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Notes

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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 disuptes 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 adversary 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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1. As of October 1980 forty-eight states had adopted no-fault divorce laws. Currently only Illinois and South Dakota require fault grounds for divorce. Freed and Foster, Divorce in the Fifty States: An Outline, 11 Fam. L.Q. 297, 300 (1977); Ill. Ann. Stat. ch. 40, § 401 (Smith-Hurd 1980); 23 Pa. Cons. Stat. Ann. § 201(c) (Purdon 1980 Cum. Supp.) (allowing no-fault divorce); S.D. Compiled Laws Ann. § 25-4-2 (1976).

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).

3. Buttenweiser, Horan, Strauss, & Williams, Professional Responsibility in the Practice of Family Law, in Professional Responsibility of the Lawyer 73, 74-75 (N. Galston ed. 1977); Pickrell & Bendheim, Family Disputes Mediation—A New Service for Lawyers and Their Clients, 7 Barrister 27, 28 (1980); Note, Non-Judicial Resolution of Custody and Visitation Disputes, 12 U. Cal. D.L. Rev. 582, 583-84 (1979) [hereinafter cited as Non-Judicial Resolution].

4. Meroney, Mediation and Arbitration of Separation and Divorce Agreements, 15 Wake Forest L. Rev. 467, 469 (1979).

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.

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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.

7. Meroney, supra note 4, at 486; Steinberg, The Therapeutic Potential of the Divorce Process, 62 A.B.A.J. 617, 619 (1976).

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 lenghty depositions and high legal fees. See Non-Judicial Resolution, at 585-86.

11. See Spencer and Zammit, Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents, 1976 Duke L.J. 911, 932-33.

12. Id. at 916-17, 939.

13. See Non-Judicial Resolution, supra note 3, at 584-85.

14. See Simons, The Invisible Scars of Children of Divorce, 7 Barrister 14 (1980), Simons 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[15] 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.[16] 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.[17]

Despite public demand for mediation services[18] many lawyers are reluctant, for several reasons, to act as mediators in marital disputes. The role of neutral mediator is quite different from the attorney's traditional role as an advocate who acts as a "hired gun" for his client.[19] Attorneys may believe they lack sufficient training in this form of client counseling.[20] They may fear that attorney mediation of domestic disputes violates the ethical standards of the legal profession.[21] 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.[22] 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,[23] judicial systems,[24] and privately operated orga-

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15. See note 24 infra.

16. Non-Judicial Resolution, supra note 3, at 584.

17. Id. at 593-95.

18. See text accompanying notes 9-17 supra.

19. G. Hazard, Ethics in the Practice of Law 80 (1978); Pick, The Go-Between, 8 Student Law. 39, 58 (1980).

20. See O. Coogler, Structured Mediation in Divorce Settlement 85 (1978); Shaffer, Lawyers, Counselors, and Counselors at Law, 61 A.B.A.J. 854, 855 (1975).

21. See notes 37-44 and accompanying text infra; Note, Simultaneous Representation: Transaction Resolution in the Adversary System, 28 Case W. Res. L. Rev. 86, 87 (1977).

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.

23. The New York Court Act provides for informal conciliation services available on the petition of one of the parties. N.Y. Jud. Law §§ 911-26 (McKinney 1975). See Blum, Conciliation Courts: Instruments of Peace, 41 J. St. B. Cal. 33 (1966) for a description of conciliation courts in California. See also Jenkins, Divorce California Style, 9 Student Law. 31 (1981) for a discussion of mandatory conciliation procedures in California.

The Dispute Settlement Center in Chapel Hill, N.C. received $7,000.00 funding from the North Carolina General Assembly in 1979 and $27,000.00 funding for the year ending June 30, 1981. Interview with Evelyn Smith, Program Coordinator of the Dispute Settlement Center of Chapel Hill, N.C., (Oct. 1, 1980). There are predictions that the New York and Florida legislatures will provide similar funding for neighborhood dispute resolution centers in the near future. Pick, supra note 19, at 59.

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

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of 614 cases in ten months and in the elimination of the backlog. Rich, Personal Viewpoint: An Experiment with Judicial Mediation, 66 A.B.A.J. 530 (1980).

The Domestic Relations Department of the Los Angeles Superior Court in California is another example of judicially sponsored mediation. This Department refers parties to the Center for Legal Psychiatry at U.C.L.A. for in-depth divorce counseling. Non-Judicial Resolution, at 596 n. 79.

25. There are private mediation services throughout the United States. The American Arbitration Association, Family Dispute Services, provides mediators for marital disputes. Pickrell & Bendheim, supra note 3, at 28; Non-Judicial Resolution, supra note 3, at 592.

The Family Mediation Association, a nonprofit organization located in Winston-Salem, N.C., provides mediators to couples at an hourly fee. The association also provides the facilities for mediation sessions. For a description of the procedure used by the Family Mediation Association, see O. Coogler, supra note 20, at 23-29, 31-38, 131-44; Meroney, supra note 4, at 476.

Labor management negotiators in New York City began the Institute for Mediation and Conflict Resolution in New York in 1969. The Institute now supervises two dispute settlement centers in New York. Standord, Gentle Art of Settling Family Disputes, Charlotte Observer, Sept. 14, 1980, (Parade Magazine) at 7-8.

26. O. Coogler, supra note 20, at 75-78. American Arbitration Association mediators undergo approximately 35 hours of training with the AAA. Pick, supra note 19, at 39. Mediators for the Dispute Settlement Center in Chapel Hill originally received approximately forty hours of training from the Community Relations Service of the U.S. Justice Department. Currently the Center administers its own weekend training sessions. Interview with Evelyn Smith, supra note 23.

27. For a summary of state statutes and cases dealing with the unauthorized practice of law see Chicago American Bar Foundation, Unauthorized Practice Handbook (J. Fischer and D. Lachman eds. 1972).

The Unauthorized Practice of Law Committee of the North Carolina State Bar determined in 1980 that the preparation of a contract by a nonattorney mediator constituted the unauthorized practice of law. Apparently the basis for the decision was that the contract contained terms "whereby a husband and wife agree to give up rights and remedies under the divorce, alimony, and other statutes by substituting binding arbitration for these rights." Council Action/Committee Reports, Unauthorized Practice of Law, 27 N.C. St. B.Q. 4, 5 (1980). The Committee further decided that advice by the organization as to the "advisability of and legal effect of entering into such an agreement also constitutes the unauthorized practice of law." Id. at 7.

28. Under Family Mediation Association (FMA) procedure the couple selects an "advisory attorney" from a panel of attorneys who have applied for membership in the FMA. The couple may also choose a nonpanel attorney if the attorney agrees to abide by FMA rules and procedures. The selected attorney supervises the drafting and execution of the final settlement agreeent, impartially explains terms of the agreement to each party, and gives advice—including tax advice—concerning the legal implications of the agreement. O. Coogler, supra note 20, at 86, 142, 172, 193-202.

29. American Arbitration Association mediators draft a "Memorandum in Mediation" for the parties. The couple then takes the agreement to an attorney who drafts the final separation agreement. Pickrell & Bendheim, supra note 3, at 28.

the case for both parties.[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.[31]

The need for attorney mediators is growing because of a combination of factors. The increasing demand for mediation services in general[32] has surpassed the availability of nonattorney mediation services.[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.[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.[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.[36] The applicable provision, Disciplinary Rule

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30. See notes 45-53 and accompanying text infra.

31. See generally G. Hazard, supra note 19, at 80.

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.

33. See Steinberg, supra note 7, at 618.

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.

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.

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.

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).

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).

(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.[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.[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 *obvious* that he can adequately represent the interests of each client. Second, each client must *consent* to the joint representation. Third, the consent of each client must be given *after full disclosure* of the possible effect of multiple representation on the exercise of the lawyer's independent professional judgment.[39] The lawyer is instructed to "resolve all doubts against the propriety of the representation" if the clients have "potentially differing interests."[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 *never* represent in litigation multiple clients with differing interests.[41] This rule has been applied even when both parties have consented to multiple representation after full disclosure of potential undesirable consequences.[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

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

> A lawyer shall decline proferred 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 proferred employment, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR 5-105(C).

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).

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

40. Id. at EC 5-15.

41. (Emphasis added.) See, e.g., Klemm v. Superior Court, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977); Greene v. Greene, 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979); Jedwabny v. Philadelphia Transp. Co., 390 Pa. 231, 135 A.2d 252 (1957).

42. See cases cited in note 41 supra. A possible explanation for this distinction is that the "obvious" standard of DR 5-105(C) creates a per se rule under which multiple representation can never be undertaken when the parties are opponents in litigation. Kaufman, A Critical First Look at the Model Rules of Professional Conduct, 66 A.B.A.J. 1074, 1079 (1980). The "conflict of interest" provision of the Model Rules of Professional Conduct omits the "obvious" requirement of the current Code. Discussion Draft of ABA Model Rules of Professional Conduct, § 1.8, reprinted in [1980] 26 Crim. L. Rep. (BNA) (Supp. Feb. 20, 1980) [hereinafter cited as Model Rules of Professional Conduct]. See note 72 supra.

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.[43] 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.[44]

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,[45] who could be sanctioned by a legal ethics committee,[46] and the divorce decree could be subject to collateral attack by a party alleging fraud, duress or overreaching.[47]

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.[48] 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;[49] (2) the existence of obstacles that prevent a lawyer representing both spouses from obtaining the information necessary for the adequate representation of the parties;[50] (3) the need to avoid an appear-

43. Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 727 (1977); Weddington, A Fresh Approach to Preserving Independent Judgment—Canon 6 of the Proposed Code of Professional Responsibility, 11 Ariz. L. Rev. 31, 35-6 (1969).

