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NOTES
Family Law—Attorney Mediation of Marital Disputes and Conflict of Interest Considerations

A recent trend toward the increasing use of mediation services and nonadversarial proceedings in the resolution of marital disputes has raised a serious question as to whether attorney mediation of domestic disputes violates the ethical "conflict of interest" standards of the legal profession. This note will examine this concern in light of the need for flexibility in dealing with an often already tragic situation. As a result of the adoption of no-fault divorce legislation in the majority of American jurisdictions,\(^1\) it has become increasingly unnecessary to consider fault in divorce actions. Under current divorce laws, fault issues are usually raised only in conjunction with questions of spousal support, property division, and child custody.\(^2\) Though the adversarial system is still necessary in a no-fault divorce action when a couple is unable or unwilling to reach a voluntary settlement agreement, frequently an adversarial approach operates against the best interests of the parties by creating conflicts that did not exist originally.\(^3\) Often the parties agree on the desirability of obtaining a divorce and wish to end the marriage in the most expeditious manner possible. They prefer to settle their differences out of court because they both fear the strangeness and formality of the courtroom and wish to avoid the high cost and embarrassment of litigation.\(^4\)

The public's desire for an alternative to courtroom resolution of marital conflicts has resulted in the increasing use of mediation services. In the mediation process the couple meets with a neutral third party who takes an active part in the discussion of issues and makes affirmative suggestions for the resolution of disagreements.\(^5\) The mediator's objectives in a separation or divorce

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2. For a discussion of fault as a consideration in alimony, spousal support, and property division awards pursuant to a no-fault divorce, see Annot., 86 A.L.R.3d 1116 (1978); Freed and Foster, supra note 1, at 305-10.

When no-fault divorce statutes fail to specify whether fault is a proper consideration in determining issues of alimony, spousal support, and property division, the matter has been left to judicial determination. E.g., Huggins v. Huggins, 57 Ala. App. 691, 331 So. 2d 704 (1976); Juick v. Juick, 21 Cal. App. 3d 421, 427, 98 Cal. Rptr. 324, 329 (1971).


5. "Mediation" is to be distinguished from "conciliation" in which the neutral third party
case are to aid the parties in reaching an acceptable compromise of their positions and to facilitate a voluntary settlement.6

In order for the mediation process to be successful, the mediator must encourage the couple to assess their demands realistically and to accommodate their differences, rather than to magnify them. The parties must be willing to communicate and to arrive at a fair settlement without consideration of fault.7 Theoretically, parties who voluntarily and maturely have reached their own agreement, rather than a court-imposed one, are more likely to be satisfied with the results and less likely to avoid compliance or to engage in repetitive and costly litigation.8

Public demand for these mediation services has developed for several reasons. Mediation of the uncontested divorce reduces the artificially created hostility which can be a by-product of adversarial proceedings.9 Mediation also reduces the financial burden of a contested divorce case.10 This burden can be extremely debilitating to individuals who are suddenly responsible for the maintenance of two households instead of one. Additionally, a mediated custody agreement is preferable to a court-imposed settlement in several ways. It is evident that in most cases the parents are the individuals who have the greatest understanding of the needs of their children. They are, therefore, most capable of determining what is in the “best interests of the child.”11 When the parents resolve custody matters privately, they are no longer at the mercy of a judge who often has little knowledge of the needs and interests of the particular family.12 The children are not subjected to the psychologically damaging strain of an adversarial procedure.13 They are not put in the difficult position of determining which parent with whom to live.14 Instead these decisions are made by the parents through the give-and-take of the mediation process.

takes a more passive role, analogous to that of a marriage counselor. The conciliator merely creates a situation that will be conducive to the objective discussion of issues. He does not attempt to interject personal suggestions for compromise. Meroney, supra note 4, at 470. The mediator may alternate between the roles of conciliator and mediator, depending on the course of the discussion. Id. at 470-71, n. 21. In both mediation and conciliation the third party promotes negotiation, while in arbitration the neutral third party serves in a quasi-judicial role. The parties have submitted to arbitration with a prior agreement to accept as final and binding the decision of the arbitrator. Id.; Pickrell & Bendheim, supra note 3.

