

Yeshiva University, Cardozo School of Law

**LARC @ Cardozo Law**

---

Articles

Faculty

---

2016

## The Scrivener's Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters

Robert Kirkman Collins

*Benjamin N. Cardozo School of Law*, [rcollins@yu.edu](mailto:rcollins@yu.edu)

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

---

### Recommended Citation

Robert K. Collins, *The Scrivener's Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters*, 17 *Cardozo Journal of Conflict Resolution* 691 (2016).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/45>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact [christine.george@yu.edu](mailto:christine.george@yu.edu), [ingrid.mattson@yu.edu](mailto:ingrid.mattson@yu.edu).

# THE SCRIVENER'S DILEMMA IN DIVORCE MEDIATION: PROMULGATING PROGRESSIVE PROFESSIONAL PARAMETERS

*Robert Kirkman Collins\**

“Our fetishization of the adversary system does lead to injustice and inefficiencies.”

—Prof. Kermit Roosevelt<sup>1</sup>

## I. INTRODUCTION

A festering ethical question for attorneys who practice divorce mediation is the propriety of an ADR neutral drafting the settlement agreement that memorializes the understandings a separating couple reach through mediation and then crafting the forms needed to allow those spouses to obtain an uncontested divorce decree. States are inconsistent in their rules permitting mediators to utilize their professional expertise to complete the paperwork process, even though it would appear that best practice would be not only to permit but to encourage mediators to scribe the couple's documents at the conclusion of their negotiations, and to guide them through the bewildering bureaucratic papers needed to obtain their divorce decree.

The debate over divorce mediator drafting is, however, simply part of the larger controversy of who, in the future, will be permitted to be a dispute resolution professional in this nation. Modern mediation attorneys are seeking to discredit the false assumption that divorce is essentially a legal problem, and declining to perpetrate the antique myth that every couple's divorce need be resolved in a trial analogous to a criminal prosecution—a dramatic courtroom battle in which past wrongs will be proven, a “bad” parent identified and exposed, and “rights” determined by a wise judge applying clear legal precedents to the facts of a particular couple.

---

\* Director, Divorce Mediation Clinic and Visiting Clinical Professor of Law, Benjamin N. Cardozo School of Law. The author is a recovering matrimonial litigator who has practiced family law and divorce mediation in New York City for nearly forty years.

<sup>1</sup> Kermit Roosevelt, *Richard A. Posner's Divergent Paths: the Academy and the Judiciary*, N.Y. TIMES (Jan. 29, 2016), <http://www.nytimes.com/2016/01/31/books/review/richard-a-posners-divergent-paths-the-academy-and-the-judiciary.html?r=0>.

Today's divorce mediation attorneys are even questioning the legal profession's self-serving fiction that attendance at law school and admission to the Bar ensure competence in document drafting, and that matters such as scribing settlement agreements and divorce forms are so arcane as to be beyond the ken of those without legal training.

This Article starts with an examination of one state's relatively recent contribution to the controversy over divorce mediator drafting, and then tours the nation to illuminate the confusing array of approaches to this issue that have been adopted in different jurisdictions. It then steps back to examine the role that lawyers have traditionally played in assisting or impeding access to justice for divorcing couples, and explores why divorce mediation can now offer a more appropriate approach than classic lawyering to marital reorganization. It concludes with an endorsement of attorney-mediators acting as scribes for their clients, and explores an approach that, at the cost of abandoning some romanticized notions of law school education, would allow even non-legal mediation professionals the authority to meet their couples' critical needs for access to the courthouse.

## II. THE DRAFTING DEBATE, UPDATED

A few years ago a tremor ran through the divorce mediation community in the state of Washington—not emanating from the movement of tectonic plates on the West Coast, but from a seismic shift induced by the promulgation of a two-page ethics opinion issued by a committee of that state's Bar Association.<sup>2</sup> While only an “advisory” comment from the Rules of Professional Conduct Committee (and not the official position of the Washington State Bar Association),<sup>3</sup> WSBA Advisory Opinion 2223 purported to prohibit lawyer-mediators from drafting the final settlement documents for couples that they had just guided to resolution. This proscription went far beyond the expected “unauthorized practice of law” rules that bar non-lawyer mediators from drafting legal docu-

---

<sup>2</sup> Wash. State Bar Ass'n of Prof'l Conduct Comm., Advisory Op. 2223 (2012), <http://mcle.mywsba.org/IO/print.aspx?ID=1669>.

<sup>3</sup> And, in fact, it is the Supreme Court of Washington that “bears the ultimate responsibility for lawyer discipline.” Caitlin Park Shin, *Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223*, 89 WASH. L. REV. 1035 (2013) (quoting *In re Disciplinary Proceeding Against DeRuiz*, 152 Wash. 2d 558, 572 (2004)).

ments; this ukase prohibited even divorce mediators who were attorneys in good standing from drafting the documents for their otherwise unrepresented clients. In doing so, the ethics committee in Washington sought to add that state to the minority list of jurisdictions<sup>4</sup> that explicitly prohibit even attorney-mediators from concluding their professional responsibilities by drafting the documentation that memorializes the couple's agreements.

The Washington ethics opinion—which has already been thoroughly and negatively analyzed elsewhere<sup>5</sup>—didn't stop there, however; it also proceeded to prohibit any other lawyer—not just the mediator, but even an independent attorney “scrivener”—from drafting the documents for a mediated couple.<sup>6</sup>

The logic underlying the Washington State Opinion? When a lawyer-mediator finishes the mediation and stands ready to draft documents, the opinion concludes that the ADR professional is no longer mediating but “practicing law;” however, because the husband and wife are divorcing, the opinion asserts that the two spouses have a non-waiveable conflict of interest, and therefore cannot be “represented” by a single attorney.

The fatal flaws in this logic? First, the committee members (none of whom, one suspects, either practices or approves of mediation) have not grasped the revolutionary concept of practice by a “neutral” attorney—the counselor as problem-solver rather than as hired mercenary fighting for one “side” against the other. Second, the opinion declares that the drafting of a contract constitutes the “practice of law,” which may be traditionally accurate, but may no longer be considered universally true.

Finally, leaving theoretical discussions aside, the opinion overlooks the reality that while people at the outset of divorce do have conflicting interests, at that magical moment when the mediator has helped them get to “Yes!”<sup>7</sup> and the myriad details of their marital settlement have finally been worked through, the two spouses no longer retain those opposing interests—they now have a single, unified concern in getting their understandings accurately reduced to writing and formalized, and their divorce papers correctly filled

---

<sup>4</sup> Of the fifteen or so states that have explicitly addressed the issue, approximately twice as many states permit the attorney-mediator to draft than prohibit it. For examples of the variety of proscriptions promulgated, see *infra* Part. III.

<sup>5</sup> Shin, *supra* note 3, at 1048–63.

<sup>6</sup> The goal appears to be to generate employment for not just one, but for three attorneys—the mediator, and separate counsel for each spouse.