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.

45. E.g., Woodruff v. Tomlin, 593 F.2d 33 (6th Cir. 1979); Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Kelly v. Greason, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968).

The consent of the parties to joint representation would not bar recovery in a malpractice action if the attorney has violated the ordinary standard of care by the initial acceptance of multiple employment, by failing to maintain a neutral position with the parties, or by failing to adequately disclose the limited nature of joint representation. Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Note, supra note 21, at 94.

46. E.g., People v. Selby, 156 Colo. 17, 396 P.2d 598 (1964); In re Opacek, 257 Minn. 600, 101 N.W.2d 606 (1960). See Annot., 17 A.L.R.3d 835, 844-45 (1968).

47. E.g., Jensen v. Jensen, 97 Idaho 922, 557 P.2d 200 (1976); Holmes v. Holmes, 145 Ind. App. 52, 248 N.E.2d 564 (1969). See Smith v. Price, 253 N.C. 285, 116 S.E.2d 733 (1960); Note, Possible Effect of Conflict of Interests in a Divorce Action Arising from Only One Attorney Obtaining the Divorce Decree, 15 Ala. L. Rev. 502, 507 (1963).

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).

48. Ohio Bar Ethics Committee, Formal Opinion No. 30, reprinted in [1975] 1 Fam. L. Rep. (BNA) 3109; N.Y. County Law. Ass'n Comm. on Professional Ethics, Opinion No. 258 (1972) reprinted in 2 Opinions of the Committee on Professional Ethics of the Association of the Bars of the City of New York and the New York County Lawyers' Association (1980) [hereinafter cited as N.Y. Opinions]; Note, supra note 21, at 95.

49. Ohio Bar Ethics Comm., supra note 48, at 3109; N.Y. Opinions, supra note 48.

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;[51] and (4) the interest of the state in child custody, settlement of property rights and the marital status of the parties.[52]

Before one concludes that an attorney should *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.[53] Furthermore, there are valid policy reasons for allowing the attorney to act as a mediator.[54]

In mediation, the parties enter the process with the intent to resolve conflicts and to avoid litigation.[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.[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.[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.[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.[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

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rule of evidence that the attorney-client privilege does not extend to a communication made by a joint client if it is relevant to the common interests of the parties and is offered in an action between the clients. Uniform Rule of Evidence 502(d)(5) reprinted in Federal Judicial Center, Federal Rules of Evidence for United States Courts and Magistrates 253, 269 (1975) [hereinafter cited as Rules of Evidence]. See text accompanying notes 86-87 infra.

51. Note, supra note 21, at 99. See Note, supra note 47, at 507.

52. Note, supra note 21, at 98. See Greene v. Greene, 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979); Mich. St. B.A. Comm. on Professional Ethics Opinion No. 85 (1945), reprinted in 38 Mich. St. B.J. 112 (1959). This argument is somewhat outdated by current divorce laws that allow the couple, by voluntary agreement, to deal with the incidents of marriage in any reasonable manner. See note 1 and accompanying text supra.

53. Klemm v. Superior Court of Fresno County, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977). See [1977] 3 Fam. L. Rep. (BNA) 2633; Note, supra note 21, at 95-109.

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

55. See text accompanying note 17 supra.

56. G. Hazard, 78-79.

57. Id. at 58-68.

58. See ABA Code, supra note 35, at EC 5-20; N.Y. Opinions, supra note 48, 258; Code of Professional Responsibility of the North Carolina State Bar, N.C. Gen. Stat. App. VII, EC 5-20, at 337 (1979 Cum. Supp.) [hereinafter cited as N.C. Code].

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.[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.[61]

Support for attorney mediation may be found in Ethical Consideration (EC) 5-20 of the ABA Code of Professional Responsibility.[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.[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.[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.[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.[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.[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."[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-

60. Interview with Susan Lewis, note 35 supra.

61. See Steinberg, supra note 7, at 619; Note, supra note 21, at 100.

62. ABA Code, supra note 35, at EC 5-20.

63. Id.

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.

65. See notes 38-39 and accompanying text supra.

66. ABA Code, supra note 35, at DR 5-105(A), (C).

67. N.Y. Opinions, supra note 48.

68. Id.

tor."[69] This is subject to the caveat that the mediator cannot later represent either spouse if his efforts at mediation are unsuccessful.[70] 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.[71]

The ABA Proposed Model Rules of Professional Conduct,[72] similarly delineate the attorney's ethical duties by the role that the attorney is performing.[73] Section 5 of the Model Rules deals with the situation in which a lawyer acts as an intermediary between clients.[74] 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.[75]

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."[76] 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.[77] 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-

69. Id.

70. Id.

71. See text accompanying notes 47-51 supra. See generally G. Hazard, supra note 19, at 58-68. The author states that in some bargaining relationships the attorney may act as the "lawyer for the situation." He further states that the determination whether a conflict of interest exists between the parties may depend on the role that the lawyer assumes. Id. at 78.

72. Model Rules of Professional Conduct, supra note 42. The Model Rules of Professional Conduct were developed by the Commission on Evaluation of Professional Standards of the ABA. The Commission was appointed in 1977 when the ABA Board of Governors concluded that the bar should rethink the Code of Professional Responsibility. The Commission presented a discussion draft of the Model Rules at the February 1980 Midyear Meeting of the ABA. The final proposed rules were to be formally submitted for consideration to the ABA House of Delegates in February 1981. Kutak, Coming: The New Model Rules of Professional Conduct, 66 A.B.A.J. 47 (1980). See Huber, Competition at the Bar and the Proposed Code of Professional Standards, 57 N.C.L. Rev. 557, 560 (1979); [1980] U.S.L.W. 2527, 2531.

73. The Model Rules are organized according to categories such as adviser, advocate, negotiator, intermediary between clients and legal evaluator. Model Rules of Professional Conduct, supra note 42, at 1.

74. Id. at 22-3.

75. Id. at 22.

76. Id.

77. Id.

lawyer confidentiality and the attorney-client privilege.[78] 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.[79] 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).[80]

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.[81] DR 4-101 defines a "confidence" as "information protected by the attorney-client privilege."[82] "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 determintal to the client."[83] 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."[84] Thus, the lawyer is precluded from voluntarily revealing the "secrets" divulged in mediation as well as the "confidences," except under certain circumstances.[85] 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.[86] 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).
86. See note 50 supra; Hurlburt v. Hurlburt, 128 N.Y. 420, 28 N.E. 651 (1891); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969); Comment, Witnesses—Privileged Professional Communications as Affected by the Presence of Third Parties, 36 Mich. L. Rev. 641, 644 (1938).

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.[87] 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.[88] 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.[89] 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.[90] Evidentiary privileges provide limited exceptions to this rule.[91] 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.[92] The test is whether a statement is made hypothetically in order to effect a settlement or is intended to be an unconditional assertion.[93] 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.

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87. People v. Decina, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799 (1956); Comment, supra note 86, at 647. See Yaron v. Yaron, 83 Misc.2d 276, 372 N.Y.S.2d 518 (1975); Ellis v. Ellis, 63 Tenn. App. 361, 472 S.W.2d 741 (1971).

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 inadmissable 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.

90. 81 Am. Jur. 2d Witness § 28 (1967). See Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L.J. 1226, 1228 (1962).

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 "[e]vidence 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[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.

Criminal Law—Competence, Prejudice, and the Right to "Effective" Assistance of Counsel

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."[1]

A criminal defendant enjoys not only a right to the assistance of counsel,[2] but also a right to effective assistance.[3] But what does sixth amendment "effectiveness" mean? Current understanding of the word focuses on "competence." For example, a trial lawyer who refuses to argue a particular defense because he feels that it will create difficult problems has acted competently; however, a trial lawyer who refuses to argue a particular defense because he has made no pre-trial investigation of its pertinence has acted incompetently.[4] Unfortunately, this definition doesn't go far enough—current understanding should consider "prejudice" as well as "competence." Because of the recent relaxation of the automatic reversal rule, a court will condemn only incompe-

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1. L. Carroll, Through the Looking Glass, in The Complete Works of Lewis Carroll 214 (Mod. Lib. ed. 1936).

2. The Supreme Court recognized a federal defendant's right to assistance of counsel in Johnson v. Zerbst, 304 U.S. 458, 462 (1938); however, the Court did not recognize a state defendant's right to assistance of counsel until Gideon v. Wainwright, 372 U.S. 335, 342 (1963), in which the Court overruled Betts v. Brady, 316 U.S. 455, 471 (1942).

3. The Court first recognized the "effectiveness" requirement in Powell v. Alabama, 287 U.S. 45 (1932). The case gained national attention when juries condemned the "Scottsboro boys," a group of illiterate black youths accused of the rape of two white girls, to death. The Supreme Court found a violation of the fourteenth amendment due process clause, because the state trial court's appointment of "all the members of the bar" did not result in an "effective" appointment of counsel. Id. at 56, 71.