6. Id.; Meroney, supra note 4, at 470.
8. Steinberg, supra note 7, at 620.
9. See authorities cited in note 3 and accompanying text supra.
10. This is particularly true in a contested custody case which may involve expert witness fees for psychologists and social workers as well as lengthy depositions and high legal fees. See Non-Judicial Resolution, at 585-86.
12. Id. at 916-17, 939.
13. See Non-Judicial Resolution, supra note 3, at 584-85.
14. See Simmons, The Invisible Scars of Children of Divorce, 7 Barrister 14 (1980). Simmons states that the number of children affected by divorce is increasing. In 1956, 361,000 children's parents became divorced. That number has tripled to approximately one million children a year currently. Id. at 15.
Mediation of the uncontested divorce also promotes the important public interest of relieving crowded court dockets by reducing the number of contested divorce cases going to court, specifically child custody cases. When the parties are able to resolve custody disputes during the mediation process there is no necessity for a prolonged initial custody hearing. Furthermore, if the parties have reached their own custody agreement they will feel responsible for its success and will be less prone to litigate matters of custody and visitation after the marriage is dissolved.

Despite public demand for mediation services many lawyers are reluctant, for several reasons, to act as mediators in marital disputes. The role of the neutral mediator is quite different from the attorney's traditional role as an advocate who acts as a "hired gun" for his client. Attorneys may believe they lack sufficient training in this form of client counseling. They may fear that attorney mediation of domestic disputes violates the ethical standards of the legal profession. In addition, many mediation services prefer not to employ attorneys as mediators on the assumption that legal training is inconsistent with the tempering of client demands necessary to make the mediation process successful. Thus attorneys are not currently involved in mediation in large numbers.

In part because of the unavailability of attorney mediators, divorcing spouses have turned to mediation and conciliation services organized or funded by state legislatures, judicial systems, and privately operated organizations.

15. See note 24 infra.
17. Id. at 593-95.
18. See text accompanying notes 9-17 supra.
22. Pick, supra note 19, at 58-59. According to Pick, lawyer-mediators comprise only 15% of the national total. Id. at 59. Lawyers who work as mediators with the American Arbitration Association are not permitted to give legal advice or function as attorneys. Pickrell & Bendheim, supra note 3, at 28. But see Non-Judicial Resolution, supra note 3, at 596 n. 78. Under the Family Law Mediator Program, established by the San Fernando Valley Bar Association in California, family law attorneys volunteer to act as mediators in family law matters. Id.
24. Judicial mediation was attempted in 1979 in a superior court in Riverside County, California because of a severe backlog of civil cases. A judge was removed from his regular caseload and assigned to handle settlement conferences exclusively. The program resulted in the settlement
nizations.²⁵ Most of these services are staffed by mediators who are trained in the behavioral sciences or who have received specialized training as mediators in their employment.²⁶ Apparently, however, the nonattorney mediator is not allowed to give any type of legal advice because of state statutes prohibiting the unauthorized practice of law.²⁷ The parties, consequently, may agree on issues of property settlement, support and child custody with no knowledge of the legal rights that they are relinquishing or of the tax advantages that they are foregoing.²⁸

Because legal advice is frequently desirable prior to entering into a final separation agreement, it is often necessary for the parties to employ an attorney outside the mediation process in order to ensure the legal validity of their agreement.²⁹ Even at this stage a single attorney may be reluctant to handle
the case for both parties.\textsuperscript{30} The couple, therefore, incurs the previously avoided expense of hiring separate attorneys, along with the risk that the lawyers' assumption of an adversarial role will cause hostilities that were hoped to be averted.\textsuperscript{31}

The need for attorney mediators is growing because of a combination of factors. The increasing demand for mediation services in general\textsuperscript{32} has surpassed the availability of nonattorney mediation services.\textsuperscript{33} Furthermore, legal advice is vital in any mediation process aimed at settling property and custody disputes. In light of this developing trend, attorneys should consider whether hesitation to serve as mediators is justified.

