an opportunity for family lawyers to reaffirm the values Lincoln and Gandhi champion. Mediation offers a proven path to help many families achieve a greater measure of peace. Mediation conducted pursuant to the *Model Standards* addresses the most serious objections that lawyers have had to its development.

76. MODEL FAMILY MEDIATION STANDARDS Standard VII.B.
77. MODEL FAMILY MEDIATION STANDARDS Standard VII.C.
78. MODEL FAMILY MEDIATION STANDARDS Standard XI.A.1.
79. Abraham Lincoln, *Notes for a Law Lecture, in* LIFE AND WRITINGS OF ABRAHAM LINCOLN 328 (Philip V. D. Stern ed. 1940). Lincoln today would surely change the phrase "good man" to "good man and woman".
80. MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 134 (1957).

How should lawyers respond? One way is by lobbying for regulations based on the *Model Standards* which will help insure that mediation practitioners deliver high quality services. More important, however, is that family lawyers can embrace mediation and its values by developing a problem solving orientation to their own practices and to future reform in family law.[81]

These are not incompatible goals. It is entirely possible for a lawyer to effectively advocate for a client by promoting problem solving behavior and attitudes.[82] A first step is for lawyers to become familiar with problem solving negotiation strategies and mediation through continuing education; the more they know about it, the more they will like it. Many lawyers will want to go further, take mediation training and become mediators themselves.

An even more important task, however, will be for lawyers to facilitate their clients' participation in mediation. On a policy level, the organized bar can sponsor pledges for its members to promise to advise their clients of the availability of mediation to resolve their disputes and its potential benefits and burdens.[83] The *Model Rules of Professional Conduct* can be revised to include a requirement that lawyers do the same.[84] Lawyers can model problem solving behavior and civil discourse in their relationships with other lawyers who represent other participants in a family dispute and encourage clients to do so as well.[85] Lawyers can also be trained in how to represent clients who participate in mediation effectively, as a coach rather than a star player.[86] The organized bar can lobby for adequate funding for public family mediation programs[87] and for parent education programs that help parents and children adjust to the problems of family reorganization.[88] Law schools can require courses in mediation and alternative dispute reso-

81. *See* Forrest S. Mosten, *Mediation and the Process of Family Law Reform,* 37 FAM. & CONCIL. CTS. REV. 429 (1999).

82. *See generally* ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

83. *See* Andrew Schepard, *Law and Children: A Divorce Lawyer's Pledge for Children,* N.Y.L.J. July 6, 1996 at 3.

84. *See* Nicole Pedone, *Lawyer's Duty to Discuss Alternative Dispute Resolution in the Best Interests of the Children,* 36 FAM. & CONCILIATION CTS. REV. 65 (1998); *Wingspread Conference Report, supra* note 16, at 150.

85. *Wingspread Conference Report, supra* note 16, at 150.

86. *See* Andrew Schepard, *Supporting Parent-Clients in Mediation of Child Custody Disputes,* 10 PRAC. LITIGATOR 7 (1999). *See generally* Jacqueline M. Nolan-Haley, *Lawyers, Clients and Mediation,* 73 NOTRE DAME L. REV. 1369 (1998).

87. *See* King, *supra* note 54, at 375 (arguing that mediation's benefits require that public mediation programs be adequately funded so as to be available to all regardless of income).

88. *See* Schepard, *supra* note 57, at 95 *et seq.,* for a description of such programs.

lution as part of their curriculums and bar examinations can include questions on the subject.

When we encourage our clients to effectively and responsibly mediate their family disputes we encourage the best in ourselves as well. The *Model Family Mediation Standards* are a commitment by the mediation profession and the organized bar to continuously improve the path of peacemaking identified by Lincoln and Gandhi for today's families and lawyers and generations to come. It will be up to each of us to decide how far we and our clients will travel down that road.