In two cases decided in the early forties, the Supreme Court established the following rule: if the defendant enjoys a right to assistance of counsel, then the Constitution guarantees him a right to "effective" assistance. The first case, Glasser v. United States, 315 U.S. 60 (1942), reversed the conviction of a federal defendant, based on the violation of an "effectiveness" requirement derived directly from the sixth amendment "assistance" requirement. Id. at 76. The other case, Betts v. Brady, 316 U.S. 455 (1942), refused to reverse the conviction of a state defendant, because the sixth amendment "assistance" requirement did not apply to the states. Id. at 471. Nevertheless, the decision reaffirmed *Powell*, which did reverse a state defendant's conviction by deriving the "effectiveness" requirement from the fourteenth amendment due process clause when a state statute provided the "assistance" requirement. Id. at 463-64. Thus, the Court simultaneously implied "effectiveness" from the sixth amendment and from the fourteenth amendment.

When Gideon v. Wainwright, 372 U.S. 335 (1963), finally overruled *Betts* to extend the sixth amendment "assistance" requirement to the states, the due process source of "effectiveness" disappeared. Consequently, both state and federal defendants now enjoy a sixth amendment right to "assistance" and a sixth amendment right to "effectiveness."

4. The courts usually distinguish between trial performance and trial preparation according to the principle of "informed, professional deliberation." E.g., United States v. Hinton, 631 F.2d 769, 782 (D.C. Cir. 1980) (quoting Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978)). When counsel has investigated tactical alternatives prior to trial, his conduct during the trial evidences tactical decisions which no judge will condemn because of judicial reluctance to second-guess the defense. See, e.g., Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).

tence prejudicial to the defense.[5] Either the defendant or the government must show that the trial lawyer's representation prejudiced or did not prejudice the trial result.[6] Thus, the real meaning of "effectiveness" depends upon the interaction of "competence" and "prejudice." A provocative line of cases in the District of Columbia Circuit—a line culminating in the reasoning originally asserted by the Fourth Circuit[7]—illustrates this interaction.[8]

In *Diggs v. Welch*[9] the court used a "farce and mockery" test[10] to measure "effectiveness": the 1945 opinion refused to reverse defendant's conviction because counsel's advice to plead guilty to a lesser offense did not render the trial a sham.[11] This test equated competence with prejudice. After all, the defend-

5. Chapman v. California, 386 U.S. 18, 22 (1967). See note 6 infra.

6. Of course, the threshold question is whether a court should reverse automatically after the defendant demonstrates a violation of his constitutional rights. Prior to 1967 the Supreme Court repeatedly reversed constitutional error without discussing prejudice. The sole exception, Motes v. United States, 178 U.S. 458 (1900), held that defendant's sixth amendment right to confront witnesses against him did not prejudice the defense because defendant admitted his guilt. Note, Harmless Error: The Need for a Uniform Standard, 53 St. John's L. Rev. 541, 544 & nn.17 & 18, 545 & nn.19 & 20 (1979).

Chapman v. California, 386 U.S. 18 (1967), relaxed the constitutional error per se rule. This decision stated that violation of some constitutional rights would still result in reversal without discussion of prejudice, but that violation of other constitutional rights would now result in reversal only after a finding of prejudice. Id. at 22. This pivotal case provided no test for distinguishing between the two classes of rights. But see id. at 52 n.7 (Harlan, J., dissenting). Apparently, the Supreme Court preferred a case-by-case approach to the problem. Consequently, other courts may construe the decision to mean that some "effectiveness" cases always command reversal, but that other "effectiveness" cases only merit reversal after a determination of prejudice.

A primary decision to forego summary reversal of constitutional error leads to a secondary decision concerning the allocation of the burden of proving prejudice. In other words, if the courts decide to reject automatic reversal, then the courts must decide who must show prejudice or the lack of prejudice. *Chapman* reserved this decision for federal law and placed the burden on the government to show beyond a reasonable doubt that constitutional error did not affect the verdict. Id. at 21, 24. Nevertheless, a later case, United States v. Agurs, 427 U.S. 97 (1976), placed the burden squarely on the defendant. Id. at 112. Thus, under the post-*Chapman* "effectiveness" cases, any of three possible scenarios might necessitate reversal: the defendant's simple showing of counsel's incompetence; the defendant's proof of counsel's incompetence and the government's failure to prove lack of prejudice; the defendant's proof of both incompetence and prejudice.

7. E.g., Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); Jackson v. Cox, 435 F.2d 1089 (4th Cir. 1970); Coles v. Payton, 389 F.2d 224 (4th Cir. 1968), cert. denied, 393 U.S. 849 (1968). See note 4 and accompanying text supra; notes 17, 18, 33, 40, 45, 56 and accompanying text infra.

8. Because "effectiveness" cases present unique factual problems, the courts could have adopted an ad hoc approach to their solution. See United States v. Wood, 628 F.2d 554, 556-57 (D.C. Cir. 1980) (courts may distinguish "effectiveness" cases on their facts). Instead, the courts chose to develop standards applicable to all such cases. See, e.g., id. at 559 (defendant must prove "serious incompetency" plus prejudice). The United States Court of Appeals for the District of Columbia Circuit has not only figured prominently in this evolution of "effectiveness," but also has produced the most volatile arguments concerning the course of this evolution.

9. 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).

10. Id. at 670. The test quickly gained nearly universal acceptance. All of the circuits except the Fifth Circuit established a "farce and mockery" standard; the Fifth Circuit itself underwent a period of substantial confusion because one opinion applauded the "farce and mockery" test. Compare MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) (effectiveness measured by "reasonable" competence standard), with Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (effectiveness measured by "farce and mockery" standard).

11. 148 F.2d at 668. The fair trial basis of the "farce and mockery" test reflected the court's belief that "effectiveness" derived its constitutional legitimacy from the fifth amendment due process clause rather than from the sixth amendment assistance clause. Id. at 668-69. Had the court taken the opposite tack, "prejudice" would never have figured in the definition of "effectiveness."

ant's demonstration that defense counsel's representation robbed him of a fair trial subsumed a showing that counsel's representation adversely affected the outcome of that trial. Consequently, a violation of the constitutional "effectiveness" requirement meant more than "incompetent" representation, it meant "prejudicially incompetent" representation. Presumably, the court tolerated "non-prejudicially incompetent" representation whenever the defendant failed to carry the burden of proving prejudice.

More than twenty years later, *Bruce v. United States*[12] described "farce and mockery" as a metaphor for the "gross incompetence" which "blotted out the essence of a substantial defense."[13] Although this language teased competence apart from prejudice, the opinion actually changed the test of "effectiveness" very little. Defendant, who argued that counsel erroneously induced defendant's guilty plea, still had to prove prejudice in order to prove incompetence.[14]

The court abandoned "farce and mockery" completely in *United States v. DeCoster (DeCoster I)*.[15] The 1973 decision noted the following blunders by counsel: failure to interview the robbery victim, the codefendants, and the arresting officers; failure to request a jury trial when the same judge who heard codefendants' guilty pleas sat on defendant's case; and failure to realize that the only alibi witness produced by the defense would place defendant at the scene of the crime.[16] The appellate panel asked the government to show "lack of prejudice"[17] after defendant proved a "substantial" violation of a particular

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After all, a Supreme Court case decided three years earlier plainly stated that a federal defendant's "right to have the effective assistance of counsel, guaranteed by the Sixth Amendment, . . . is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76 (1942). By adopting a fair trial test, the circuit court dealt with the impact of counsel's conduct on the verdict—i.e., with the prejudicial effect of counsel's incompetence. Although Mitchell v. United States, 259 F.2d 787, 789-93 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958), later recognized the sixth amendment as the proper source of "effectiveness," the decision retained the established "farce and mockery" test.

Indeed, some judges recently revived the due process notion of "effectiveness." They saw a "continuum" stretching from sixth amendment cases like Gideon v. Wainwright, 372 U.S. 335 (1963) (state impairment of trial representation), to fifth amendment cases like United States v. Agurs, 427 U.S. 97 (1976) (counsel's own incompetence). See United States v. DeCoster (DeCoster III), 624 F.2d 196, 201 (D.C. Cir. 1979) (en banc). The court in *DeCoster III* found that under the principles established by Chapman v. California, 386 U.S. 18 (1967), *Gideon*-type cases deserved automatic reversal, or disproof of prejudice by the government; *Agurs*-type cases required proof of prejudice by the defendant. 624 F.2d at 201-03. But this argument contained two serious flaws. On one end of the "continuum," the judges confused sixth amendment "assistance" with sixth amendment "effectiveness." Compare *Gideon*, 372 U.S. at 342, with *Glasser*, 315 U.S. at 76. On the other end, they employed a due process case that explicitly avoided the "effectiveness" issue. See *Agurs*, 427 U.S. at 112 n.20. Thus, the continuum spread itself too widely.

12. 379 F.2d 113 (D.C. Cir. 1967).

13. Id. at 116-17.

14. Id. at 116.

15. 487 F.2d 1197 (D.C. Cir. 1973). (The reporters vary in the spelling of defendant's name; in this Note it will appear "DeCoster.")

16. Id. at 1200-01.

17. Id. at 1204 (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968)).

"duty" owed by "reasonably competent" counsel,[18] and remanded to the district court for a supplemental hearing on counsel's performance.[19] Subsequently, *DeCoster II*[20] reversed defendant's conviction. Together, these two decisions established a tougher test of "effectiveness."[21]

Reacting to the panel's opinions in *DeCoster I* and *II*, the District of Columbia Circuit met *en banc* to decide *DeCoster III*.[22] With the panel in dissent, the court changed the competency test to "serious incompetency,"[23] and placed the burden on defendant to prove "likely prejudice," and only then on the government to disprove "actual prejudice."[24] This plurality opinion actually revived *Bruce*. "Serious incompetency" differed only slightly from "gross incompetence."[25] Similarly, the "likely prejudice" standard restored defendant's burden of proving that counsel's conduct "blotted out the essence of a substantial defense."[26] As a result, "actual prejudice" had only formal significance. Once again, the defendant had to prove prejudice in order to prove incompetence.