There are two major reasons for attorney reluctance to become involved in mediation. The first is a belief by the individual attorney that he lacks sufficient counseling skills to adequately control discussions with such potential for emotional volatility. It is relatively easy, however, to remedy a deficiency in counseling skills. The attorney who lacks training or experience with mediation counseling could participate in training sessions similar to those attended by lay mediators.\textsuperscript{34} Co-mediation with a trained counselor could also be used to supplement the skills of the inexperienced attorney, although this may increase the cost of mediation.\textsuperscript{35}

The second major factor inhibiting attorney involvement in mediation services pertains to ethical considerations. The most significant ethical dilemma arising out of attorney mediation of domestic disputes is posed by the "conflict of interest" provisions of the American Bar Association (ABA) Code of Professional Responsibility.\textsuperscript{36} The applicable provision, Disciplinary Rule

\begin{itemize}
\item \textsuperscript{30} See notes 45-53 and accompanying text infra.
\item \textsuperscript{31} See generally G. Hazard, supra note 19, at 80.
\item \textsuperscript{32} Mediation services are expected to spread to smaller cities as a result of the popularity of mediation in urban areas. Pick, supra note 19, at 59.
\item \textsuperscript{33} See Steinberg, supra note 7, at 618.
\item \textsuperscript{34} See note 26 and accompanying text supra. Merder, The Need for an Expanded Role for the Attorney in Divorce Counseling, 4 Fam. L.Q. 280, 288 (1970); Mussehl, From Advocate to Counselor: The Emerging Role of the Family Law Practitioner, 12 Gonz. L. Rev. 443, 448 (1977); Non-Judicial Resolution, supra note 3, at 597-98.
\item See New York State Trial Lawyers' Association Code of Professional Responsibility, [1975] 1 Fam. L. Rep. (BNA) 3115. Section 6(a) of the Code states, "(t)he matrimonial lawyer shall encourage, counsel and advise negotiation toward the settlement of marital and/or family problems by agreement before litigation." Id. at 3116.
\item \textsuperscript{35} Interview with Susan Lewis, a private practitioner in Durham and Chapel Hill, North Carolina, (Oct. 8, 1980). Ms. Lewis has practiced marital mediation for three years and occasionally works in conjunction with a psychologist. She suggests that any attorney who is inexperienced in mediation consider working with a trained counselor to provide the counseling necessary in the mediation process. Even after obtaining sufficient counseling skills, the attorney may wish to work with a psychologist in cases in which the parties are highly emotional. See Steinberg, supra note 7.
\item To avoid a violation of Disciplinary Rule (DR) 3-102(A) of the ABA Code of Professional Responsibility, the attorney should refrain from sharing legal fees with the nonlawyer. American Bar Association, Code of Professional Responsibility, DR 3-102(A) (1979), reprinted in T. Morgan & R. Rotunda, 1979 Standards Supplement to Problems and Materials on Professional Responsibility 25 (1979) [hereinafter cited as ABA Code]. The attorney should also avoid forming a partnership with the nonlawyer to prevent a violation of DR 3-103(A). Id. at 3-103(A).
\item \textsuperscript{36} E.g., ABA Code, supra note 35, at Ethical Consideration (EC) 5-14, 5-15, 5-16, 5-19, 5-20, DR 5-105(A)-(C).
\end{itemize}
(DR) 5-105(A), requires that a lawyer decline employment if the employment will adversely affect his judgment or if he will be required to represent different interests.\footnote{37} The purpose of the restriction on multiple representation is to maintain the lawyer's independent professional judgment and to ensure adequate representation of the interests of each client.\footnote{38} Under a separate provision of the Code, DR 5-105(C), however, a lawyer may represent multiple clients if three conditions are met. First, it must be \textit{obvious} that he can adequately represent the interests of each client. Second, each client must \textit{consent} to the joint representation. Third, the consent of each client must be given \textit{after full disclosure} of the possible effect of multiple representation on the exercise of the lawyer's independent professional judgment.\footnote{39} The lawyer is instructed to "resolve all doubts against the propriety of the representation" if the clients have "potentially differing interests."\footnote{40}

The presence or absence of litigation is a factor in determining the propriety of representing multiple clients. The lawyer is advised that he should \textit{never} represent in litigation multiple clients with differing interests.\footnote{41} This rule has been applied even when both parties have consented to multiple representation after full disclosure of potential undesirable consequences.\footnote{42}

When no litigation is involved, the attorney must balance factors that indicate the potential harm to clients from joint representation against those favoring the employment of only one attorney. Some of the factors to be considered include the degree to which the clients' interests potentially differ, the possibility of increased hostility and expense resulting from the employment of separate attorneys, the desire of the parties to have the attorney serve in a neutral capacity as opposed to taking an adversarial role, and the ability of the

\footnote{37} Id. at DR 5-105(A). The text of DR 5-105(A) reads:

\begin{quote}
A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR 5-105(C).
\end{quote}

\footnote{38} Id. at EC 5-14, DR 5-105(C). The ABA has stated that the underlying view for precluding the attorney from representing conflicting interests is that "a client is entitled to the benefit of his lawyer's undivided judgment, unfettered by commitments or loyalty to others." ABA Comm. on Professional Ethics Informal Opinions, No. 1233 (1972).