<sup>7</sup> WILLIAM L. URY, ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1992).

out and processed through the court. While no one would seek to resurrect the ancient “Doctrine of Unity” studied in Family Law, which dealt with a married couple as a single entity under the historic doctrine of “couverture” by simply obliterating the wife’s identity and subsuming her rights under those of her husband, the archaic concept of dealing with the “couple” as a single unit might actually prove useful at this moment.<sup>8</sup> At the outset of any divorce the departing husband and wife do have potentially (if not actual) adverse interests over an entire spectrum of parenting and financial issues, but any conflicts become not only waiveable but non-existent once resolution of all of their substantive questions has been achieved through mediation. At that moment of consensus, all that remains to be done is to memorialize and sign their agreement and process their divorce papers—in which the parties’ interests are beyond being generally aligned . . . and actually congruent.<sup>9</sup>

The “real” reason for the Washington State opinion? This salvo seems to be yet another shot in the ongoing siege by matrimonial litigators attempting to halt civilian flight away from their traditional gladiatorial matrimonial practice—the most recent skirmish in the reactionary thirty-year turf war being fought by the litigation bar since the inception of divorce mediation.

### III. A SCRIVENER SCORECARD

Washington is now moving to place itself in the minority of states that prohibit attorney-mediators from drafting; it does not stand alone, however, in seeking to bar divorce mediation attorneys from drafting . . . and preserve billable hours for more traditional lawyers.

Currently, there is widespread disagreement among the various jurisdictions as to the proper scope of document drafting authority for an attorney practicing divorce mediation.<sup>10</sup> There is

---

<sup>8</sup> This would be analogous to the single-entity status of two people who hold property as “tenants by the entirety.”

<sup>9</sup> “[C]ommon representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.” WASH. RULES OF PROF’L CONDUCT R. 1.7 cmt. 28.

<sup>10</sup> For the would-be scrivener, there are actually two issues—the agreement, and the divorce papers. There’s more of a need for discretion (and therefore greater difficulty) in drafting the particular points in a settlement agreement (both in the wording of the different provisions and the decision to include or omit specific paragraphs or points), whereas in most jurisdictions there’s only one acceptable way to prepare divorce documents or forms for the Court’s approval.

simply no discernible consensus among the states as to whether the divorce mediator, who is also a duly admitted attorney in that jurisdiction may, at the conclusion of a mediation in which the parties have reached consensus on all their marital issues, appropriately draft the settlement agreement that reflects and memorializes the financial and parenting decisions made by the couple.<sup>11</sup>

The rules that do exist in each jurisdiction regarding the proper professional parameters of an attorney practicing divorce mediation must, unfortunately, be ferreted out from a variety of state ethics opinions, disciplinary proceedings, Practice Guidelines, and state Court Rules.<sup>12</sup> The answers that do emerge from a review of the fifty states, however, is less a contrasting study in black and white and more of a spectrum approaching “Fifty Shades of Grey”<sup>13</sup>—an array of rules ranging from “yes” to “no”. . .with a bewildering variety of approaches in between.

A roll call of the states does suggest that a majority—but certainly not an overwhelming one—favors permitting the mediator to act as scrivener; the bar associations of nine states have opined that the drafting of the agreement by an attorney-mediator is prohibited, while fourteen states find it permissible. (One state apparently couldn’t figure it out.)<sup>14</sup>

### A. *Some States Say “Yes”*

- i. **Indiana** explicitly authorizes divorce mediators to draft their clients’ settlement agreement and craft and submit a proposed dissolution decree, a waiver of a final hearing,

---

On the other hand, when preparing papers—presumably on behalf of the plaintiff or petitioner in the divorce proceeding, even if done with the consent of and as an accommodation to both spouses, a mediation scrivener may be technically (even if not functionally) *appearing* as counsel for one party in court in an official capacity—which seems both intuitively less than neutral and closer to the traditional “practice of law.”

<sup>11</sup> Discussed below is the exponentially more controversial issue of whether a *non-attorney* mediator can—or in fact, should—draft operative settlement documents for their couple without running afoul of UPL (Unauthorized Practice of Law) restrictions. See *infra* Part IX.

<sup>12</sup> See Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties in Mediation: Fifty Years Later it Remains the Elephant in the Room*, 51 FAM. CT. REV. 85, at 93-7 (2013).

<sup>13</sup> With apologies to E.L. JAMES, *FIFTY SHADES OF GREY* (2013).

<sup>14</sup> See Shin, *supra* note 3. The State Bar of Arizona couldn’t make up its mind in 1996 as to whether a lawyer-mediator could draft the settlement documents, and simply advised lawyers “to exercise their own professional judgment” on the issue (!). STATE BAR OF ARIZ. RULES OF PROF’L CONDUCT, ETHICS OP. 96-01 (1996).

their parties' child support agreement. . . and an income withholding order.<sup>15</sup>

- ii. **Utah** had originally determined that in divorce “a disinterested lawyer could not possibly conclude that a lawyer could fairly and zealously represent both clients”;<sup>16</sup> however, upon appeal the Board of Bar Commissioners held it permissible for a mediator to draft if the couple is committed to the terms of their agreement, there are no unresolved points and there is informed consent, and the arrangement is revealed to the court.<sup>17</sup> (The following year, Utah clarified that an attorney-mediator may draft and file a legally-binding settlement document (and even the related pleadings), recognizing that in so doing “the lawyer will be jointly representing the parties in their common goal of effecting proper legal filings or obtaining judicial approval of their fully resolved issues. Because the parties in this situation have fully resolved their issues, they are not considered ‘adverse’ under Rule 1.7(a)(1).”)<sup>18</sup>
- iii. **Massachusetts** simply allows that the mediator “may participate in the preparation of the written agreement” emerging from the discussions, holding that an attorney-mediator who drafts the settlement agreement is engaged in the practice of law, but may do so with appropriate disclosure.<sup>19</sup>
- iv. **Colorado** looks to the Colorado Dispute Resolution Act (“CDRA”) to find authorization for not only attorney-mediators but even non-attorney mediators to draft the settlement documents, declaring that:

The implication of the CDRA is that the settlement agreement may be drafted by the mediator, for approval by the parties and their attorneys, if any, and for signature by the parties. Because the CDRA clearly does not require the mediator to be a lawyer,

---

<sup>15</sup> IND. RULES OF CT., *Rules for Alternative Dispute Resolution R. 2.7 (F)*, IND. JUDICIARY (May 14, 2015), <http://www.in.gov/judiciary/rules/adr/>.

<sup>16</sup> UT. STATE BAR RULES OF PROF'L CONDUCT, ETHICS ADVISORY OP. NO. 05-03 (2005), <https://www.utahbar.org/ethics-advisory-opinions/eaoc-05-03>.

<sup>17</sup> *Judicial Council Rules of Judicial Administration*, UT. COURTS, (last visited Feb. 25, 2016), <http://www.utcourts.gov/resources/rules/ucja/#ch13a/html>.

<sup>18</sup> UT. STATE BAR RULES OF PROF'L CONDUCT R. 2.4(c) (2006).

