

## MODEL RULE 2.2 AND DIVORCE MEDIATION: ETHICS GUIDELINE OR ETHICS GAP?

Mediation<sup>1</sup> has recently attracted both lay and professional attention as an alternative form of dispute resolution.<sup>2</sup> Rule 2.2 of the Model Rules of Professional Conduct, which allows lawyers to act as “intermediaries,”<sup>3</sup> expressly recognizes mediation as a form of intermeditation.<sup>4</sup> The application of Rule 2.2 to lawyers engaged in divorce mediation remains unclear because the rule requires a lawyer engaged as an intermediary to serve as a “common” representative, a role which may be incompatible with the divorce mediation process.<sup>5</sup> In addition, Rule 2.2 conflicts with several state bar association rulings regarding divorce mediation<sup>6</sup> issued under the Model Code of Professional Responsibility.<sup>7</sup> At present, fourteen states have adopted the Model Rules.<sup>8</sup> As

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1. Mediation is “the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and research a consensual settlement that will accommodate their needs.” J. FOLBERG & A. TAYLOR, *MEDIATION, A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7 (1984).

2. Congress recently passed the Dispute Resolution Act of 1980, Pub. L. No. 96-190, 94 Stat. 17 (codified at 28 App. U.S.C. § 1-3.4(b) (1982)). Although Congress did not fund the national resource center for alternative dispute resolution provided in the legislation, the “passage of the Act, even if unfunded, has the salutary effect of legitimizing what some consider to be a ‘new’ movement.” ABA Special Comm. on Alternative Means of Dispute Resolution, *State Legislation on Dispute Resolution*, (Monograph Series No. 1) i (1982). Several professional associations have recently formed, including the National Institute of Dispute Resolution, The Federal Mediation and Conciliation Service, The Academy of Family Mediators, and The Society of Professionals in Dispute Resolution. Professional journals and newsletters have proliferated, including the *Newsletter of the Association of Family and Conciliation Courts*, *Harvard Journal of Negotiation*, *NIDR’s Dispute Resolution Forum*, *Mediation Quarterly*, and *The Missouri Journal of Dispute Resolution*.

Law schools have begun offering courses on mediation. See Riskin, *Mediation in the Law Schools*, 34 J. LEG. ED. 259 (1984). Law firms have set up in-house alternative dispute resolution sections. See Silas, *Settling Disputes*, 72 A.B.A. J., April 1, 1986, at 37. Former Chief Justice Burger supports diverting some cases from the adversarial system into alternative resolution forums. Burger, *Isn’t There A Better Way?*, 68 A.B.A. J. 274 (1982).

3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983) [hereinafter MODEL RULES]. See text of Rule 2.2 *infra* note 24.

4. MODEL RULES, *supra* note 3, Rule 2.2 comment.

5. See *infra* notes 40-45 and accompanying text.

6. See *infra* notes 29-39 and accompanying text.

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1979). The American Bar Association adopted the Model Rules to supersede the Model Code which was in force in various forms in all states. See Falsgraf, *Quo Vadis Model Rules?*, 72 A.B.A. J., April 1, 1986, at 8.

8. As of March 1, 1987, the following states had adopted the Model Rules: Arizona, Arkansas, Connecticut, Delaware, Florida, Maryland, Minnesota, Missouri, Montana, Nevada, New

other states consider their adoption, state bar associations must determine the proper application of Rule 2.2 to divorce mediation.<sup>9</sup>

This Note examines Rule 2.2 in the context of divorce mediation. Part I defines mediation and highlights the differences between mediation and traditional divorce proceedings. Part II examines the lawyer's representational role in mediation and the role mandated by Model Rule 2.2. Part III explains the positions adopted by various bar association committees concerning divorce mediation. Part IV describes commentators' concerns about the inadequacies of the common-representation approach to mediation. Finally, part V offers solutions to the "ethics gap" created by Model Rule 2.2 and advocates the adoption of a new model rule to encompass divorce mediation.