\footnote{39} ABA Code, supra note 35, at DR 5-105(C).

\footnote{40} Id. at EC 5-15.


Another rationale for the distinction is that withdrawal of the attorney due to an increase in conflict will normally have less detrimental effect on the clients if the matter is not currently in litigation. R. Wise, Legal Ethics 77-78 (2d ed. 1970); ABA Code, supra note 35, at EC 5-15.
clients to protect their interests with only limited representation. The attorney must bear in mind the possibility that an initially uncontested divorce may escalate into an action requiring litigation. If this should occur the attorney would be required to withdraw from representation of either party, resulting in hardship to the clients.

If the attorney accepts multiple employment in a divorce action, and his decision is later found to have been erroneous, the penalties could be severe. A party alleging injury caused by the conflict of interest may bring a civil malpractice action against the attorney, who could be sanctioned by a legal ethics committee, and the divorce decree could be subject to collateral attack by a party alleging fraud, duress or overreaching.

Although the Code leaves open the possibility of multiple representation, some jurisdictions absolutely preclude multiple representation in a divorce action, even where no-fault and dissolution-of-marriage statutes have been adopted.

The four principal reasons given for this rule are: (1) the existence of inherently differing interests between the spouses that may later become the subject of adversary litigation; (2) the existence of obstacles that prevent a lawyer representing both spouses from obtaining the information necessary for the adequate representation of the parties; (3) the need to avoid an appear-

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44. ABA Code, supra note 35, at EC 5-15; Non-Judicial Resolution, supra note 3, at 597-99; Note, supra note 21, at 94.


But see Brosie v. Stockton, 105 Ariz. 574, 468 P.2d 933 (1970) (court refused to set aside a property settlement because plaintiff failed to allege damages resulting from joint representation); Todd v. Rhodes, 108 Kan. 64, 193 P. 894 (1920) (when husband employed the same attorney to represent both parties to the divorce he could not subsequently attack the divorce on grounds of joint representation); Halvorsen v. Halvorsen, 3 Wash. App. 827, 479 P.2d 161 (1970) (court refused to set aside property settlement because joint representation by one attorney was proper under the circumstances).


50. Ohio Bar Ethics Comm., supra note 48, at 3110; Note, supra note 21, at 99. Obstacles include the reluctance of the parties to disclose all relevant information because they fear that harmful disclosures may be used later by the opposing spouse in a contested action. It is a general
ance of impropriety;" and (4) the interest of the state in child custody, settlement of property rights and the marital status of the parties.\textsuperscript{52}

Before one concludes that an attorney should \textit{never} represent both parties in an uncontested divorce action, it should be noted that such representation is permissible in many jurisdictions if the parties have previously resolved all conflicts and if the attorney has obtained the consent of both clients after full disclosure of the implications of common representation.\textsuperscript{53} Furthermore, there are valid policy reasons for allowing the attorney to act as a mediator.\textsuperscript{54}

In mediation, the parties enter the process with the intent to resolve conflicts and to avoid litigation.\textsuperscript{55} Although the interests of the couple diverge in some areas, they are not yet "conflicting" because the parties have not decided to pursue them aggressively.\textsuperscript{56} The attorney can inform the clients from the outset that he is not acting as an advocate for either party. Consequently there is little possibility that either spouse will rely on the attorney for adversarial advice. Since the attorney does not hold himself out as being the representative of each party in an adversarial situation, any appearance of impropriety is lessened. In a sense the mediator is acting as the attorney for the mediation process rather than for the individual clients.\textsuperscript{57} He must, therefore, inform the clients that he will withdraw from the representation of either party prior to the subsequent divorce action, whether it is contested or not.\textsuperscript{58}

Although the attorney-mediator has a fiduciary duty to give correct and appropriate advice on tax matters and on the possible legal effects of any agreement, he should not propose a specific plan for the terms of the agreement.\textsuperscript{59} These decisions ultimately are left to the discretion of the couple. Upon entering mediation the parties have usually decided that they have the emotional maturity and independence necessary to protect their own interests and to conduct their own negotiations. A client, however, who is insecure about his or her ability to make an independent decision should be advised to

\textsuperscript{51} Note, supra note 21, at 99. See Note, supra note 47, at 507.