<sup>19</sup> MASS. SUP. JUD. CT. UNIFORM R. ON DISPUTE RESOL. R. 7(g). *See also* MASS. BAR. ASS'N. ETHICS OP., 85-3 (1985).

it serves as statutory authority for a nonlawyer mediator to draft a written settlement agreement.<sup>20</sup>

B. *Some states say, “Well, if you must. . .”*

- i. **Michigan** gives grudging approval for mediator drafting, providing a less than ringing endorsement: “Upon tentative resolution of the dispute, it is not inappropriate for a mediator to suggest that the parties memorialize their understandings in a written document. The lawyer, in the role of neutral mediator, is not per se prohibited from preparing the document.”<sup>21</sup> (The main concern of Michigan appears to be for mediators to discourage clients from signing agreements without having retained separate counsel.)
- ii. **Kansas** affords a similarly heavy-handed approach to lawyer employment; both the Supreme Court and Court Mediation Rules of Kansas allow for drafting, but insist that the mediator pressure couples to retain counsel.<sup>22</sup>
- iii. **Maine** holds that an attorney-mediator can draft the agreement and ancillary documents—including the divorce judgment.<sup>23</sup> Formerly, the Maine Board of Overseers of the Bar<sup>24</sup> had allowed preparation of the agreement and court documents such as the judgment;

---

<sup>20</sup> See Anthony van Westrum, *Best Practices for Avoiding Unauthorized Practice of Law in Mediation*, 36 COLO. LAW. 21 (2007), [https://www.cobar.org/repository/Inside\\_Bar/Alternative%20Dispute%20Resolution/auog050615\\_TCL%20UPL%20Article.pdf](https://www.cobar.org/repository/Inside_Bar/Alternative%20Dispute%20Resolution/auog050615_TCL%20UPL%20Article.pdf).

<sup>21</sup> MICH. INFORMAL ETHICS OP. RI-278 (1996), [http://www.michbar.org/opinions/ethics/numbered\\_opinions?OpinionID=1148&Type=6&Index=A](http://www.michbar.org/opinions/ethics/numbered_opinions?OpinionID=1148&Type=6&Index=A).

<sup>22</sup> See KAN. SUP. CT. R. 901 (“The attorney-mediator advises and encourages the parties to seek independent legal advice before the parties execute any settlement agreement drafted by the attorney-mediator.”); See also KAN. SUP. CT. R. RELATING TO MEDIATION VII (D) (“Any memo of understanding or the proposed agreement which is prepared in the mediation process should be separately reviewed by independent counsel for each participant before it is signed. While a mediator cannot insist that each participant have separate counsel, they should be discouraged from signing any agreement, which has not been so reviewed. If the participants, or either of them, choose to proceed without independent counsel, the mediator shall warn them of any risk involved in not being represented, including where appropriate, the possibility that the agreement they submit to a court may be rejected as unreasonable in light of both parties’ legal rights or may not be binding on them.”).

<sup>23</sup> Applegate & Beck, *supra* note 12.

<sup>24</sup> ME. BOARD OF OVERSEERS OF THE BAR PROF’L. ETHICS COMM’N., ETHICS OP. 137 (1993), [http://www.mebaroverseers.org/attorney\\_services/opinion.html?id=89822](http://www.mebaroverseers.org/attorney_services/opinion.html?id=89822).

now, the Maine Rules of Professional Conduct<sup>25</sup> specifically permit the mediator to draft the “settlement agreement or instrument reflecting the parties’ resolution of the matter” so long as they urge participants to obtain outside legal advice. However, Rule 2.4(e)(3) cautions that “upon conclusion of the mediation, the lawyer shall not represent any of the parties in the matter that was the subject of the mediation, or in any related matter,” thus closing the door to the neutral’s submission of the divorce papers.<sup>26</sup>

- iv. **Tennessee** requires a mediator to “request that the terms of any settlement agreement reached be memorialized appropriately” and to discuss with the principals the process for formalization;<sup>27</sup> the Rules of Professional Conduct provide that a mediator: “(1) may, with the informed consent of all the parties to the dispute. . . draft a settlement agreement that results from the dispute resolution process,” but “shall not otherwise represent any or all of the parties in connection with the matter,”<sup>28</sup> also precluding the mediator signing on as counsel or appearing in court for the divorce papers.<sup>29</sup>

### C. *Some states say “Sort of. . .”*

- i. **Virginia** elected not to adopt ABA Model Rule 2.4, but instead promulgated its own rules of ethical conduct regarding drafting.<sup>30</sup> The Commonwealth appears more preoccupied with limiting any evaluative tendencies of attorney-mediators than with drafting issues; it doesn’t address the question of the propriety of the mediator

<sup>25</sup> ME. RULES OF PROF’L CONDUCT, R. 2.4 (e)(2), [http://www.courts.maine.gov/rules\\_admin/orders/rules/text/mr\\_prof\\_conduct\\_plus\\_2014-10-10.pdf](http://www.courts.maine.gov/rules_admin/orders/rules/text/mr_prof_conduct_plus_2014-10-10.pdf).

<sup>26</sup> The only mechanism for avoiding the ban would be to take the truly expansive definition of the mediation not having “terminated” until the divorce process had been handled.

<sup>27</sup> TENN. SUP. CT. R. 31 APP. A, §10(a)(1).

<sup>28</sup> TENN. R. PROF’S. CONDUCT R. 2.44(e)(1), [http://www.tba.org/sites/default/files/2011\\_TRPC\\_0.pdf](http://www.tba.org/sites/default/files/2011_TRPC_0.pdf).

<sup>29</sup> *But N.B.* – providing both clients with assistance in filing out divorce forms so that each can proceed *pro se* is not specifically prohibited.

<sup>30</sup> VA. RULES OF PROF’L CONDUCT R. 2.10 & R. 2.11, <http://www.vsb.org/docs/2009-10-pg-rpc.pdf>; *See also* VA. GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (1999), [http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl\\_guidelines.pdf](http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf).

scribing the agreement. Virginia does, however, prohibit a lawyer who has served as a third-party neutral (which includes mediators under Rule 2.11(a)) from serving “as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.”<sup>31</sup>

- ii **North Dakota** directs that in child custody mediations, the mediator is “to reduce to writing any agreement of the parties” and have them sign it . . . but then provides that the contract isn’t binding on the parents until approved by the court<sup>32</sup>—an approach also adopted by its neighbor, *South Dakota*.<sup>33</sup>

#### D. *Some states say “No!”*

- i. **Illinois**, in a State Bar Association Advisory Opinion on Professional Conduct,<sup>34</sup> states that a lawyer who mediates with a couple cannot draft their settlement document (nor craft their divorce papers), as that would constitute legal representation of both sides in a litigation. The opinion reaffirms the determination of an earlier ethics opinion<sup>35</sup> that a “divorce, even when uncontested, is litigation.”<sup>36</sup>
- ii. **Texas** similarly concludes in an ethics opinion<sup>37</sup> that because a “divorce, no matter how amicable or uncontested, is a litigation proceeding under Texas law,” an attorney-mediator can never be permitted “to represent both parties” in preparing the documents to effectuate their mediated agreement or process the divorce, because of the

---

<sup>31</sup> VA. RULES, *supra* note 30, at R. 2.10 (e).

<sup>32</sup> N.D. CENT. CODE §14-09.1-07 (2004), at <http://www.legis.nd.gov/cencode/t14c09-1.pdf?20160205172233>.