## I. MEDIATION, ADVERSARIAL DIVORCE AND THE COURTS

Mediation is a voluntary process in which a neutral third party, without authority to impose a solution, helps the participants reach an agreement.<sup>10</sup> Divorce mediation differs significantly from traditional divorce proceedings.<sup>11</sup> In a traditional legal dispute, the parties assume an adversarial posture; if one wins, the other loses. The parties assume that a general rule of law will determine the resolution of the dispute and seek full legal entitlement rather than a settlement that accommodates the needs of both. Parties who choose divorce mediation, in contrast, are also concerned with non-material values such as honor, respect, dignity, security and love.<sup>12</sup> They recognize that divorce does not end, but only changes their relationship, especially if they are parents who must make

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Hampshire, New Jersey, New Mexico, and Washington. 1 Law. Man. on Prof. Cond. 01:3 (ABA/BNA) (Sept. 9, 1986).

9. The problems this Note discusses do not apply to non-lawyers engaged as mediators because only lawyer-mediators must follow the Model Rules. Likewise, this Note does not address court-adjunct mediation because an entirely different set of ethical standards govern mediators working within a court-sponsored structure.

10. See *supra* note 1 for the definition of mediation. The mediation process can be used in a variety of ways to resolve personal, social and economic problems. Examples include divorce, custody, neighborhood differences, educational conflicts, minority and racial tensions, environmental concerns, business and labor disputes, and health care issues. See FOLBERG & TAYLOR, *supra* note 1, at xii.

11. See generally Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-45 (1982) (discussing the differences between adversarial proceedings and mediation).

12. See FOLBERG & TAYLOR, *supra* note 1, at 10. In mediation, "the emphasis is not on who is right or wrong or who wins and who loses, but rather upon establishing a workable solution that meets the participant's unique needs." *Id.*

arrangements for their children's emotional and financial support. Because mediation allows the parties the flexibility to control the process, as well as the outcome, the parties can emphasize important non-material values and benefit from a creative solution to which each agrees.<sup>13</sup>

Courts view divorce mediation agreements as privately negotiated contracts that are not subject to stringent substantive and procedural rules.<sup>14</sup> The parties may choose to embody their legal rights within the contract or bargain away some rights for non-material benefits.<sup>15</sup> Although marital settlements require court approval, courts are reluctant to scrutinize or alter these contracts because of the consensual nature of the agreement and the highly personal interests at stake.<sup>16</sup> Courts will set aside a mediated private contract only if it is found "unconscionable."<sup>17</sup> Consequently, judicial review provides relief only in the most oppressive situations. The wide range of contract possibilities and judicial deference to the solution chosen make competent and ethical practice by lawyer-mediators especially important.

## II. MODEL RULE 2.2 AND THE LAWYER'S REPRESENTATIONAL ROLE

Basic tenets of ethical legal practice dictate the lawyer's representational role and duties to his client. Because divorce mediation potentially involves the representation of at least two clients, confusion arises as to the lawyer-mediator's role.<sup>18</sup> Three models of representation exist. A lawyer may serve in a traditional adversarial capacity, representing only

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13. See Riskin, *supra* note 11, at 43-45. See also ABA, Special Comm. on Dispute Resolution, *Dispute Resolution Paper* (Series No. 3), 47-48 (1984) (noting that the "legislatively regulated pace" of litigation does not coincide with the "emotional pace" of divorce).

14. See FOLBERG & TAYLOR, *supra* note 1, at 10.

15. *Id.* at 10. Mediation participants spend emotional energy reaching their agreement and, therefore, are more invested in a mediation agreement than an agreement that others negotiate or impose. *Id.* The majority of participants find satisfaction with the process and results of mediation. *Id.* See also Pearson & Thonnes, *The Benefits Outweigh the Costs*, 4 FAM. ADV., Winter 1982, at 26, 30-31 (providing detailed information on the participant's satisfaction with mediation).