The *DeCoster I* and *II* panel acted promptly to counter the repercussive *DeCoster III* decision.[27] In *United States v. Wood*,[28] the panel argued that a majority of the *en banc* court, through four of the five opinions,[29] had actually adopted a "reasonable competence" test.[30] And in *United States v. Hinton*,[31] Judge Bazelon,[32] the author of the first two *DeCoster* opinions, rewrote the

18. Id. at 1202-04. The opinion suggested the ABA Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971) as a general source for the duties which the trial courts should develop on a case-by-case basis. 487 F.2d at 1203 & n.23. Compare the ABA Standards with the list of duties in Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968).

19. DeCoster I, 487 F.2d at 1201.

20. United States v. DeCoster (DeCoster II), No. 72-1283 (D.C. Cir., decided Oct. 19, 1976), appended to United States v. DeCoster (DeCoster III) 624 F.2d 196, 300 (D.C. Cir. 1979) (en banc).

21. See generally Bazelon, The Defective Assistance of Counsel, 42 U. Cinn. L. Rev. 1 (1973).

22. United States v. DeCoster (DeCoster III), 624 F.2d 196 (D.C. Cir. 1979) (en banc).

23. Id. at 206 (quoting Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974)).

24. Id. at 206 & n.64, 208, and id. at 245 (Robinson, J., concurring).

25. Id. at 206. The court described this slight change as a "refinement." Id.

26. Id. at 206 n.64. The court expressly equated the two phrases. Id.

27. The *DeCoster I* and *II* panel consisted of three judges. Chief Judge Bazelon and Judge Wright formed the majority. Judge MacKinnon concurred in part and dissented in part.

28. 628 F.2d 554 (D.C. Cir. 1980) (en banc) (counsel failed to interview witnesses before trial, failed to understand the legal principles involved in the insanity defense, and failed to seek a continuance when the court disqualified the only favorable expert witness).

29. DeCoster III, 624 F.2d at 222 (MacKinnon, J., concurring opinion); id. at 248 (Robinson, J., concurring opinion); id. at 267 (Bazelon,, J., dissenting opinion); id. at 300 (Wright, C. J., dissenting opinion).

30. United States v. Wood, 628 F.2d at 569-70 & n.57 (Bazelon, J., concurring and dissenting); *Id.* at 561 & n.5 (Robinson, J., concurring and dissenting).

31. 631 F.2d 769 (D.C. Cir. 1980) (counsel failed to request a recess when the Government's disclosure of witnesses' statements overwhelmed the defense).

32. Judge Bazelon has spent more than thirty years on the District of Columbia Circuit, fifteen as Chief Judge. His service there has marked him as a man of courage, compassion, and creativity. He now holds the semi-retired status of a senior judge. Wash. Post, Mar. 30, 1978, § A, at 22, col. 1.

"likely prejudice" "actual prejudice" formula. He interpreted "likely prejudice" as a "likelihood," inviting the presumption of prejudice from defendant's proof of counsel's incompetence;[33] and he interpreted "actual prejudice" as governmental demonstration "beyond a reasonable doubt that . . . [counsel's] deficiencies . . . [constituted] harmless [error]," returning the real burden to the government.[34] Together, *Wood* and *Hinton* reestablished the progressive *DeCoster I* and *II* test of "effectiveness."[35]

By adopting the "reasonable competence" language, the District of Columbia Circuit has joined the growing majority of appellate courts.[36] Ten of the eleven circuits have abandoned the once universal "farce and mockery" test,[37] and nine of which[38] have adopted either a "reasonable competence" test,[39] or a "normal competence" test,[40] or both.[41] This reform movement[42]

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33. United States v. Hinton, 631 F.2d 769, 783 (D.C. Cir. 1980). The *DeCoster II* opinion noted that counsel's "substantial" violation of his duties created a presumption of prejudice. DeCoster II, 624 F.2d at 309 & n.32. The court borrowed the presumption from the Fourth Circuit. Compare Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (prejudice presumed from proof of any violation), with Jackson v. Cox, 435 F.2d 1089, 1093 (4th Cir. 1970) (no presumption of prejudice from insubstantial violation).

34. United States v. Hinton, 631 F.2d at 783.

35. *Hinton* reestablished "reasonable competence" plus proof of "lack of prejudice" by the government. Id. at 780 & n.31, 783.

36. See, e.g., McMann v. Richardson, 397 U.S. 759 (1970), in which the Court adopted a "reasonably competent" test, described as assistance "within the range of competence demanded of attorneys in criminal cases." Id. at 770, 771. But the opinion also recognized the discretionary power of trial judges "to maintain proper standards of performance by attorneys . . . representing [criminal] defendants . . . in their courts." Id. at 771.

37. Only the Second Circuit clings to this standard. United States v. Bubar, 567 F.2d 192 (2d Cir.), cert. denied, 434 U.S. 872 (1977) (counsel's decision to forego insanity defense in favor of courtroom portrayal of defendant as persecuted religious psychic did not constitute ineffective assistance).

North Carolina retains the "farce and mockery" test. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974).

38. The Seventh Circuit measures competency under a "minimum standard of professional representation." William v. Twomey, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975) (counsel's failure to interview codefendant who would have exculpated defendant constituted ineffective assistance).

39. See United States v. Hinton, 631 F.2d 769 (D.C. Cir. 1980); Dyer v. Crisp, 613 F.2d 275 (10th Cir.), cert. denied, 445 U.S. 945 (1980) (effective assistance found without discussion of facts); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979) (counsel's failure to anticipate future holdings in the criminal law concerning warrants, interrogation, and identification did not constitute ineffective assistance); Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978) (counsel's failure to investigate circumstances of defendant's arrest based upon his decision that only an insanity defense would exculpate defendant did not constitute ineffective assistance); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974) (counsel's failure to advise defendant of elements of robbery, including intent to permanently appropriate property, constituted ineffective assistance); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (counsel's failure to call a police expert who would have rebutted the government's crucial identification evidence constituted ineffective assistance).

40. See Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (counsel's failure to make a motion to exclude the jury while the court dismissed the first rape indictment, and counsel's decision to forego his peremptory challenges in the second rape indictment, constituted ineffective assistance); Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (counsel's failure to impeach two witnesses' courtroom identifications of defendant when the witnesses could not identify him at the line-up, and to impeach another witness' courtroom identification when the witness identified him only after the FBI pointed him out, warranted evidentiary hearing on ineffective assistance).

41. See United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978) (counsel's unnecessary introduc-

seeks to rid the criminal courts of incompetent defense attorneys.[43] Young lawyers often begin their careers representing criminal defendants;[44] other more experienced lawyers take dozens of cases at a time;[45] a few lawyers simply lack the ability to present a proper defense.[46] Meanwhile, the civil courts have protected these defense attorneys from private actions brought by dissatisfied defendants,[47] and the professional bar has proven unwilling to entertain disciplinary proceedings against them.[48] Consequently, the reform of coun-

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tion of defendant's prior convictions into a trial in which defendant did not testify constituted ineffective assistance).

The different labels attached to this strict competency test have caused some confusion over whether "reasonable" implies something different than "normal." After all, substitution of the word "reasonable" in place of the word "normal" suggests that the court has avoided a malpractice standard. See, e.g., Restatement (Second) of Torts § 299A (1965) ("skill and knowledge normally possessed by members of that profession"). Actually, the Supreme Court in McMann v. Richardson, 397 U.S. 759 (1970), described "reasonable" competence by alluding to the "range of competence demanded of attorneys in criminal cases." *Id.* at 770-71.

42. The reform of the competency test left a couple of unanswered questions in the courts of appeals. Both problems threatened to develop "reasonable" competency into a double standard. The courts resolved most of the arguments in favor of a single constitutional standard.

Although *McMann* adopted the "reasonably competent" test in a habeas corpus case, some doubt lingered as to whether defendant should show a greater violation of effective assistance in collateral attack than on direct appeal. See, e.g., Garton v. Swenson, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974). Recent cases have not pursued this distinction. See, e.g., Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978). Nevertheless, the distinction survives in joint representation cases. Compare Holloway v. Arkansas, 435 U.S. 475 (1978) (direct attack: defendant need not show that a conflict of interest actually affected counsel's representation), with Cuyler v. Sullivan, 446 U.S. 335 (1980) (collateral attack: defendant must show that a conflict of interest actually affected counsel's representation).

The distinction between the competency of court-appointed counsel and the competency of privately-retained counsel also created some confusion. For example, the Second Circuit used an agency theory to justify its refusal to determine the effective assistance issue when the defendant selected the attorney himself. United States v. Bubar, 567 F.2d 192 (2d Cir.), cert. denied, 434 U.S. 872 (1977). And the Fifth Circuit used a state action theory to justify the use of a less strict standard of competency when the defendant chose his own attorney. Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), cert. denied, 422 U.S. 1011 (1975). However, the Supreme Court recently destroyed this appointed versus retained counsel dichotomy, stating that a "proper respect for the Sixth Amendment" requires that "the often uninformed decision to retain a particular lawyer" should not reduce a defendant's constitutional protection, and that "conduct of a criminal trial itself implicates the State in the defendant's conviction." Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

43. See, e.g., Bazelon, supra note 21; Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 Va. L. Rev. 927 (1973); Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. L. Rev. 289 (1964).