<sup>33</sup> S.D. CODIFIED LAWS §25-4-61 (2004), [http://legis.sd.gov/Statutes/Codified\\_Laws/DisplayStatute.aspx?Statute=25-4&Type=Statute](http://legis.sd.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Statute=25-4&Type=Statute).

<sup>34</sup> IL. STATE BAR ASS’N. PROF’L RULES OF CONDUCT, ETHICS OP. NO. 04-03 (2005), *aff’d* 2010.

<sup>35</sup> IL. STATE BAR ASS’N. PROF’L RULES OF CONDUCT, ETHICS OP. NO. 98-06 (1998).

<sup>36</sup> *Id.* (In fact, an uncontested divorce action is a ceremony, required simply because traditional court proceedings are built on the assumption that there must be an “adverse” party to stand in opposition to any request for judicial relief.

<sup>37</sup> TX. STATE BAR PROF’L ETHICS COMM., ETHICS OP. 583 (2008), [http://www.klgates.com/files/upload/Texas\\_Ethics\\_Opinion\\_583.pdf](http://www.klgates.com/files/upload/Texas_Ethics_Opinion_583.pdf).

spouses’ “potentially conflicting interests.”<sup>38</sup> While providing the benefit of and unambiguous answer, the Texas approach does elevate procedure over reality, in that—as discussed above—only after all the terms of an agreement have been worked out would the agreement be drafted and submitted for approval to the court. . . which is a point that the parties no longer have adverse interests.<sup>39</sup>

E. *Some states that appear to say “NO”(but do)*

- i. **Washington** has the restrictions of Ethics Opinion 2223; as discussed above, however, it’s only advisory in nature, and not all practitioners have felt themselves bound by its dictates.<sup>40</sup>
- ii. **New York State** would appear to have prohibited the attorney/mediator as scrivener<sup>41</sup> but as a practical matter did not; it determined that a mediator cannot draft the Agreement and divorce papers unless the mediator can satisfy the “disinterested lawyer” test of DR 5-105(c), but as a practical matter the test appears to have been “passed” by every couple in the Empire State who reach terms after mediation.<sup>42</sup>

F. *Finally, some organizations say “Yes”*

The ABA, it should be noted, does permit attorney drafting. In 2010, the American Bar Association Section of Dispute Resolu-

---

<sup>38</sup> *Id.* at R. 1.07.

<sup>39</sup> The fact that all proceedings for marital dissolution in Texas are nominally “litigations” reveals more about the inflexible system of procedures in the state where both spouses cannot jointly seek dissolution of the marriage than about the inherently “litigious” nature of a marital proceeding, once negotiations have resolved all the issues.

<sup>40</sup> For more discussion, see presentations by Leslie Grove, Robert Kirkman Collins, Don Desonier, Rina Goodman and Stephanie Bell, at Panel Discussion 7.7 (The Scrivener’s Dilemma: Mediators Who Draft Settlement Agreements (WSBA Advisory Opinion 2223)) given at the 21st Annual Northwest Dispute Resolution Conference in Seattle, WA in March, 2014, <http://wsba-adr.org/page/2014-track-divorce-family>.

<sup>41</sup> NY STATE BAR ASS’N. COMM. ON PROF’L. ETHICS, OP. 736 (2001).

<sup>42</sup> In 2010, an experienced attorney-mediator in New York State was brought up on disciplinary charges by the Grievance Committee for the Ninth Judicial District (File No. 298190/10) after court personnel (but not either client) objected to his having drafted a formal separation agreement at the conclusion of a mediation; the charges were subsequently dropped.

tion Committee on Mediator Ethical Guidance issued an opinion on the “Mediator’s Duty of Care When Drafting Agreements,”<sup>43</sup> which permits an attorney-mediator to act as “scrivener” to memorialize deal points, and to “add additional language” and draft the operative settlement agreement if they have the professional experience and competence to do so.<sup>44</sup> In addition, it should be noted that the Model Standards of Practice for Family and Divorce Mediation also provide that “the mediator may document the participants’ resolution of their dispute.”<sup>45</sup>

#### IV. THE SCRIVENER SKIRMISH IN CONTEXT

Given that no clear consensus can be gleaned from the various states as to the wisdom or propriety of an attorney-mediator drafting a couple’s divorce settlement, where might be the solution be found? The answer lies in examining the issue in the context of an overview of how divorce has been (and should be) handled in this country, and then in a microscopic exploration of how best the drafting problem should be addressed as a practical matter.

The wide disparity among rules prohibiting or permitting lawyer-mediators to draft the operative settlement documents is best viewed as a skirmish in the larger battle to end the “legalization” of domestic disputes and terminate the traditional attorney monopoly as the only accredited dispute resolution professionals in the nation.

Such an evolution—or revolution—is much needed. Since the country’s founding, each of the United States has maintained with public funds a court system for the determination of family disputes; in recent times, however, those courts have increasingly become accessible to only the privileged few. By and large, matrimonial litigations have developed into wars of attrition, inaccessible except to the well-resourced. With procedural paths so complex as to require expensive, professional sherpas in the form of attorneys to act as guides, litigation becomes a luxury affordable

---

<sup>43</sup> ABA SEC. OF DISP. RESOL. COMM. ON MEDIATOR ETHICAL GUIDANCE SODR-2010-1, <http://apps.americanbar.org/dch/more.cfm?com=DR018600&mod=12>.

<sup>44</sup> For a critical view of this approach, see Elayne E. Greenberg, *Two for the Price of One is a Costly Choice: the Ethical Issues for Lawyer-Mediators Who Consider Drafting Agreements*, 3 NYSBA NY DISP. RESOL. LAW. (2010).

<sup>45</sup> MODEL STANDARDS OF PRACTICE FOR FAM. AND DIVORCE MEDIATION. VI. E. (2000).

only by a privileged minority of the population.<sup>46</sup> While the problem is growing worse, it is not new; even a generation ago former President Jimmy Carter wryly observed: “Ninety percent of our lawyers serve ten percent of our people. We are over-lawyered and underrepresented.”<sup>47</sup>

Yet doesn’t divorce of necessity require handling by attorneys in court? Shouldn’t family dissolution necessarily involve interpreting and applying statutes and precedents to a particular family’s facts, with lawyers protecting the rights of the parties? In some particularly difficult and sophisticated cases this might be so, but for the nation to continue to approach all divorces as if each one involved complex legal matters requiring attorney guidance and judicial intervention instead of caring assistance through a messy mix of financial problems, personal issues, and parenting dilemmas well within the ken of the principals actually distorts the process, and adds to the participants’ agony.

One hundred years ago, when Woodrow Wilson occupied the White House, perhaps domestic difficulties needed to be handled exclusively by attorneys in courts of law; however, to continue to view divorce today through that same limited litigation lens works a grave distortion of the realities. A century ago, divorce was rare.<sup>48</sup> It came about only as the result of behavior that was (or closely bordered on) criminal behavior—adultery, cruelty, or desertion.<sup>49</sup> It marked a tragic and scandalous breakdown in the social order, for which spouses would bear the stigma for the remainder of their natural lives. Judges granted divorces reluctantly, and only when truly egregious marital misconduct could be proven, but never if one or both spouses simply wanted to end the marriage. Courts necessarily intervened to make sure that children and women—the economically vulnerable parties of the day—were protected through orders of child support and alimony.