16. See FOLBERG & TAYLOR, *supra* note 1, at 10.

17. *Id.*

18. See ABA Special Comm. on Dispute Resolution, *ADR: Mediation and the Law: Will Reason Prevail?*, (Discussion Series No. 3) 36 (1983). The report notes that "[m]ost lawyers see representational advice as the heart of their practice, at least in dispute matters. And thus mediation appears to be in violation of several canons of ethics; there seems to be either a lack of loyalty to the client or a conflict of interest. This conceptual difference [between representational lawyering and mediational lawyering] creates tremendous confusion and misunderstanding among those who assume that it's a lawyer's job to represent somebody, and if you're not, you're not acting like a

one party in the mediation process.<sup>19</sup> In this situation the other parties must secure an advocate to protect their rights. Alternatively, the lawyer-mediator may represent neither party acting instead as a neutral facilitator in a non-adversarial capacity.<sup>20</sup> Finally, the lawyer-mediator may "commonly represent" all of the parties to the dispute.<sup>21</sup> The organized bar has long discouraged, and sometimes prohibited, multiple representation of clients.<sup>22</sup> When a lawyer represents more than one client in the same matter the possibility exists that the clients have, or will develop, diverse interests. In such a situation, the lawyer faces difficult conflict-of-interest problems: to which client does the lawyer owe the duties of loyalty, zealous advocacy and confidentiality?<sup>23</sup>

#### A. *Model Rules of Professional Conduct, Rule 2.2*

The American Bar Association drafted Model Rule 2.2 to provide guidance to lawyers engaged as intermediaries. Model Rule 2.2 adopts a "common representation" approach to all forms of intermediation. The Rule permits a lawyer to "act as intermediary between clients" if the lawyer complies with the Rule's requirements.<sup>24</sup> The lawyer must con-

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lawyer." *Id.* See also MODEL RULES, *supra* note 3, Rule 2.2 comment (noting that "confusion can arise as to the lawyer's role where each party is not separately represented").

19. See N. Carolina Bar Assoc. Ethics Op. 323 (1982) (allowing a lawyer to represent one party to mediation in subsequent litigation if the lawyer clearly explains that she represents only one of the parties at the time of mediation).

20. See *infra* notes 29-45 and accompanying text.

21. See MODEL RULES, *supra* note 3, Rule 2.2. See *infra* note 24 for text.

22. See, e.g., Iowa Bar Assoc. Ethics Op. 83-3 (1983) (prohibiting a lawyer from acting as a mediator in a divorce proceeding because of the actual or potential conflicts of interest); New Hampshire Bar Assoc. Ethics Op. 1983-4/4 (1983) (prohibiting a lawyer from giving legal advice to both parties in divorce mediation to prevent conflicts of interest); Kansas Bar Assoc. Ethics Op. 83-3 (1983) (prohibiting a lawyer from acting as a mediator if the parties are "adverse").

23. See generally M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 9 (1975) (discussing the duties of the lawyer in an adversarial system).

24. Model Rule 2.2 provides:

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the

sult with each client concerning the implications of the common representation. She must explain the advantages and risks of common representation and obtain each client's consent. The lawyer also must "reasonably believe" that intermediation does not pose a disadvantage to the clients' interests and that she, as an intermediary, can act impartially.

The Rule implicitly and explicitly refers to the lawyer-intermediary as the representative of both parties.<sup>25</sup> The commentary expressly states that Rule 2.2 does not apply if the parties are not "clients," even if the parties have appointed the lawyer as a non-representational mediator.<sup>26</sup> Therefore, if the divorce mediator does not take a common-representation approach to the mediation sessions, Model Rule 2.2 offers no guidance and may implicitly forbid the lawyer to act in a non-representational capacity.<sup>27</sup> Ethics committees and commentators have found the common-representation approach difficult, and sometimes impossible, to apply in the divorce mediation context.<sup>28</sup> Several bar associa-

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decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

25. A "lawyer acts as intermediary under this Rule [2.2] when the lawyer *represents* two or more parties with potentially conflicting interests." MODEL RULES, *supra* note 3, Rule 2.2 comment (emphasis added).