\textsuperscript{54} See notes 9-17 and accompanying text supra.

\textsuperscript{55} See text accompanying note 17 supra.

\textsuperscript{56} G. Hazard, 78-79.

\textsuperscript{57} Id. at 58-68.


\textsuperscript{59} Interview with Susan Lewis, supra note 35; see Non-Judicial Resolution, supra note 3, at 598.
employ an outside attorney for advice on choosing a particular course of action.\textsuperscript{60} If the attorney determines that one of the parties is particularly vulnerable to domination by the other spouse, or is willing to give up everything to "get it all over with," he should advise the dominated party to retain separate counsel, and the attorney-mediator should seriously consider total withdrawal from mediation.\textsuperscript{61}

Support for attorney mediation may be found in Ethical Consideration (EC) 5-20 of the ABA Code of Professional Responsibility.\textsuperscript{62} This provision states in pertinent part:

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.\textsuperscript{63}

EC 5-20 is somewhat ambiguous in several respects. First, it fails to state whether the mediator, as well as the arbitrator, is required to be impartial.\textsuperscript{64} Second, it fails to specify whether the three conditions for multiple representation stated in DR 5-105(C) also apply to the attorney-mediator.\textsuperscript{65} A possible interpretation of the provisions is that the attorney who is acting as a mediator is not "representing" the parties. It is only after the mediation process is terminated that the attorney is precluded from "representation." It could be argued that if this is the proper construction of EC 5-20, the attorney-mediator is outside the scope of DR 5-105, which speaks in terms of "adequate representation," "representation" after full disclosure, and "representation" of different interests.\textsuperscript{66}

Ethical committees have followed this mediation-representation distinction in interpreting the Code. An opinion of the New York Committee on Professional Ethics defines an attorney's duties in representing both a husband and wife in a divorce action according to his role in the case.\textsuperscript{67} The Committee states, "It would be improper in a domestic relations case for a lawyer representing one spouse to undertake any form of representation of the other."\textsuperscript{68} In the same opinion, however, the Committee states that "[a] lawyer approached by husband and wife in a matrimonial matter and asked to represent both, may, however, properly undertake to serve as a mediator or arbitra-

\begin{footnotes}
\item[60] Interview with Susan Lewis, note 35 supra.
\item[61] See Steinberg, supra note 7, at 619; Note, supra note 21, at 100.
\item[62] ABA Code, supra note 35, at EC 5-20.
\item[63] Id.
\item[64] Though this seems a trivial distinction, some commentators believe the role of the mediator varies significantly when he is not required to be "impartial" as required of the arbitrator. G. Hazard, supra note 19, at 62-63.
\item[65] See notes 38-39 and accompanying text supra.
\item[66] ABA Code, supra note 35, at DR 5-105(A), (C).
\item[67] N.Y. Opinions, supra note 48.
\item[68] Id.
\end{footnotes}
tor." This is subject to the caveat that the mediator cannot later represent either spouse if his efforts at mediation are unsuccessful. Apparently the Committee believed that the role of the attorney determines the definition of representation, implying that representation in an adversary capacity involves different duties from those required when the lawyer is acting in a mediator's role.

The ABA Proposed Model Rules of Professional Conduct similarly delineate the attorney's ethical duties by the role that the attorney is performing. Section 5 of the Model Rules deals with the situation in which a lawyer acts as an intermediary between clients. The conditions for acting as an intermediary under section 5.1 are satisfied when: (1) The possibility of adjusting the clients' interests is strong; (2) Each client will be able to make adequately informed decisions in the matter; (3) There is little likelihood that any of the clients will be significantly prejudiced if the contemplated adjustment of interests is unsuccessful; (4) The lawyer can act impartially and without improperly affecting other services the lawyer is performing for any of the clients; and (5) The lawyer fully explains to each client the implications of the common representation, including the advantages and risks involved, and obtains each client's consent to the common representation.

The introduction to section 5 states that "[u]nder some circumstances, a lawyer may act as an intermediary between spouses in arranging the terms of an uncontested separation or divorce settlement." Apparently "some circumstances" exist when all the conditions of section 5.1 are met. The comment to section 5.1 of the Model Rules, however, indicates possible adverse effects of mediation. These include the increase in antagonism during mediation, the additional cost and embarrassment to the parties because of premature discontinuation of the mediation process, and the probable loss of client-
lawyer confidentiality and the attorney-client privilege. The comment asserts that clients should be informed before beginning mediation of the possibility that the lawyer may be compelled to testify in a later divorce action between the parties.