---

<sup>46</sup> In fact, by the turn of this Century, 80% of matrimonial cases involved at least one self-represented party. See Madelynn Herman & Bruce Povda, *Self Representation Pro Se Statistics Memorandum*, NAT’L CTR. FOR ST. CTS. (Sept. 25, 2006).

<sup>47</sup> Quoted in Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004).

<sup>48</sup> For an official, excruciatingly detailed statistical analysis of divorce in the United States exactly 100 years ago, see U.S. BUREAU OF THE CENSUS, MARRIAGE AND DIVORCE, 1916. (US Gov’t Printing Office) (1919), <https://ia700406.us.archive.org/5/items/cu31924081073839/cu31924081073839.pdf>.

<sup>49</sup> In 1916, over three-quarters of all divorces were granted for the commission of acts of adultery (11.5%), cruelty (28.3%), or desertion (36.8%). U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DECEMBER, 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS UNITED STATES 1867–1967, 49 (1973), [http://www.cdc.gov/nchs/data/series/sr\\_21/sr21\\_024.pdf](http://www.cdc.gov/nchs/data/series/sr_21/sr21_024.pdf).

Much has changed in the last century. Divorce is now a common<sup>50</sup> if not commonplace phenomenon; depending on the statistics credited, an average of some fifty percent of all marriages end in divorce. Divorce is no longer the rare, shameful exit from marriage reluctantly granted to exceptionally and tragically dysfunctional families unable to sustain important societal norms, but an unfortunate though hardly surprising outcome in nearly a majority of marriages. Unlike a century ago, immediate no-fault divorce is now available in all fifty states,<sup>51</sup> requiring nothing more than one party publically proclaiming that the marriage has failed, without any obligation to allege (much less prove) that the other spouse had engaged in despicable behavior. Given the universality of no-fault divorce, there is no longer any reason other than institutional inertia to continue to treat each divorce case as if it were a quasi-criminal investigation;<sup>52</sup> there is no single person who needs to be determined by trial to be at “fault”. Yet we still frame the discussion of divorce as if every couple needed to “lawyer up” and expect that a judge will assess blame in a quasi-criminal proceeding, divide assets, establish parenting roles and rule, and set support . . . because both spouses are incompetent to reach their own resolutions.

But trial is a fiction in divorce. Some ninety-seven percent of all matrimonial cases end up in a settlement short of adjudication, so it’s a pernicious myth for the vast majority of people that matters will be decided by a judge. We still promulgate the notion that the expected finale will ultimately take place in court when virtually all cases do settle before trial . . . and that couples therefore need professional guides in the form of attorneys to do formal discovery and stage manage a courtroom showdown. It is an expensive miscalculation—and the matrimonial litigators who profit from the system do precious little to dispel the notion.

---

<sup>50</sup> For the statistics now kept by the Federal Government’s Center for Disease Control and Prevention, see *National Marriage and Divorce Rate Trends*, NAT’L VITAL STAT. SYSTEM (Nov. 23, 2015), [http://www.cdc.gov/nchs/nvss/marriage\\_divorce\\_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm).

<sup>51</sup> New York belatedly joined the other forty-nine states in discovering the brave new world of no-fault divorce without a statutory waiting period on Columbus Day (October 12) of 2012. N.Y. DOM. REL. L. 170(7).

<sup>52</sup> Certainly in cases that require ferreting out hidden assets, discovery or perhaps trial might be needed; however, the vast majority of divorces involve W-2 wage earners, for whom the ability to secrete assets is limited, at best.

## V. TWO METHODOLOGIES FOR MONOPOLY

Unfortunately, some lawyers carefully and craftily play on two mechanisms of control to maintain their monopoly on access to justice in divorce court. Sadly, those litigators are rewarded for fighting through hourly fees, rather than being incentivized for using their wisdom, wit and expertise to work out solutions for clients in marital transition. And, tragically, people going through the frightening chaos of having their family life dissolve are particularly vulnerable to the claims of practitioners who advocate that divorce is a terrifying “legal” problem . . . and that the public therefore needs to pay litigators to “protect them” and “enforce their rights.”<sup>53</sup> (Who, one frequently wonders when observing litigators at work in the Courthouse, is there to protect the people from these lawyers who claim to be protecting them?).

How is fear turned to profit? Historically, two major impediments have been utilized by the organized bar to limit universal access to justice in divorce (language and procedure) and seven myths (as set out below) promulgated to keep people herded within the “system.”

Divorce lawyers, traditionally, have shrouded their work in historically venerable but obscure verbiage, accessible only to the professionally initiated. Attorneys continue to draft divorce agreements in outmoded, incomprehensible legal jargon. One suspects that by making the “standard” language arcane and impenetrable to the general public, continuation of the monopoly of the guild of lawyers is protected.<sup>54</sup> (Although it should be noted that the use of

---

<sup>53</sup> Even the progressive attorneys adopting a “collaborative lawyering” approach, which seeks settlement and eschews the self-fulfilling prophesy that court intervention is necessary to resolve matrimonial matters, still posit the process as one that needs to be guided by attorneys, rather than by the spouses. See SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* (BRADFORD PUBLISHING, 2004).

<sup>54</sup> A standard mutual estate waiver in a marital settlement agreement used by the author in practice reads:

Each of the parties hereby waives, renounces, grants, remises and releases to the other forever, for all purposes whatsoever, all rights in the property of the other, including but not limited to dower, curtesy, community property, and equitable distribution or a distributive award of marital property, all rights and interests which he or she may have or hereafter acquire in the real or personal property or estate of the other wheresoever situated and whether acquired before or subsequent to the marriage of the parties or before or subsequent to the date of the execution of this Agreement, by reason of his or her inheritance or descent or by virtue of any decedent or estate law or any statute or custom, or arising out of the marital relation, or for any other reason whatsoever, and each party hereby expressly waives and releases any right of election under this state’s Estates, Powers and Trusts Law or any successor statute thereto, or any

linguistic legal obfuscation to control access to justice is hardly a recent problem.)<sup>55</sup>

Unfortunately, procedural complexities as well as linguistic obfuscation also preclude people's direct access to justice. Since the start of the 20th Century we have assigned the task of dissolving marriages to courts,<sup>56</sup> but increasingly, as a practical matter, only the wealthiest can now afford effective access to them. We would consider it unconscionable to allow a town's Fire Department to only respond to conflagrations in burning houses that were the residences of couples making in excess of \$200,000 per year . . . yet divorce courts, which also provide much-needed public services to families in crisis, are effectively accessible only to the privileged minority of the population who can afford the private guidance of attorneys.

These twin gatekeepers of arcane language and procedural mysteries help sustain a virtually impenetrable thicket around the process of divorce; unfortunately, in addition there is a set of notions about the process of divorce that further pushes the public into remaining in the classic litigation track.