26. MODEL RULES, *supra* note 3, Rule 2.2 comment. Rule 2.2 distinguishes mediation between clients from mediation between non-clients. Rule 2.2 does not apply to the latter. It is unclear, however, when a lawyer represents participants in mediation such that they become clients. Folberg and Taylor note that "a lawyer who serves as a mediator outside of the law office, gives no legal advice or opinions, and does not draw up an agreement is not acting in a legal capacity and is not then governed by the lawyer's code." FOLBERG & TAYLOR, *supra* note 1, at 254-55. These commentators note that such instances are rare and more often a lawyer offers impartial legal advice or explains the law to the participants. *Id.*

27. The history of Rule 2.2 indicates that the rule may not apply to divorce mediation even if the lawyer-mediator adopts a common representation approach. In early drafts of Model Rule 2.2, the commentary stated that "under some circumstances a lawyer may act as an intermediary between spouses in arranging the terms of an uncontested separation or divorce settlement." MODEL RULES, *supra* note 3, Rule 5.1 comment (Discussion Draft 1980). The drafters deleted this language in the final version, possibly indicating an intent that Rule 2.2 not apply to divorce mediation. Professor Silberman notes that in light of the conflicting state ethics opinions on the subject of divorce mediation, the framers of the Model Rules should have made express reference to the issue. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107, 121 (1982).

28. *See infra* notes 29-45 and accompanying text. Professor Silberman notes that the difference between common representation and non-representation may be largely semantic. Alternatively, the distinction "may signify important assumptions about the role of the lawyer in mediation and about the tasks and responsibilities that may be undertaken." Silberman, *supra* note 27, at 121.

tion ethics opinions have suggested a non-representational approach to divorce mediation as the proper method to resolve potential ethical dilemmas.

### III. ETHICS OPINIONS UNDER THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY

#### A. *Boston Bar Association Opinion No. 78-1*

The Boston Committee on Ethics, in Opinion No. 78-1, reviewed a lawyer's proposal to mediate and draft a separation agreement for a divorcing couple.<sup>29</sup> The committee found the conflicts inherent in the divorce context too great to permit the lawyer to represent both parties. The committee resolved the conflict-of-interest problem by allowing the lawyer to mediate if she does not represent either party.<sup>30</sup>

The committee recognized several possible difficulties of the non-representational approach in divorce mediation.<sup>31</sup> The committee expressed concern that a party would claim that the lawyer-mediator had not fully explained all applicable considerations and as a result was led to agree to a settlement that he would not otherwise have accepted. Second, the committee noted that economic and personality differences between the parties might result in unequal bargaining power. Finally, the committee feared that without the assistance of independent counsel the parties might make commitments they would subsequently regret and renegotiation would be difficult, time consuming and expensive.

The committee also suggested that difficulties might arise if the parties sought other legal representation after reaching a mediated settlement. The committee felt that an attorney who had not participated in the negotiations would find it difficult to evaluate whether the agreement accurately reflected the views, needs, strengths and weaknesses of the parties. As a result, lawyers might decline to advise the parties, undertake a full scale review leading to a reopening of the negotiations, or focus on the form rather than the substance of the agreement.<sup>32</sup>

Acknowledging that problems inhere in any approach to divorce, the committee permitted non-representational divorce mediation despite the

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29. Boston Bar Assoc. Ethics Op. 78-1 (1978).