44. See, e.g., United States v. Cariola, 323 F.2d 180 (3d Cir. 1963) (counsel corroborated defendant's contention that counsel's inexperience evoked an improper guilty plea).

45. See, e.g., Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (court-appointed public defender, burdened with a heavy schedule, failed to prepare adequately for trial).

46. See, e.g., DeCoster III, 624 F.2d at 264 (Bazelon, J., dissenting) (counsel's numerous errors described as "slovenly, indifferent representation").

47. The few malpractice cases litigated have all resulted in victory for counsel. Kaus & Mallen, The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice," 21 U.C.L.A. L. Rev. 1191, 1192 (1974). And actions under 42 U.S.C. § 1983 against court-appointed lawyers have also failed. Gozansky & Kertz, Private Lawyers' Liability Under 42 U.S.C. § 1983, 24 Emory L.J. 959, 969 (1975).

48. Although client complaints usually concern incompetence, bar disciplinary committees prefer to limit their proceedings to moral misconduct. Marks & Cathcart, Discipline within the Legal Profession: Is it Self-Regulation? 1974 U. Ill. L.F. 193, 225.

sel's competence has fallen upon the criminal courts themselves. "Reasonable competence" represents their response.

This language merits comparison with other well-known measures of counsel's conduct. According to the ABA Code of Professional Responsibility, a "lawyer should represent a client competently."[49] Unfortunately, a constitutional competency test based on the Code's general statement would not provide a judge with any guidelines for the defense of criminal cases.[50] The ABA Standards Relating to the Prosecution Function and the Defense Function remedy this problem with a list of duties owed by counsel; for example, client conferences, pre-trial motions, and preparatory investigations.[51] But a constitutional test based on the Standards' specific duties would thrust a judge into an active role in the defense of criminal cases.[52] Finally, a tort standard of counsel's conduct exists: a reasonably prudent lawyer should possess the care, skill, and knowledge attributed to members of the profession similarly situated.[53] Although "reasonable competence" comes very close to this approach, no circuit has actually adopted a tort standard.[54] Perhaps the courts' caution stems from a desire to avoid retrial for mere negligence.[55] At any rate, "reasonable competence" demonstrates the judges' determination to improve the performance of attorneys representing criminal defendants in their courts.

Although the District of Columbia Circuit has adopted the majority position on competence, that court has adopted the minority position on prejudice—only one other circuit places the burden on the government rather than on the defendant.[56] The disagreement indicates different responses to the fact that counsel's failure to prepare for trial rarely makes its way into the trial record. Neither the defendant nor the government can easily show that some act which never took place prejudiced or did not prejudice the verdict. Consequently, most of the circuits believe that the absence of a written record invites a "disappointed prisoner" to use his "imagination" to create an "opportunity to try his former lawyer."[57] However, the District of Columbia Circuit has expressed the view that actual prejudice may well escape the record as an inev-

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49. ABA Code of Professional Responsibility, Canon 6 (1980).

50. Most discussions of professional ethics presuppose a lawyer's competence. E.g., G. Hazard, Ethics in the Practice of Law 20 (1978).

51. ABA Standards Relating to the Prosecution Function and the Defense Function §§ 3.2, 3.6(a), 4.1 (Approved Draft, 1971).

52. See, e.g., DeCoster III, 624 F.2d at 208 ("[a categorical approach] would open the door to a fundamental reordering of the adversary system into a system more inquisitorial in nature").

53. W. Prosser, Handbook of the Law of Torts § 32, at 161-63 (4th ed. 1971).

54. The two circuits which adopted the "normal competence" test came closer to a tort standard than the other circuits, comparing their approach to a professional standard of care. Marzullo v. Maryland, 561 F.2d 540, 544 n.9 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); Moore v. United States, 432 F.2d 730, 737 & n.27 (3d Cir. 1970). See notes 39-40 and accompanying text *supra*.

55. Bines, supra note 43, at 943-44.

56. See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (counsel failed to interview the rape victim, her male companion, and a disinterested witness; failed to advise defendant of the elements of the crime, including penetration; and failed to discover the victim's medical report showing the absence of spermatozoa).

57. See, e.g., Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).

itable result of counsel's incompetence.[58] By promoting the goal of improved trial representation, the minority position actually takes the better view. A brief return to the interaction of competence and prejudice demonstrates just how governmental disproof of prejudice helps to increase a trial lawyer's "effectiveness."

If counsel's performance passes muster under the "reasonable competence" standard, then the defendant has received "effective" assistance; if counsel's performance has not passed muster, and if that performance has prejudiced the verdict, then the defendant has received "ineffective" assistance. But between these two extremes lies a void where the defendant receives "not ineffective" assistance of counsel.[59] Here, the defendant has not received "effective" assistance, because he has not received reasonably competent representation; however, the defendant has not received "ineffective" assistance, because counsel's incompetence has not prejudiced the guilty verdict.

The creatures of this void, the "not ineffective" trial lawyers, avoid detection when courts allocate proof of prejudice to the defendant. They risk detection when courts allocate disproof of prejudice to the government. Consider what happens when the defendant must show prejudice. By assuming without deciding that counsel's conduct violated the "reasonable competence" standard, the courts can proceed directly to the issue of prejudice, dispensing with the issue of competence altogether.[60] Consequently, a slovenly trial attorney has no reason to improve his incompetent representation as long as that representation does not deteriorate to the point of prejudicing the verdict. But consider what happens when the government must show the lack of prejudice. This burden does not arise until the defendant has clearly established counsel's violation of the "reasonable competence" standard. Consequently, a slovenly trial attorney must improve his incompetent representation in order to escape public condemnation, regardless of whether that representation prejudiced the verdict. In short, the defendant's assumption of the burden of proving prejudice hurdles the competency test, while the government's assumption of the burden of disproving prejudice saves the competency test.

"Reasonable competence" plus governmental proof of "lack of prejudice" should vastly improve criminal trial representation.[61] Nevertheless, this double-barreled approach cannot completely solve the problem: mere negligence may escape the competency test, and disproof of prejudice by the government may falsely exonerate a poor performance. The best possible meaning of sixth amendment "effectiveness" ultimately depends on those con-

58. DeCoster I, 487 F.2d at 1204.

59. Gregory Bateson has demonstrated the significance of the double negative in psychology, anthropology, and biology. G. Bateson, Steps to an Ecology of Mind (1972).

60. See United States v. Wood, 628 F.2d 554, 559-60 (D.C. Cir. 1980) (en banc) (the appellate court did not reach the issue of counsel's incompetence, because that court felt that no prejudice resulted from counsel's conduct assuming such incompetence).

61. See United States v. Hinton, 631 F.2d 769 (D.C. Cir. 1980). The *Hinton* decision does not signal the end of the "effectiveness" controversy, given the differences which divide the court.

scientious trial attorneys who truly want to "master" their profession.[62]

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62. L. Carroll, supra note 1. Of course, this "looking glass" appeal to professionalism addresses Holmes' "good [man] . . . who finds his reasons for conduct . . . in the . . . sanctions of conscience," rather than Holmes' proverbial "bad man . . . who cares only for the . . . knowledge . . . of what courts will do in fact." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459, 461 (1897).

Civil Procedure—Acquiring Diversity Jurisdiction Over An Unincorporated Association

Federal diversity jurisdiction is premised on the existence of diversity of citizenship between all plaintiffs and all defendants.[1] The citizenship of a partnership or unincorporated association is, for purposes of determining federal diversity jurisdiction, that of each of its members.[2] As a result of this rule, many associations and their obligees find themselves barred from bringing suit on the basis of diversity in the federal courts. Courts and commentators have unsuccessfully advocated the establishment of an association jural entity, with citizenship based on the association's principal place of business[3] or on a consideration of the residences of the association's controlling members only.[4] Because of the attractiveness of the federal court system,[5] multistate unincorporated associations and those who wish to sue them have responded to the situation by devising means to circumvent this harsh requirement.

One method of obtaining diversity jurisdiction upon an unincorporated association is to bring an action on an association obligation, but only against the individual diverse members.[6] The partnership form lends itself particularly well to this type of action because each partner is responsible for liabilities of the partnership.[7] Thus, in *Jones Knitting Corp. v. A.M. Pullen & Co.*,[8] plaintiff was allowed to amend its complaint to drop the nondiverse partners

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1. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). The citizenship of an individual is determined by his domicile. Gilbert v. David, 235 U.S. 561 (1915). A corporation is a citizen of both the state of its principal place of business and that of its incorporation. 28 U.S.C. § 1332(c) (1976).

2. Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900); Chapman v. Barney, 129 U.S. 677 (1889). In United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965), the Supreme Court reaffirmed the rule by refusing to recognize a labor union as a judicial personality with a single residence. The Court felt that the expansion of diversity jurisdiction that would have resulted from such recognition was properly a matter for legislative action. Id. at 153. No such action has since been taken.

3. See, e.g., Mason v. American Express Co., 334 F.2d 392 (2d Cir. 1964); ALI Study of Division of Jurisdiction Between State and Federal Courts § 1301(b)(2) (1969); Comment, Citizenship of Unincorporated Associations for Diversity Purposes, 50 Va. L. Rev. 1135 (1964); Comment, Diversity Jurisdiction for Unincorporated Associations, 75 Yale L. J. 138 (1965). A similar result has already been achieved with regard to the residence of an unincorporated association for venue purposes. See Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556 (1967).