## VI. SEVEN FATAL FALLACIES OF DIVORCE

People going through divorce are maneuvered into remaining in the historic litigation system through exposure to seven systematically promulgated but pernicious fictions that disempower them:

---

other law of any state, territory and jurisdiction, to take against the Last Will and Testament or codicils thereto of the other, whether heretofore or hereafter executed, including but not limited to any right to elect to take, as against the same, the intestate share to which he or she would otherwise be entitled, and each party hereby renounces and waives any right to administration of the estate of the other party, and further waives any right to be or become the legal representative of the other's estate.

Why not simply state: "Each of us shall be free to do what we choose in our wills, and we waive any right in the other's estate?" Is it because the "legalese" text requires a professional guide to draft, interpret and translate, whereas the "Plain English" version is immediately and universally accessible? The rights waived and exchanged in both the arcane and modern language are identical . . . and when was the last claim for dower or curtesy asserted in a court in this nation, or the last occasion a practitioner really needed to navigate the subtle distinctions under Anglo-Saxon rules of pleading among "waives, renounces, grants, remises or releases?"

<sup>55</sup> Famously, two millennia ago it was objected: "Woe unto ye, ye lawyers! For ye take away the key of knowledge. Ye enter not in yourselves, and those that would enter, ye hinder." *King James Bible*, Luke 11:52.

<sup>56</sup> In colonial times and well into the Nineteenth Century many states assigned the right to dissolve a marriage to their state legislature. See *DIVORCE: AN AMERICAN TRADITION* OXFORD UNIV. PRESS, 1991.).

- i. THE FICTION OF COMBAT: That divorcing couples are inevitably enemies, and must act accordingly;<sup>57</sup>
- ii. THE DISTORTION OF COMPETENCE: That divorcing couples are incompetent to make their own decisions or even conduct their own dialogue;<sup>58</sup>
- iii. THE MYTH OF COURT: That divorcing couples face a set of essentially legal problems that must ultimately be determined by a Judge;
- iv. THE ERROR OF COST: That in order to divorce couples must be resigned to exhaust themselves both financially and emotionally;
- v. THE ROLE OF CAUSATION: That determination of who was “at fault” for ending the marriage is of importance;
- vi. THE CANARD OF “CUSTODY”: That children are possessions to be won or lost in the battle between their parents; and
- vii. THE BATTLE FOR CONTROL: That the attorneys and not the principals should be in charge of the process . . . and participate in determining the outcome.

## VII. RETHINKING DIVORCE FOR THE 21ST CENTURY

Over the last thirty-odd years, however, the practice of divorce mediation has been working a quiet revolution, challenging the notion that divorce should be approached as a purely legal issue and starting to “outsource” it to problem-solvers not necessarily a part of the traditional legal establishment. Divorce mediators, drawn from the ranks of burnt-out litigators seeking a less brutal and more rational professional practice, have joined with therapists and others from the helping professions to assist people to minimize the gratuitously brutal side-effects of divorce in court.

The elimination of the necessity for any judicial finding of wrong-doing in divorce created by the shift away from “fault” divorce in the late 1960s and early 1970s has helped ease the need for

---

<sup>57</sup> Tennessee’s Rules of Professional Conduct, for instance, determine that “a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved.” TENN. RULES OF PROF’L. CONDUCT R. 2.2[6].

<sup>58</sup> “The client should be cautioned not to discuss the matter with the spouse, but rather refer any questions or inquiries to the attorney through the spouse’s own lawyer.” WILLARD H. DA-SILVA, N.Y. STATE BAR ASSOCIATION: MATRIMONIAL LAW 45 (2011).

individual legal representation.<sup>59</sup> Divorce no longer need be about which spouse did what to whom in the past, but is now free to focus on helping couples plan for their future . . . and that is precisely the approach that mediation takes. Even after over three decades of practice, however, mediation remains a radical approach to divorce.

The threat posed by the divorce mediation movement has been clear to the matrimonial bar from the very outset. Typical of the sanctimonious and self-serving rhetoric was a proclamation made by the Association of the Bar of the City of New York some thirty years ago; when facing the nascent specter of divorce mediation, they declared that:

[T]he complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolution and the inequality in bargaining power resulting from differences in the personalities or sophistication of the parties make it virtually impossible to achieve just result free from later recriminations or bias or malpractice, unless both parties are represented by separate counsel.<sup>60</sup>

A generation of divorce mediators and their relieved and satisfied clients have put a lie to that dire prognostication . . . but institutionally, most divorces are still addressed as if they were incipient litigations. Alas, they needn't—and shouldn't—be.

### VIII. THE PREMISE OF MEDIATION

Divorce mediation has, however, grown over the last generation as a common-sense alternative to matrimonial litigation precisely because it challenges those seven myths of litigation:

- i. COMBAT: Mediation works a paradigm shift, helping each person deal with the other as a former partner facing a shared set of problems for the future, rather than as an enemy or adversary.
- ii. COMPETENCE: Mediation reinforces—nay insists—on the competence and authority of the two people directly involved to negotiate and reach their own decisions about

---

<sup>59</sup> See John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. L. 411 (2012).

<sup>60</sup> NY BAR ASS'N COMM. ON PROF'L. CONDUCT, OP. 80–23 (1981).

- their children, finances, and the outlines of their future lives.
- iii. **COURT:** Mediation refocuses negotiations away from the courthouse and abstract debates of “rights” and “The Law”; participants are informed of statutory standards, but liberated to adopt solutions that make sense to them, given whom they have been and the understandings and expectations by which they had previously conducted their lives.
  - iv. **COST:** Mediation enables couples to reach resolution in a time-frame of months rather than years, and with a cost measured in a few thousand dollars rather than tens or hundreds of thousands of dollars. (The emotional savings for them and for their children of proceeding in a forum that doesn’t permanently demonize the other parent is quite simply incalculable.).
  - v. **CAUSATION:** Mediation focuses on plans for the future—and refuses to afford the couple a forum for the destructive and ultimately futile squabbles of trying to win their departing spouse’s acceptance of their view of what had happened in the past.
  - vi. **“CUSTODY”:** Mediation avoids the competitive contest of labeling and helps parents work through the practical details of how each will remain in relationship with their children through a viable parenting schedule and a method for decision-making, even after the adults start to live in separate households.
  - vii. **CONTROL:** Mediation insists that attorneys play the role of counselors and not of principals, allowing the spouses to retain greater control over both the process of discussion and the decisions that flow as the outcome.

These benefits offered by mediation have, however, brought with them a reaction from the organized bar, who (correctly) perceive a growing competition for the “consumers” of divorce services, many of whom now elect to proceed outside the classic litigation system. It is hardly surprising that impediments to the practice of mediation—such as bar rules against the drafting of mediated agreements—should be strewn in the path of the radical reformers whenever possible.

## IX. DRAFTING DILEMMAS – ROLES AND RULES

Other than the economic professional threats posed by the growth of mediation and these larger questions of the democratization and de-legalization of divorce, there are particular, practical reasons why the question of mediator drafting should be resolved in favor of scribing. Focusing back on the specific question of mediator drafting, the better outcome would certainly be to permit—if not encourage—mediators to be the scribes of their parties' agreement.