30. *Id.*

31. *Id.*

32. *Id.* See also Samuels & Shawn, *The Role of the Lawyer Outside the Mediation Process*, 1 MEDIATION Q. 13 (1984) (discussing the role of an independent counsel for clients who are engaged in mediation).

potential difficulties. The committee recognized that divorce mediation would be beneficial in many instances, because it allows the parties to settle their dispute cheaply and avoids some emotional distress.<sup>33</sup> The committee emphasized the lawyer-mediator's obligation to explain that she does not represent either party as well as the benefits and disadvantages of mediation. Under these circumstances, the committee asserted that the parties should be free to choose non-representational divorce mediation to resolve their dispute.

### *B. Connecticut Bar Association Formal Opinion 35*

The Ethics Committee of the Connecticut Bar Association reviewed a mediation model in which an interdisciplinary team, including a mental health professional, a lawyer and an accountant, would offer divorce mediation.<sup>34</sup> Under the proposed model, the lawyer would not represent either party. The committee encouraged mediation as a means to reduce the acrimony generated in adversarial divorce proceedings.<sup>35</sup> The committee found that the differing interests of the parties did not prevent an attorney from serving as a facilitator on behalf of both parties in an attempt to reach an agreement.

### *C. New York City Bar Association Opinion No. 80-23*

The New York City Bar Association Committee on Professional and Judicial Ethics issued Opinion No. 80-23 regarding a lawyer's participation in a non-profit interdisciplinary divorce mediation program.<sup>36</sup> The opinion allowed the lawyer-mediator to participate if she followed specific "rules."<sup>37</sup> One of the rules requires the lawyer-mediator to clearly

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33. Boston Bar Assoc. Ethics Op. 78-1 (1978). The committee noted that pro se proceedings offered the least expensive alternative, but that ignorance of the law may cause the parties to agree to inappropriate arrangements. The committee found that this problem would not exist if separate counsel represented each client, but noted the additional financial and emotional cost resulting from separate representation. *Id.*

34. Conn. Bar Assoc. Ethics Op. 35 (1982).

35. *Id.* The committee noted that lawyers had acted as mediators in other volatile areas such as labor law. *Id.*

36. N.Y. City Bar Assoc. Ethics Op. 80-23 (1981).

37. *Id.* The opinion provided that: (1) the lawyer must clearly and fully advise the parties of the limitations resulting from the lawyer's non-representational role and warn the parties that they should not look to the lawyer to protect their individual interests or keep confidences from the other party; (2) the lawyer must clearly and fully explain the risks of proceeding without separate counsel and proceed only with the understanding and consent of the parties; (3) a lawyer may participate with mental health professionals only in those aspects of mediation which do not require the exercise

explain the risks and significance of the lawyer-mediator's role as a representative of neither party. The parties then must expressly consent before the lawyer-mediator may proceed. The committee cautioned that mediation may be inappropriate in some circumstances, either because informed consent is impossible to achieve or the issues are too complicated to be resolved without the aid of separate counsel.<sup>38</sup> The committee noted that situations clearly exist where the parties prudently can consent to mediation and the use of an impartial, non-representational advisor.<sup>39</sup>

#### IV. THE INADEQUACY OF COMMON REPRESENTATION

Several commentators have suggested that both the adversarial and the common representation models fail to adequately describe the divorce mediation process. Richard Crouch, Chairman of the Ethical Practices and Procedures Committee, Family Law Section, of the American Bar Association, explains that the lawyer-mediator, unlike the lawyer in an adversarial proceeding, does not represent the interests of one party against the other.<sup>40</sup> Crouch suggests that mediation is most successful when the lawyer represents neither party and the parties give informed consent to non-representation at the outset of the process.<sup>41</sup>

According to Leonard Riskin, Director of the Center for the Study of Dispute Resolution at the University of Missouri-Columbia, there is a "traditional" and a "progressive" approach to the lawyer-mediator's rep-