4. See generally Navarro Sav. Ass'n v. Lee, 446 U.S. 458 (1980) (Blackmun, J., dissenting); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), cert. denied, 385 U.S. 817 (1966); Comment, Limited Partnerships and Federal Diversity Jurisdiction, 45 U. Chi. L. Rev. 384 (1978).

5. "[I]t is . . . generally acknowledged that the federal courts and federal judiciary in general enjoy a merited excellent reputation, and many attorneys have invoked diversity jurisdiction on behalf of their clients because of a preference for the procedures and judicial administration available in the federal courts." Moore & Weckstein, Diversity Jurisdiction: Past, Present, and Future, 43 Tex. L. Rev. 1, 23 (1964). The burgeoning diversity caseloads of the federal courts suggest the continued vitality of this statement.

6. See, e.g., Kaplan Co. v. Industrial Risk Insurers, 86 F.R.D. 484 (E.D. Pa. 1980); Hamond v. Clapp, 452 F. Supp. 885 (S.D.N.Y. 1978) (mem.); Isdaner v. Beyer, 53 F.R.D. 4 (E.D. Pa. 1971); Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311 (S.D.N.Y. 1970).

7. Uniform Partnership Act § 15.

8. 50 F.R.D. 311 (S.D.N.Y. 1970).

to avoid dismissal of the suit due to lack of diversity.[9] The district court defined the residence of a partnership as determined by the citizenship of those partners actually joined in the action and by the citizenship of those who, as indispensable parties, must be joined.[10]

Another procedure used to avoid diversity requirements is the class action suit, as applied to unincorporated associations by Federal Rule of Civil Procedure 23.2,[11] where diversity is based on the residences of the named representatives only.[12] The class action operates best when a large, decentralized association is involved—such as a nationwide labor union—and joinder of all members is unrealistic.[13] While the class action offers a simpler and procedurally more efficient lawsuit than does the *Jones*-type action, its availability for the purpose of avoiding diversity requirements is unclear. This Note will examine the full ramifications and effectiveness of both the class action and the *Jones* device.

To join less than all members in a suit on an association obligation presumes that each named member may be held individually accountable for the liabilities of the association. This is a question of state law that only incidentally concerns the question of federal diversity jurisdiction. Individual liability of a member of a nonpartnership, unincorporated association cannot be predicated on membership alone,[14] but may rest on participation in,[15] or knowledge and ratification of, an association act.[16] The lack of uniform individual liability renders a *Jones*-type procedure less attractive to one suing a nonpartnership association because it injects the additional issue of whether the named member participated in or ratified the act sued upon.

That a cause of action exists against an individual partner upon partnership liability, however, is clear from the Uniform Partnership Act (U.P.A.).[17] Section 15 provides that all partners are jointly and severally liable for the

9. Id. at 315-16.

10. Id. at 315.

11. "An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members." Fed. R. Civ. P. 23.2.

12. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Patrician Towers Owners, Inc. v. Fairchild, 513 F.2d 216 (4th Cir. 1975); Pyle v. Arthur Andersen & Co., 16 Fed. R. Serv. 2d 634 (D.C. Or. 1972).

13. See, e.g., Local 194, Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976); United Fed'n of Postal Clerks v. Watson, 409 F.2d 462 (D.C. Cir.), cert. denied, 396 U.S. 902 (1969); American Airlines, Inc. v. Transport Workers Union, 44 F.R.D. 47 (N.D. Okla. 1968).

14. Cox v. Government Employees Ins. Co., 126 F.2d 254, 256 (6th Cir. 1942); Vandervelde v. Put & Call Brokers & Dealers Ass'n, 43 F.R.D. 14, 17 (S.D.N.Y. 1967).

15. See Libby v. Perry, 311 A.2d 527, 534 (Me. 1973).

16. See Wilson & Co. v. United Packinghouse Workers, 181 F. Supp. 809, 815 (N.D. Iowa 1960); Fredstrom v. Giroux Post, No. 11 of Am. Legion, 94 F. Supp. 983, 985 (W.D. Mich. 1951). Such individual liability will generally be joint and several. See Dunlap Printing Co. v. Ryan, 275 Pa. 556, 119 A. 714 (1923). Members of a for-profit nonpartnership association may be personally liable for an association act just as partners would. See Burks v. Weast, 67 Cal. App. 745, 228 P. 541 (1924).

17. Adopted by 48 states and the District of Columbia as of January, 1980. 6 Uniform Laws Ann. 1 (Supp. 1981).

wrongful act or omission of any partner and for the misapplication of a third party's property and jointly liable for all other debts and obligations of the partnership.[18] By holding each partner individually liable for a partnership liability, the U.P.A. embraces, at least in this area,[19] the aggregate theory of partnership, where the partnership is nothing more than a grouping of individual partners.[20] The entity theory of partnership[21] requires an action on a partnership obligation to be brought against the partnership itself, as all legal rights and obligations flow from the entity, and partners are liable only through the primary liability of the entity. Thus, utilization of the *Jones* method of enforcing partnership obligations depends on the strength of the aggregate theory.[22]

The major limitation on the *Jones* procedure is the requirement that all indispensable parties to the litigation be joined.[23] Indispensability in the federal courts is governed by Federal Rule of Civil Procedure 19. In determining whether an action may proceed absent certain parties, rule 19 calls for a pragmatic consideration of the interests of the parties before the court, the interests of the parties absent from the court, and judicial economy.[24] The ultimate question of joinder is a matter of federal procedure and controlled by federal law.[25]

The most important consideration in determining the indispensability of jointly liable parties under the rule 19 approach is the posture of the parties to

18. All of these acts are chargeable to the partnership. Uniform Partnership Act §§ 13 & 14.

19. For a discussion of which areas of the U.P.A. reflect the aggregate theory, and which the entity theory, see Jensen, Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?, 16 Vand. L. Rev. 377 (1963).

20. W. Cary, Partnership Planning 7 (1970); J. Crane & A. Bromberg, Law of Partnership 27 (2d ed. 1968).

21. The entity theory has been adopted in the case law of two states. See Smith v. McMicken, 3 La. Ann. 319 (1848); Layman v. Readers' Digest Ass'n, Inc., 412 P.2d 192 (Okla. 1965), but there appears to be no real movement to revise Uniform Partnership Act § 15 to render the partners liable only through the partnership. The entity theory, however, is widely applied by courts in situations when equity requires, see Jensen, supra note 19, at 384-87, and has been applied within the framework of Section 15 in Southard v. Oil Equip. Corp., 296 P.2d 780, 784 (Okla. 1956).

22. When an action to enforce a partnership obligation is maintained against less than all partners as individuals, solely to acquire diversity jurisdiction, the argument exists that equity requires the entity's obligations to be pursued initially against the entity. This argument becomes more forceful when the number of partners sued and their involvement with the acts in question lessens. However, plaintiffs' need to use this procedure to acquire federal jurisdiction has implicitly been found to override these considerations in the *Jones* line of cases.

23. See Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311, 315 (S.D.N.Y. 1970).

24. Fed. R. Civ. P. 19(b). Under rule 19, persons materially interested in the subject of an action should be joined as parties so that they may be heard and a complete disposition of the case made. Id. 19(a). When this joinder cannot be accomplished—because of limitations on service of process, subject matter jurisdiction, or venue—the court must determine whether the particular persons are mere necessary parties, and thus the action may proceed in their absence, or whether the persons are indispensable parties, and thus the action must be dismissed. Id. 19(b). The factors affecting the determination include: the extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties; the potential for lessening or avoiding this prejudice by the shaping of relief; whether a judgment rendered in the person's absence will be adequate; and whether the plaintiff will have an adequate remedy if the action is dismissed. Id., Adv. Comm. Note.

25. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 125 (1968).

the litigation. The served partners are potentially prejudiced by the possibility of their individual property being subject to levy and execution on a judgment[26] and the resulting need to bring an action against their partners for indemnification.[27] When the action is brought against most of the members of a stable ongoing business, where partnership ties are strong, courts recognize that joint assets will be voluntarily used to satisfy a judgment and thus the potential prejudice to any one member is slight.[28] However, if the potential exposure would tax the partnership assets, or if the partnership arrangement is more akin to an arms-length relation—as when corporations join together to pursue a joint venture in partnership form—these dangers assume a greater presence. Prejudice to the unjoined partners will depend on whether judgment may be executed on their portion of the joint assets[29] as well as on the strength of the partnership ties[30] and the res judicata effect on the unnamed partners of a judgment against the joined partners as individuals.[31]

Federal courts formerly based indispensability findings on state law and thus equated joint obligors, including all partners on a contract claim,[32] to indispensible parties, as dictated by the strict common law joinder rule.[33] Since the amendment of rule 19, these conclusory determinations in cases involving contractual relations have largely, but not invariably, been

26. See text accompanying notes 40-49 infra.

27. Uniform Partnership Act § 18(b) requires the partnership to indemnify every partner for payments made and liabilities reasonably incurred in the ordinary and proper conduct of business, subject to any agreement among the partners. Rights to indemnification may be excluded altogether by the partners' agreement. See Goff v. Bergerman, 97 Colo. 363, 368, 50 P.2d 59, 61 (1935). Upon dissolution, the liability of the partnership to indemnify a partner comes after liabilities to outside creditors. See Uniform Partnership Act § 40(b).