In times past, a “scrivener” was simply a “professional or public copyist or writer”<sup>61</sup>—a minor legal functionary fulfilling the role of amanuensis recording (rather than as the professional creating) the content of a contract. The concept is useful to the present inquiry because the term captures the essential truth that at the moment that a divorce mediator finishes helping an unhappy couple reach all the parenting and financial terms of their marital settlement agreement, that neutral's role in generating the documents to memorialize those understandings (and filling out the papers to obtain their divorce decree from the Court) is more analogous to the ministerial one of reflecting the settlement terms accurately on paper rather than the “representation” of one client's interests against the other familiar from traditional litigation contests.<sup>62</sup>

This question of what the mediator's transcribing role should be actually incorporates four related but distinct inquiries. First, it is necessary to distinguish between the task of drafting the comprehensive agreement and the less creative (but traditionally more lawyerly function) of generating and presenting divorce papers in court for a Judge's approval and the issuance of a decree. The first set of questions is therefore whether an attorney-mediator should draft a) the settlement agreement, and b) the divorce filings. Second, while all mediators may be created equal, not all have the same professional credentials—and the answers to these same two questions may perhaps be different depending on whether the mediator is a duly admitted attorney in the jurisdiction or a non-attorney mediator. The second set of questions is therefore: should a

---

<sup>61</sup> <http://www.merriam-webster.com/dictionary/scrivener>.

<sup>62</sup> The term is probably best known from its use by Nathaniel Hawthorne in his enigmatic short story, “Bartleby, the Scrivener: A Story of Wall Street,” first published in the middle of the 19th Century. NATHANIEL HAWTHORNE, *BARTLEBY, THE SCRIVENER: A STORY OF WALL STREET* (1853).

NON-attorney mediator draft a) the agreement, and b) the divorce filings.

As explored earlier, in many jurisdictions it is commonplace for the settlement agreement to be drafted by the mediator who is also an attorney,<sup>63</sup> and there is a practical and procedural efficiency in not having to bring in and educate a second, outside professional to the terms of any settlement. As has been previously observed in this Journal, “An effective divorce mediator must be able to draft custody and/or other agreements such as property division agreements.”<sup>64</sup> If an outside drafter must be employed, the details of the agreements reached in the mediation sessions must somehow be transmitted to the scrivener; the alternative is to let one party transmit the information to their own counsel for drafting, which runs the risk of partisan distortion and may induce strategic, rather than neutral, drafting.<sup>65</sup>

While a rule against attorney-mediator drafting may profit the current professional gatekeepers, from the public’s perspective it makes little sense. As a practical matter, the mediator has been personally involved in the negotiation of all the details of the settlement, and remains in the best position to record on paper precisely what the couple had decided to do. Clarity as to the conclusions reached is an obligation owed by mediators to their clients, and “it remains the mediator’s duty to be sure that the participants do not leave the mediation without a complete understanding of the details of their agreement.”<sup>66</sup> Indeed, one reason that couples might opt for an attorney-mediator in the first instance is the assumption that as a lawyer this neutral will be drafting the agreements emerging from the mediation,<sup>67</sup> and it is even predicted that documents scribed by these attorneys run a lesser risk of rejection by counsel for the individual clients or the Court.<sup>68</sup>

It is simply inefficient for an attorney-mediator to draft up an interim “Memorandum of Understanding,” just to have another at-

---

<sup>63</sup> Dee M. Samuels & Joel A. Shawn, *The Role of the Lawyer Outside the Mediation Process*, 1 MED. Q. 2, 16 (1983).

<sup>64</sup> Jaime Abraham, *Divorce Mediation Limiting the Profession to Family/Matrimonial Lawyers*; 10 CARDOZO J. OF CONFLICT RESOL. 241, 260 (2008).

<sup>65</sup> A large number of people going through divorce will also simply not be able to afford to have an attorney do the drafting.

<sup>66</sup> KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL* 207 (2003).

<sup>67</sup> Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 471-2 (1999).

<sup>68</sup> Abraham, *supra* note 64 (citing David L. Price, *Client to Client Divorce Mediation*, 44 ORANGE CTY L. 10, 10 (2002)).

torney translate the deal terms from plain English into “legalese”. The concept of a Memorandum of Understanding (or “MOU”) was created by John Haynes, “the best of the best among mediators,”<sup>69</sup> and one of the founders of the divorce mediation profession.<sup>70</sup> The MOU was always meant to be a simple interim document to memorialize the agreements of the parties in plain English; drafted without signature lines, a Memorandum of Understanding was not meant to serve as the binding document executed by the parties and submitted to the Court.<sup>71</sup> It was designed to allow the couple to review a detailed, written recitation of their agreed-upon proposals to ensure accuracy and communicate the deal points to whatever professional scrivener would draft the operative legal agreement.

If the mediator is an attorney, the MOU is simply a wasteful exercise. Who pays for the extra time spent in drafting this interim document that transmits the deal points to the scribe? What details may be lost when the operative document is generated by someone other than the professional who was present for all of the negotiating sessions? What can be done for those many couples who—given the inevitable economic crises arising from the additional costs of a second household in divorce—cannot afford to hire outside counsel to study and draft the formal agreement from the informal one?

For mediators who are attorneys, it makes little sense not to do the scribing of the final papers; they should simply draft the deal.

## X. UNAUTHORIZED PRACTICE OF LAW PROBLEMS

What, however, of non-attorney mediators? The drafting of contracts for clients has traditionally been the province of the legal profession, and there have been nightmare examples of Unauthorized Practice of Law proceedings brought against non-attorney

---

<sup>69</sup> Paula M. Young, *A Connecticut Mediator in a Kangaroo Court? Successfully Communicating the ‘Authorized Practice of Mediation’ Paradigm to ‘Unauthorized Practice of Law’ Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1055 (2008).

<sup>70</sup> JOHN M. HAYNES, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* (SPRINGER PUBLISHING, 1981).

<sup>71</sup> This was Haynes solution for non-attorney mediators to the “Unauthorized Practice of Law” problem; *id.*, at 175.

mediators<sup>72</sup> and even an attempt to discipline an attorney-mediator who drafted the parties' formal agreement.<sup>73</sup>

But what actually constitutes as "the practice of law"? Problems arise when authorities simply prohibit as the protected province of lawyers all acts that are traditionally within the compass of an attorney's traditional duties; one immediately falls into a Kafkaesque, circular universe that codifies historic turf boundaries and permits no change or innovations that would erode the legal monopoly. In effect, progress is prohibited.<sup>74</sup> If an activity had previously fallen within the Legal Guild's territory, courts continue to afford the protection. Defining the practice of law as those tasks that have traditionally fallen within the purview of attorneys provides a convenient crystallization of boundaries that precludes change.

However, there is an alternative approach to defining permissible behaviors of "legal" practice by specifying actions, rather than delineating boundaries.