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of professional legal judgment—the same kind of mediation activities permissible to lay mediators; (4) a lawyer may provide impartial legal advice and assist in reducing the parties' agreement to writing only if the lawyer fully explains all pertinent considerations, alternatives and consequences to each party; (5) the lawyer may give legal advice only to both parties in the presence of the other; (6) the lawyer must advise the parties of the advantages of seeking independent counsel before executing any agreement the lawyer drafts. *Id.*

38. *Id.*

39. *Id.* See also Mass. Bar Assoc. Ethics Op. 85-3 (1985). The Massachusetts Bar Association suggests that the mediation process consists of two steps, each with a different representational role. First, when actually mediating, the lawyer does not represent either party. In the second step—drafting a separation agreement—the lawyer performs a dual-representational role. Because the lawyer makes choices in language that may result in a more advantageous result for one party, the committee believes that the lawyer's role in drafting a separation agreement is more properly characterized as representational. *Id.* The opinion requires a lawyer to discuss the two different roles at the outset of the mediation process. *Id.*

40. R. Crouch, *The Dark Side of Mediation: Still Unexplored*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 345 (ABA 1982).

41. *Id.* at 346.

representational role.<sup>42</sup> The traditional approach, adopted in Model Rule 2.2, views the lawyer-mediator as an advocate for both clients. Riskin believes that this approach makes lawyer-mediation less effective because representation burdens the lawyer with conflict of interest concerns.<sup>43</sup> The progressive approach, which views the lawyer-mediator as a neutral intermediary rather than a representative of the parties, relieves the lawyer-mediator of the obligations imposed by traditional representation and the attorney-client privilege.<sup>44</sup> This approach removes conflict-of-interest concerns. Riskin argues that the progressive, non-representational approach enhances the effectiveness of the lawyer-mediator because it emphasizes her role as a neutral third party.<sup>45</sup>

## V. CLOSING THE ETHICS GAP

Commentators and bar association ethics committees have found Model Rule 2.2's common-representation approach an inadequate model for the role of lawyer-mediators in the divorce setting.<sup>46</sup> The Rule creates an "ethics gap" by its express terms, because it fails to recognize the alternative of non-representational divorce mediation.<sup>47</sup> Without a discernable ethical standard to guide their conduct, lawyers will be reluctant to undertake divorce mediation for fear of malpractice liability and disciplinary action. For this reason, one of several possible solutions should be employed to close the ethics gap.

### A. *A Separate Code of Ethics*

One possibility would be to designate lawyer-mediators as a separate professional group subject to their own rules of ethical conduct. The American Bar Association would lack authority to regulate the activities of lawyer-mediators engaged in divorce mediation. Such an approach, however, ignores the fact that bar associations have already taken jurisdiction over lawyers practicing divorce mediation. In addition continued supervision by bar associations would seem to be desirable because lawyer-mediators also employ traditional legal skills in the resolution of

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42. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984).

43. *Id.* at 342.

44. *Id.* at 342-43.

45. *Id.*

46. *See supra* notes 29-45 and accompanying text.

47. *See supra* notes 25-27 and accompanying text.

these disputes.<sup>48</sup> As a result lawyer-mediators would be subject to concurrent and potentially conflicting ethical standards. Forcing lawyer-mediators to limit their activities to those permissible for lay-mediators would avoid the concurrent jurisdiction problem but also would destroy an important advantage of lawyer-mediation—the application of legal skills and knowledge to the settlement process.<sup>49</sup> For these reasons, treating lawyer-mediators as a separate professional group will not solve the problems created by Rule 2.2.