28. See, e.g., Hamond v. Clapp, 452 F. Supp. 885 (S.D.N.Y. 1978) (mem.) (one unjoined partner, law partnership); Isdaner v. Beyer, 53 F.R.D. 4 (E.D. Pa. 1971) (25 of over 200 partners in Touche, Ross & Co. were unjoined, total claim was $200,000); Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311 (S.D.N.Y. 1970) (defendant was accounting firm with 22 of 59 partners joined). While Rule 19 recognizes that it is desirable to settle controversies in wholes, the fact that a plaintiff could do so by bringing suit against all partners in state court has been held not to preclude proceeding in federal court. Kaplan Co. v. Industrial Risk Insurers, 86 F.R.D. 484 (E.D. Pa. 1980).

29. In Federal Resources Corp. v. Shoni Uranium Corp., 408 F.2d 875 (10th Cir. 1969), the partnership consisted of two corporations. Substantially all of the net income of one partner came from partnership operations. The claim was for just under two million dollars, and Wyoming law allowed a judgment against one of two partners to be executed on partnership property. These facts led the court to conclude that both corporations were indispensable parties to an action based on a partnership obligation, because the unjoined partner "might here be economically wiped out without ever having a day in court." Id. at 878.

30. See id. In Isdaner v. Beyer, 53 F.R.D. 4, 6 (E.D. Pa. 1971), the court emphasized that the unjoined partners would be represented by the same partnership counsel if there were any need of further litigation.

31. The large majority of courts that have considered the question have held that a judgment upon a partnership obligation against less than all partners does not conclusively establish the existence of a partnership debt as against another partner not made a party to the former proceeding or judgment. For a full listing of cases on the issue see Annot., 11 A.L.R.2d 847 (1950).

32. See text accompanying note 18 supra.

33. Since there is but one obligation and one cause of action for its breach, all joint obligors must be joined in the action. 2 S. Williston, Law of Contracts, § 327, at 668 (3d ed. W. Jaeger 1959); accord, Eastern Metals Corp. v. Martin, 191 F. Supp. 245, 250 (S.D.N.Y. 1960); Weaver v. Marcus, 73 F. Supp. 736, 738 (W.D. Va.), rev'd on other grounds, 165 F.2d 862 (1948).

eliminated.[34]

Another common law concept which has continued to affect federal indispensability analysis is the state joint debtor statute.[35] Originally designed to ameliorate the harsh effects of the common law joinder rule,[36] these statutes have recently been applied by federal courts to actions based on partnership liability for the purpose of determining that the unjoined partners were not indispensible parties to the action.[37] Courts so holding reason that since the statutes allow the action to continue against the joined partners alone, the unjoined partners are merely necessary parties, to be joined only if feasible.[38] Reliance on this theory is unnecessary under Federal Rule of Civil Procedure 19. Further, such an application ignores the procedural limitations built into the original operation of the statutes to prevent their use as a means for the plaintiff to choose which jointly liable partner he would sue.[39]

While bringing suit against less than all partners may be possible under Rule 19, there is less certainty in regard to the enforceability of the plaintiff's judgment. In a claim against one or more partners as individuals, partnership

34. See Isdaner v. Beyer, 53 F.R.D. 4 (E.D. Pa. 1971) (holding jointly liable partners not indispensable solely on basis of rule 19 balancing approach). But see Federal Resources Corp. v. Shoni Uranium Corp., 408 F.2d 875 (10th Cir. 1969) (holding both corporate partners indispensable parties to an action on a partnership contract, since contract was with partnership and not any individual partner); Codagnone v. Perrin, 16 Fed. R. Serv. 2d 989 (D.R.I. 1972) (in action against tortfeasor agent, principal held to be indispensable party).

35. These acts generally provide that "[w]here less than all the named defendants . . . are served with summons, the plaintiff may proceed against the parties served . . . and if the judgment is for the plaintiff it may be taken against all the defendants." N.Y. Civ. Prac. Law § 1501 (McKinney 1976). The New York statute, enacted in 1788, has served as a model in other states. See, e.g., N.C. Gen. Stat. § 1-113 (1969).

36. See McLoren, Venue, Process and Parties in Business Litigation, 1954 U. Ill. L.F. 557, 562. For a discussion of the historical development of the procedures used to lessen the effects of the strict common law rule in partnership cases, see generally Campbell, Partnership Obligations and Their Enforcement, 32 Chi.-Kent L. Rev. 127, 128-31 (1954). For a listing of statutory modifications to the rights and duties of joint obligors in general, see 2 S. Williston, supra note 33, § 336, at 697.

37. See Hamond v. Clapp, 152 F. Supp. 885 (S.D.N.Y. 1978) (mem.); Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311 (S.D.N.Y. 1970); James Talcott, Inc. v. Burke, 145 F. Supp. 489 (N.D. Ohio 1956) (one partner and the partnership entity declared not indispensable and venue requirements thereby met).

38. Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. at 315 (S.D.N.Y. 1970). See note 24 supra.

39. The language of the statute assumes that all jointly liable parties will be named as defendants and will remain as defendants until judgment. See Miller v. Farino, 58 A.D.2d 731, 395 N.Y.S.2d 867 (1977) (mem.); Spencer Kellogg & Sons, Inc. v. Bush, 31 Misc. 2d 70, 219 N.Y.S.2d 453 (Sup. Ct. 1961) (per curiam); Robertson v. Club Ephrata, 56 Wash. 2d 108, 351 P.2d 412 (1960); and N.C. Gen. Stat. § 1-113(1) (1969). Requiring joinder of all partners reflects the persistent belief that partnership debts are peculiarly joint in their substantive character, and thus partners should sue or be sued together except where procedural inequities would ensue. This view is evidenced by only eight states (Alabama, Arizona, Colorado, Mississippi, Missouri, North Carolina, Tennessee, Texas) having modified the joint liability of partners via the substantively controlling U.P.A., in the face of procedural modifications to allow suit against a single joint debtor in a large majority of jurisdictions. 6 Uniform Laws Ann. 38, 175 (1968 & Supp. 1981). Also, many state statutes now allow service to be made on a partnership through one of its members, leading to the same result as the joint debtor acts. But to effect such service, the partnership must be formally named in the complaint. See Johnson v. Albritton, 101 Fla. 1285, 134 So. 563 (1931); Rait v. Jacobs Bros., 49 Misc. 2d 903, 268 N.Y.S.2d 750 (Sup. Ct. 1966); Walsh v. Kirby, 228 Pa. St. 194, 77 A. 452 (1910).

assets will not be subject to judgment, even though the claim is predicated on a partnership act. The U.P.A. prohibits execution on specific partnership property unless the claim is against the partnership.[40] Since the plaintiff's purpose in a *Jones*-type action is to avoid serving all partners,[41] or the partnership itself,[42] such a claim would not run against the partnership property.[43] The same result is reached outside of the U.P.A. because if neither the partnership nor all partners are served, the served partners appear as individuals to protect their own interests only.[44] This follows from the general rule that a judgment rendered without notice to, or service on a defendant, in this case the partnership, is void for want of jurisdiction.[45]

Joint debtor statutes allow judgment to be executed on joint property when some partners are not served, but this result is based on constructive notice being given to the unserved partners through service on either the partnership entity or the served partners as representatives of the whole.[46] Constructive notice excuses service of process on the partnership, but its presence as a party to the action is still required.[47] Thus, judgment in a *Jones* action, whether proceeding under the U.P.A., the common law, or a joint debtor statute, is limited to the served partners' individual property,[48] which includes their rights to partnership income.[49]

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40. Uniform Partnership Act § 25(2)(c).

41. This was the only method of obtaining jurisdiction over a partnership at common law. See J. Crane & A. Bromberg, supra note 20, § 58(a). This method would support a judgment against partnership assets even if the partnership itself was not named as a party. See Palkovitz v. Second Fed. Sav. & Loan Ass'n, 412 Pa. 547, 195 A.2d 347 (1963).

42. Many states have statutes permitting a partnership to sue or be sued in its common name. J. Crane & A. Bromberg, supra note 20, § 57(b).

43. See McLaren, supra note 36, at 562.

44. In this situation the appearance of noninvolvement by the entity is reinforced where statutes confer jurisdiction over the partnership simply by naming the entity as a defendant while effecting service on any one partner. See J. Crane & A. Bromberg, supra note 20, § 60.

45. See 49 C.J.S. Judgments § 23, at 52 (1947), and cases cited thereunder, and Restatement of Judgments § 4 (1942).

46. The constitutionality of executing a judgment on partnership property that is jointly owned by unserved partners was upheld in Sugg v. Thornton, 132 U.S. 524 (1889). The court treated the partnership as a distinct legal entity. Id. at 530-31. See Comment, Jurisdiction over Partnerships, 37 Harv. L. Rev. 793, 804 (1924), for suggestion that application of joint debtor acts requires implicit recognition of the partnership entity as the conduit through which notice of the action is delivered to the unserved partners. But see Kittredge v. Grannis, 244 N.Y. 182, 155 N.E. 93 (1926) (the nonserved partners receive notice sufficient to allow a judgment on their commonly held property by virtue of the statute which provides for such a judgment on a joint claim, and service on one partner on a joint claim which names all defendants); J. Crane & A. Bromberg, supra note 20, § 59, for listing of cases applying joint debtor acts while rejecting entity theory.

47. See note 39 supra.

48. A line of early cases, primarily in Pennsylvania, reached a contrary result based on the pre-U.P.A. practice of allowing one partner to confess a judgment for a partnership debt without the consent of his partners. These cases reasoned that a plaintiff should be able to force a partner to apply partnership assets to satisfy a judgment because the partner could do so voluntarily. See, e.g., Winters v. Means, 25 Neb. 241, 41 N.W. 157 (1888); Harper v. Fox, 7 Watts & Serg. 142 (Pa. 1844). Uniform Partnership Act § 9(3), however, states that no partner has the power to confess a judgment against the partnership unless he is authorized to do so by all the partners. Thus the former practice should be unavailable today, and a judgment may be executed only on the assets of the individual served. See Fairman Bros. v. Ogden Gas Co., 106 Pa. Super. 130, 161 A. 634 (1932).