#### XI. A PRACTICAL APPROACH—THE CERTIFIED MEDIATION SCRIVENER

One answer may be to promulgate expanded professional parameters that define drafting boundaries under a new paradigm. As with the "practice of law," perhaps it is simply impossible to define the enigma of what divorce mediation is using existing frames of reference. It is not the practice of law, but does involve legal practice—a recognized paradox ("Not all law practiced by non-lawyers is unauthorized.")<sup>75</sup> It is not therapy, although the process frequently provides therapeutic moments. Nor is it financial planning . . . but it does help people make economic plans for the future. Rather than continue to struggle to delineate the appropriate boundaries of mediation using the framework of its myriad professions of origin, perhaps it is easier—and more

---

<sup>72</sup> See, e.g., Young, *supra* note 69, at n. 43.

<sup>73</sup> NY STATE BAR ASS'N., *supra* note 41.

<sup>74</sup> See, e.g., State Bar Ass'n of Conn. v. Conn. Bank & Trust Co., 140 A.2d, 863,871 (Conn. 1958) (noting that the Connecticut Court of Appeals proclaimed "We do not hesitate to say, however, that if the record indicated that [an activity] would be "commonly understood to be the practice of law," we would hold that the acts performed constituted the unlawful practice of law.).

<sup>75</sup> Westrum, *supra* note 20.

constructive—to adopt an entirely new perspective. . . and describe acceptable activities.

Ironically—but perhaps with poetic justice—Washington State, in the very same year that it re-kindled the debate over whether attorney-mediators should draft documents in its advisory ethics opinion, also approved a process for NON-lawyer mediators to draft documents which perhaps provides a possible solution to the drafting enigma.<sup>76</sup> In 2012, that state’s Supreme Court promulgated a Practice Rule for “Limited License Legal Technicians” in response to the “wide and ever-growing gap in necessary legal and law related services for low and moderate income persons.”<sup>77</sup> The rule requires training (and certification after testing) of people with given educational credentials (short of a law degree), who would then be authorized to help people craft the paperwork for their divorces.

Drawing on that model, separate instruction and testing for certification as an independent “C.M.S.”—“Certified Mediation Scrivener”—might well answer the question of who should be entitled to draft the documents emerging from mediation—eschewing the debate over whether drafting is or is not the practice of law, and simply authorizing those people deemed competently trained to perform the task. (The precedent would be to parallel the certification process utilized to authorize practice for another antique, quasi-legal factotum—the Notary Public.).

Truth be told, most marital settlement agreements are assembled rather than drafted. Instruction on the necessary components of the agreement, and provision of an encyclopedia of commonly used clauses to select from, could allow drafting of some 95% or more of each document, without any original literary efforts by the “scrivener.”<sup>78</sup> This is a narrow, focused skill set.

---

<sup>76</sup> See SUP. CT. OF WASH., ORDER NO. 25700-A-1005, [http://www.wsba.org/~media/Files/Licensing\\_Lawyer%20Conduct/LLLT/20120615%20SCt%20Order%20%20Legal%20Technician%20Rule.ashx](http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/LLLT/20120615%20SCt%20Order%20%20Legal%20Technician%20Rule.ashx); See also *Limited Practice Rule for Limited License Legal Technicians*, WASH. CTS. (Sept. 3, 2013), [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=APR&ruleid=gaapr28](https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr28).

<sup>77</sup> *Id.*

<sup>78</sup> There are a limited number of combinations and permutations for most of the foreseeable issues in a marital settlement agreement, and these can be provided to the sanctioned scriveners to choose from — paragraphs, say, for: a) he keeps the car, which is in his name; b) she transfers the car, which is in her name, to him; c) she keeps the car, which is in her name; d) he transfers the car, which is in his name, to her; e) they transfer the car, which is in both names, to him; f) they transfer the car, which is in both names, to her; g) they sell the car, and divide the proceeds as follows: . . . . Particular cases will inevitably call for hand-crafted provisions, but the vast majority of possible outcomes for the issues in a divorce can be taken “off the shelf.”

If drafting professionals could be recognized and certified, experienced mediators without law degrees could be tested to insure competence in drafting settlement documents and authorized to help their mediation clients to closure without the ominous threat of Unauthorized Practice of Law prosecutions.<sup>79</sup>

(At the risk of offending some colleagues, it might also be prudent to also have even divorce mediators who have J.D. degrees sit for certification as a “Certified Mediation Scrivener” unless a given practitioner were sufficiently experienced to be “grandfathered” in (by perhaps submitting five previously drafted marital settlement agreements for review). Neither graduating from law school nor passing the Bar actually provides any practical training in drafting marital agreements or divorce pleadings; these skills are neither taught in law schools nor tested in admission to the Bar. Unfortunately, law schools have for generations erred on the side of striving to be graduate institutions rather than professional schools that train their students for practice.)<sup>80</sup>

Washington State Ethics Opinion 2223 invokes the State’s statutory definition of the practice of law as the application of judgments to the situation of another “which require the knowledge and skill of a person trained in the law.”<sup>81</sup> It is time we admitted that law schools simply do not prepare their students to actually practice law.<sup>82</sup> However, drafting marital settlement agreements and the accompanying divorce papers actually do not require the skills of a person trained in law school; they require the skills of a scrivener trained in drafting divorce documents.

There is no good reason to assume that only an attorney can draft a settlement agreement—or, for that matter, that an attorney is already competent to do so simply because of their J.D. degree. Perhaps it is time to extract these tasks from the theoretical debates that surround them, and simply have each state certify those

---

<sup>79</sup> Colorado, for example, licenses real estate brokers to fill out legal forms on behalf of clients, determining by examination those deemed to be competent to be among those licensed by the state “to ‘practice law’ in limited situations.”

<sup>80</sup> Few courses offered in American law schools provide useful instruction in the practice of divorce law—certainly not the commonly available but universally theoretical survey course in “Family Law”—much less the fine art of drafting a marital settlement agreement. The author takes pride that the Divorce Mediation Clinic, and the course offered in New York Matrimonial Drafting and Procedures at the Benjamin N. Cardozo School of Law in New York City that are exceptions to this rule.

<sup>81</sup> WASH. CT. GEN. R. 24(a) (2002).

<sup>82</sup> The level of institutional denial in this regard is breathtaking. See, e.g., *The Emperor’s New Clothes* in HANS CHRISTIAN ANDERSEN, *THE COMPLETE FAIRY TALES AND STORIES*, TRANS. ERIK CHRISTIAN HAUGAARD 77 (Anchor Books, 1983).

professionals—regardless of background—who demonstrate competence as authorized to perform these much-needed tasks as ancillary functions to their duties as divorce mediators.

## XII. CONCLUSION

Despite the conflicting opinions from across the country as to the wisdom or propriety of an attorney-mediator drafting the settlement agreement for their mediated couples, it seems appropriate to accept the practice as an essential and efficient extension of the divorce mediation process. Old, monopolistic unauthorized practice of law restrictions can and should be abandoned, and well-trained mediators—whether attorneys or not—should be formally credentialed to draft settlement agreements and assist couples in filling out the papers to obtain their divorce.

We as a nation need to do more to expand access to justice for the large number of couples who need divorce, rather than seeking to impede those who help provide such avenues—even if to do so means the abandonment of some venerated notions of the role of lawyers and a challenge to entrenched economic interests. The simplification and democratization of dispute resolution—rather than the preservation of a historic professional monopoly—should be our goal in the century to come.