### *B. Amending Model Rule 2.2*

Another way to address the ethical concerns of lawyers who perform nonrepresentational divorce mediation would be to amend Rule 2.2. Adding the words “mediator,” “lawyer-mediator,” “non-representation,” and “parties” in the appropriate places would expand the scope of Rule 2.2 to encompass non-representational mediation.<sup>50</sup> Unless such an amendment referred specifically to divorce mediation, however, the Rule would apply to all mediation, with less than desirable results. In any event, such an amendment would create a clumsy and cumbersome rule. It merely adds the non-representational role to a rule designed to reflect a common representational approach.<sup>51</sup>

### *C. A New Model Rule*

A new rule offering guidance to lawyers engaged in non-representational divorce mediation would provide the most effective solution to the ethics gap in Rule 2.2. The rule should address the unique issues that arise in the non-representation context. To ensure that the lawyer-medi-

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48. Without such concurrent regulation, lawyer-mediators who drafted separation agreements might be engaged in the unauthorized practice of law. See MODEL RULES, *supra* note 3, Rule 5.5 (unauthorized practice of law).

49. Professor Riskin notes that learning in law school has widened to encompass “political, economic, social and emotional factors that do or should impact on decisions and the effects of decisions on individuals and society.” Riskin, *supra* note 11, at 55. In addition, because the lawyer is a legal expert, “the lawyer-mediator can help the parties free themselves, when appropriate, from the influence of legal norms so that they can reach for a solution that is appropriate to them.” *Id.* at 40-41.

50. An amended Model Rule 2.2(a)(1), for example, could read:

(a) A lawyer may act as intermediary/mediator between clients/parties if:

(1) The lawyer consults with each client/party concerning the implications of common representation/non-representation, including the advantages and risks involved, and the effect on the attorney-client privilege, and obtains each client’s/party’s consent to the common representation/non-representation.

51. See *supra* notes 24-27 and accompanying text.

ator remains a neutral third party, for example, the rule must require her to serve in an impartial and unbiased manner. Because of the limited scope of the non-representational role, the rule must require the lawyer-mediator to inform the parties of the difference between the guidance a lawyer-mediator provides and the advice a traditional adversarial lawyer provides.<sup>52</sup>

The proposed rule, however, need not address those concerns unique to a common-representation approach. Unlike the role of a Rule 2.2 intermediary,<sup>53</sup> for example, the non-representational role of a divorce mediator is completely non-adversarial. As a result, the attorney-client privilege does not attach. In addition, because the lawyer-mediator in the non-representational role represents neither party, not both, the rule need not address conflict-of-interest concerns.<sup>54</sup> The following proposed rule offers the necessary guidance:

- (1) A lawyer may perform divorce mediation if:
  - (a) the lawyer informs each party that the lawyer does not represent that party or any party to the process, but instead acts as a neutral facilitator; and
  - (b) the lawyer fully explains to each party the duties a non-mediating lawyer owes to a client and the privileges afforded the lawyer-client relationship, and fully informs each client of the duties and privileges applicable to the relationship between the lawyer and the parties to the mediation; and
  - (c) the lawyer explains to each party the role the lawyer will perform in drafting any agreement; and
  - (d) the lawyer explains to each party the consequences of the lawyer's non-representation should the mediation terminate; and
  - (e) the lawyer obtains consent from each party to act in a non-representational role.
- (2) If the lawyer and the parties to the divorce mediation choose to have the lawyer represent all parties in a common representational role, the guidelines of Rule 2.2 shall apply.

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52. Ethics opinions concerning non-representational divorce mediation generally define the lawyer's role as that of a neutral facilitator. Because the public may not know the difference between a lawyer-mediator's duties and a traditional lawyer's duties, the ethics opinions require the lawyer to clarify the distinctions. *See supra* notes 29-39 and accompanying text.

53. *See supra* notes 24-27 and accompanying text.

54. *See supra* notes 40-45 and accompanying text.

## VI. CONCLUSION

The increased interest in divorce mediation has created a need for a new Model Rule to provide ethical guidance to lawyer-mediators. Because Model Rule 2.2 applies only to "common representation," the rule offers no guidance to lawyers providing non-representational divorce mediation. As a result, the Model Rules contain an "ethics gap." This Note proposes filling this gap with a new Model Rule that specifically addresses the unique ethical considerations arising from the non-representational role lawyers may assume in divorce mediation.

*Wendy Woods*