The Model Code is innovative in that it specifically authorizes attorney mediation of an uncontested separation or divorce and lists the specific conditions to be met before an attorney can undertake mediation. Satisfaction of the same conditions, however, should permit multiple representation under DR 5-105 of the current Code. When the possibility of adjusting the clients' interests is strong, when each client is able to make adequately informed decisions, when there is little likelihood of significant prejudice to either client if mediation is unsuccessful, and when the lawyer can act impartially, the "obvious" standard of DR 5-105(C) should be satisfied. Furthermore, the disclosure and consent requirements of the Model Rules are nearly identical to those expressed in DR 5-105(C).

In addition to conflict of interest problems, attorneys contemplating mediation may be concerned with the preservation of confidential information disclosed during mediation. Cannon 4 of the current ABA Code of Professional Responsibility requires the lawyer to preserve the confidences and secrets of a client. DR 4-101 defines a "confidence" as "information protected by the attorney-client privilege." "Secrets" are defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." EC 4-4 states that the lawyer's ethical obligation to guard the confidences and secrets of his clients is broader than the attorney-client privilege, and exists without regard to the fact that "others share the knowledge." Thus, the lawyer is precluded from voluntarily revealing the "secrets" divulged in mediation as well as the "confidences," except under certain circumstances. Only "confidences," however, would be excluded from evidence if the attorney were compelled to testify in an action between the parties.

The rules of evidence that define the statements which qualify as DR 4-101 "confidences" generally consider statements made in the presence of a joint client not to be confidential in an action between the parties. Such statements, therefore, are not within the attorney-client privilege except with regard to third parties not privy to the conversation. The presence of an op-

78. Id.
79. ABA Code, supra note 35, at DR 5-105(A), (C).
80. Id. at DR 5-105(C).
81. Id. at EC 4-1 through 4-6, DR 4-401 (A), (B), (C), (D).
82. Id. at DR 4-401(A).
83. Id.
84. Id. at EC 4-4.
85. Id. at DR 4-101(B).
posing party during a communication raises a presumption that the communication was not intended to be confidential. This presumption can be rebutted, however, by a showing that the client reasonably intended for his statements to remain confidential. Common sense dictates a finding that joint clients reasonably intend confidentiality when they sign an agreement stating that all matters discussed in mediation are confidential and that the attorney cannot be subpoenaed by either party to testify in a later action.

Mediation services have attempted to deal with the problem of confidentiality by requiring both spouses to sign such an agreement. The parties may also be required to stipulate in the contract that any information disclosed during mediation is made with a view toward settlement or compromise, therefore it is excluded by rules of evidence. It is unclear whether such agreements are enforceable. Generally, all competent persons may be compelled to testify and produce evidence as an aid to the administration of justice. Evidentiary privileges provide limited exceptions to this rule. The state’s interest in hearing all evidence relevant to a particular case may therefore override the voluntary agreement of the parties.

The rule of evidence requiring exclusion of an offer of compromise does not normally encompass all information revealed in settlement negotiations. In most jurisdictions independent statements of fact made in connection with an offer of compromise are admissible. The test is whether a statement is made hypothetically in order to effect a settlement or is intended to be an unconditional assertion. A confidentiality agreement may be enforceable only in part, therefore, the couple should be warned that confidentiality of mediation sessions cannot be assured, even after execution of such an agreement.