49. "A partner's interest in the partnership is his share of the profits and surplus, and the

Another procedural method utilized to preserve diversity in an action involving a multi-state, unincorporated association is to bring a class action suit under Federal Rule of Civil Procedure 23.2.[50] This is possible because the citizenship of the class is that of the named representatives only,[51] who can usually be chosen to insure complete diversity. Also, while all members of the association are not formal parties to the action, they are bound by the judgment.[52] Thus the *Jones* action's difficulties of executing judgment on the association's assets may be avoided. There are several unresolved issues regarding the proper interpretation of rule 23.2, however, that may proscribe its use in this context.

One issue is whether the requirements of rule 23(a)[53] must be satisfied in an action brought under rule 23.2. One school of thought emphasizes that rule 23.2 expressly incorporates one of the requirements of rule 23(a)—that the representative parties fairly and adequately protect the interests of the association—thus negatively implying that the remainder of rule 23(a) was intentionally omitted.[54] Further, because the purpose of rule 23.2 is to give entity treatment to associations through the class action device,[55] the formal requirements of rule 23(a) should be subordinated whenever they may prevent qualification of an association as a class.[56]

Several courts have taken the opposite view, however, on the grounds that the requirements of rule 23(a) are the essential foundation of any class action.[57] The numerosity requirement of rule 23(a), applied to rule 23.2 actions

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same is personal property." Uniform Partnership Act § 26. Any judgment creditor of a partner may petition a court of competent jurisdiction to charge the interest in the partnership of a debtor partner with payment of the unsatisfied amount of such judgment debt, and the court may appoint a receiver of his share of the profits. Id. § 28(1).

50. See note 11 supra. This rule was added in 1966 to deal specifically with actions relating to unincorporated associations. These actions had formerly been regulated by the general provisions of Rule 23. See Fed. R. Civ. P. 23.2 Adv. Comm. Note.

51. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Calagaz v. Calhoun, 309 F.2d 248 (5th Cir. 1962). With plaintiff partners, uniformly held to be indispensable parties, see J. Crane & A. Bromberg, supra note 20, § 55(a), this may be the only way for a national partnership to bring suit under diversity jurisdiction.

52. "It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present." Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). See also Christopher v. Brusselback, 302 U.S. 500 (1938); Hartford Life Ins. Co. v. IBS, 237 U.S. 662 (1915).

53. These requirements are: 1) the class is so large that the joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative are typical of the claims or defenses of the class; and 4) the representative parties will adequately and fairly protect the interests of the class. Fed. R. Civ. P. 23(a).

54. See 7A C. Wright & A. Miller, Federal Practice and Procedure § 1861 (1972).

55. Fed. R. Civ. P. 23.2, Adv. Comm. Note.

56. See 7A C. Wright & A. Miller, supra note 54, § 1861; accord, Gay Liberation v. University of Mo., 416 F. Supp. 1350 (W.D. Mo.), rev'd on the merits, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); Management Television Sys., Inc. v. National Football League, 52 F.R.D. 162 (E.D. Pa. 1971). But see text accompanying notes 69-71 infra.

57. See Merkey v. Board of Regents, 344 F. Supp. 1296 (N.D. Fla.), vacated on other grounds, 493 F.2d 790 (6th Cir. 1973); Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R. 1971); Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704 (D. Colo. 1966).

by two district courts,[58] presents the most compelling argument for application of rule 23(a). If there is no numerosity requirement, a two-man partnership could be sued as a class with only the diverse partner being named as the representative. Even short of this extreme position, use of rule 23.2 solely to achieve diversity may be improper. The general purpose of a class action is to allow suit to proceed where joinder of all parties is impractical,[59] and the purpose of rule 23.2 in particular is to permit suit where the impracticality stems from traditional procedural treatment of the unincorporated association.[60] Where modern procedures allowing associations to sue or be sued as an entity are available,[61] these purposes are inapposite and application of rule 23.2 is merely a means of circumscribing diversity requirements.

The issue whether a rule 23.2 action may proceed in the face of state laws granting unincorporated associations the capacity to sue or be sued is the second major question in this area. In general, capacity to sue in diversity actions is governed by state law.[62] Before rule 23.2 was enacted, a class action was unavailable where state law granting unincorporated associations capacity to sue was intended to be the exclusive means for an association to sue or be sued.[63] Where state law granting an association the capacity to sue was merely permissive, however, a class action was available.[64] It is unclear how rule 23.2 has changed the law in this area. Commentators[65] and one district court[66] have interpreted rule 23.2 as a procedural device which supplements state practice in this area. They argue that the *Erie* doctrine[67] requires this federal procedure to remain available even where state law clearly provides an exclusive means for an association to sue or be sued.[68]

Other courts, however, have relied on the Committee Note to rule 23.2 to support a different view.[69] The Note provides that the purpose of rule 23.2 is "to give 'entity treatment' to the association when for formal reasons it cannot sue or be sued as a jural person under rule 17(b)."[70] This suggests that the

58. Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R. 1971); Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704 (D. Colo. 1966).

59. Hansberry v. Lee, 311 U.S. 32 (1940); Demarco v. Edens, 390 F.2d 836 (2d Cir. 1968); Montgomery Ward & Co. v. Langer, 168 F.2d 182 (8th Cir. 1948).

60. See Fed. R. Civ. P. 23.2, Adv. Comm. Note.

61. See note 42 supra.

62. Fed. R. Civ. P. 17(b).

63. Underwood v. Malone, 256 F.2d 334 (3d Cir.), cert. denied, 358 U.S. 864 (1958).

64. Oskoian v. Canuel, 269 F.2d 311 (1st Cir. 1959).

65. See 7A C. Wright & A. Miller, supra note 54, § 1861; 3B J. Moore, Federal Practice ¶ 23.2.02 (3d ed. 1980).

66. See Pyle v. Arthur Andersen & Co., 16 Fed. R. Serv. 2d 634 (D. Or. 1974).

67. If a matter is covered by a Federal Rule of Civil Procedure and that rule is valid, then it is controlling regardless of state law to the contrary. See Hanna v. Plumer, 380 U.S. 460 (1965); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

68. See 7A C. Wright & A. Miller, supra note 54, § 1861.

69. Patrician Towers Owners, Inc. v. Fairchild, 513 F.2d 216 (4th Cir. 1975); Lee v. Navarro Sav. Ass'n, 416 F. Supp. 1186 (N.D. Tex. 1976), rev'd on other grounds, 97 F.2d 421 (5th Cir. 1979), rev'd, 446 U.S. 458 (1980); Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R. 1971).

70. Fed. R. Civ. P. 23.2, Adv. Comm. Note.

rule is not operative until Rule 17(b), which points to state law, prohibits entity treatment.[71] This would bar the use of a class action even in states which permissively allow unincorporated associations to sue or be sued in their common name.

The future use of Rule 23.2 to maintain diversity jurisdiction clearly hinges on the outcome of these issues. Imposition of the numerosity requirement of Rule 23(a) would prevent many associations from qualifying as a class, and the widespread availability of state statutes allowing entity treatment could virtually preclude use of Rule 23.2 in this context. The ongoing debate over these questions and resultant split in court decisions relegate the class action device to an uncertain means of maintaining federal diversity actions in many jurisdictions.

In the area of diversity jurisdiction over unincorporated associations, judicial development is at a crossroad. Federal courts have applied the same harsh rule of an association's residence through the past century.[72] In an effort to open the federal courts to unincorporated associations, litigators and courts have utilized divergent concepts such as joint debtor acts and class actions, and attempted to fit them into the diversity jurisdiction puzzle.[73]

Both procedural tools are designed to facilitate the bringing of a suit where joinder of a whole group is inconvenient. But they are not tailored to solve all the problems raised by their interaction with the rule of an association's residence in the diversity context, thus the procedural guidelines for unincorporated association litigation are less than plain. A *Jones* action exists by virtue of the aggregate theory of partnership, but that theory's uncertain foundation is undermined by this use. The geometric increase in the level of complexity of rules concerning judgments occasioned by the introduction of *Jones* procedures leaves unwary plaintiffs vulnerable to hard fought, yet unenforceable, judgments. Nor is the class action device a consistently effective tool. In many cases, its use is justifiable only through a desire to circumvent diversity requirements, and this leads to an opposing school of thought that would deny this possibility.

The purpose of this note is not to suggest a solution, but to expose some inherent dangers of the present situation. From this examination, however, it is apparent that a simpler procedural system would result from granting unincorporated associations a residence for diversity purposes. The pressure towards this end evidenced by the increased use of the *Jones* action and class action tools coupled with the willingness of many courts to accept such use of those procedures reflect an increasingly prevalent view that manipulative dangers are but necessary incidents to the more important consideration of pro-

71. See Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. at 355.

72. See note 2 supra.

73. Comment, Citizenship of Unincorporated Associations for Diversity Purposes, supra note 3, at 1142; Comment, Diversity Jurisdiction for Unincorporated Associations, supra note 3, at 143-44.

viding unincorporated associations with a much needed federal forum.[74]

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74. See 7A C. Wright & A. Miller, supra note 54, § 1861; Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1226 (1966).