88. E.g., Family Mediation Association Marital Mediation Rules, Section 21, reprinted in O. Coogler, supra note 20, at 121-22; The "Agreement in Mediation of the American Arbitration Association also contains such a provision. Pickrell & Bendheim, supra note 3, at 28.
89. Family Mediation Association Marital Mediation Rules, Section 21, supra note 88, at 122. It is a general rule that offers of compromise are inadmissible as evidence of an admission by the party making the offer. See 29 Am. Jur. 2d Evidence § 629 (1967); Annot. 15 A.L.R.3d 13 (1967); 2 D. Stansbury, North Carolina Evidence § 180, at 56 (H. Brandis rev. 1973); Rules of Evidence, supra note 50, rule 408, at 33-37.
91. 81 Am. Jur. 2d Witness § 28 (1967); Comment, supra note 90, at 1228.
92. 29 Am. Jur. 2d Evidence § 630 (1967); Annot. 15 A.L.R.3d 13, 22 (1967). See e.g., Rose v. Rose, 112 Cal. 341, 44 P. 658 (1896); Lewis v. Lewis, 192 N.C. 267, 134 S.E. 486 (1926); Eagle Ins. Co. v. Albright, 3 Wash. App. 256, 474 P.2d 920 (1970). Federal Rule of Evidence 408, however, states that evidence of an offer or acceptance of an offer to compromise a claim is not admissible to prove liability for or invalidity of the claim or its amount. The Rule further states that "evidence of conduct or statements made in compromise negotiations is likewise not admissible." Rules of Evidence, supra note 50, at 33-37.
93. 29 Am. Jur. 2d Evidence § 630 (1967). Even an independent statement of fact made during compromise negotiations may be inadmissible, however, if the party states that it was made without prejudice and in the confidence that a compromise would be reached. Id.
The previous examination of the ethical guidelines for attorneys indicates that attorney-mediation is a permissible option. The interests of both the attorney-mediator and the mediating couple, however, require the following precautions to be taken if an attorney assumes the mediation role. First, the attorney should ascertain whether the couple's goal on entering mediation is to reach a fair settlement without consideration of fault. He should be certain that both spouses are capable of making informed and independent decisions about support, property and custody matters. If either party appears unable to make such decisions, he or she should be advised to retain outside counsel for advice during the mediation process.94

Second, in order to comply with the disclosure provisions of DR 5-105(C), the attorney should hold an initial information session with the parties to disclose the possible adverse effects of mediation. This disclosure should include a warning that mediation sessions may not be confidential in an action between the parties,95 a warning that the attorney would be required to withdraw from mediation if hostilities increase,96 and a warning that the attorney is not acting as an advocate for either party. The attorney should then obtain a written and informed consent from each spouse to prevent later allegations of fraud, duress, or undue influence.97

Third, if litigation is underway prior to the commencement of mediation, the parties should be required to dismiss or suspend the court action. If the parties decide to resort to litigation during the mediation process, the attorney-mediator should withdraw from further involvement.98

Finally, if the couple reaches a mutually acceptable settlement, the attorney should draft the agreement and fully explain its provisions to both parties. He should then terminate his representation of either spouse in any matter concerning their marital relationship. He is precluded from representing either party in a subsequent divorce action, even if uncontested.99

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94. The parties may also be permitted to have outside counsel present during mediation sessions. Before accompanying a client into mediation, the attorney should be fully informed of the client's wish to reach a settlement through a nonadversarial approach. The attorney should participate in the session only to the extent of advising her client on the consequences of particular courses of action.

95. The couple may be asked to sign a confidentiality agreement stating that each party agrees to forego his or her right to subpoena the mediator or mediation work product in any subsequent legal action. The agreement should also state that all statements made during mediation are considered client confidences and secrets, and are for the purpose of reaching a compromise. See notes 81-93 and accompanying text supra.

96. See note 58 and accompanying text supra. Section 5.2 of the Model Rules of Professional Conduct require withdrawal of the attorney-mediator if: 1) either of the clients requests his withdrawal; 2) if any of the conditions for mediation listed in Section 5.1 cannot be met; or 3) if it becomes apparent that a mutually advantageous adjustment of interests cannot be made. Model Rules of Professional Conduct, supra note 42, at 23.

97. Note, supra note 21, at 103-04. Disclosure standards may be different for different types of clients. With a less informed or educated client the lawyer must take greater care to ascertain whether the client comprehends the full implications of mediation. See In re Farr, 264 Ind. 153, 340 N.E. 2d 777 (1976); Holmes v. Holmes, 145 Ind. App. 52, 248 N.E.2d 208 (1969); In Re Dolan, 76 N.J. 1, 384 A.2d 1076 (1978).

98. ABA Code, supra note 35, at EC 5-15.

99. Id. at EC 5-20.
Attorney mediation is a permissible and desirable alternative to the adversarial approach in reaching divorce settlements in many jurisdictions. Although an attorney-mediator must be fully aware of his ethical responsibilities and willing to sharpen his counseling skills, the opportunity to fill a need is great. The individual and societal benefits\(^\text{100}\) of providing mediation as an alternative to litigation in divorce cases makes it an option worth pursuing.

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100. See notes 9-17 and accompanying text supra.