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DIVORCE MEDIATION: A HOUSE DIVIDED (Part I)

By Lenard Marlow

The early settlers who founded divorce mediation came from many backgrounds. Many came from the mental health field. That was understandable. It was mental health professionals, charged with the responsibility of picking up the pieces of families after lawyers got through with them, who had seen the damage caused by adversarial divorce proceedings, first hand. Then, too, there were lawyers, slowly in the early years, but increasingly so as time went by. That was understandable as well. After all, there was a significant legal piece in divorce mediation. The subject matter that would make up the bulk of the mediation (decisions relating to child support, maintenance, the division of property, etc.) were necessarily affected by the law. Then too, the parties' ultimate agreement had to be reduced to a written legal document. Finally, the parties' divorce necessarily involved the law and the courts.

But they came from other backgrounds as well. There were clergymen, accountants, financial planners, retired businessmen, former real estate brokers. There were even some who could not be identified that precisely. They were just the interested others. They made up a somewhat mis-matched army. To be sure, over time, there were two groups that clearly came to be identified with the field, mental health professionals and lawyers. But though they were unified in purpose, they were unified in little else. Their previous experience gave them little in common. They certainly had not had the same training. They did not even think in the same way or speak the same language. In fact, they were somewhat strange bedfellows.

This was not a problem in the early days of divorce mediation. To be more accurate, it was, but no one chose to see it as such. Thus, their answer was to try to keep their lines clean. This was much harder for mental health professionals to do. Since mediation was not a form of therapy, but was what lawyers had done all along, just in a different form, lawyers could perform both the

mediation component and the legal component. Mental health professionals, on the other hand, could not.
Their answer to this was either to team up with a lawyer or, if they did not do that, to refer the couple to a lawyer to prepare their agreement or have them go out and get their own lawyers.

Nevertheless, there were problems with this solution. To begin with, it was not possible to separate the mediation and legal aspects of the process that simply. After all, legal questions inevitably came up in the course of the mediation. But there was also the danger that the mediator would lose control of the mediation; that the lawyers who now became involved would undermine the mediator's efforts and the agreement that he or she had so carefully helped the two of them put together. Mediators' answer to this was to send the parties off to "mediator friendly" lawyers. To be sure, that only solved one problem by creating another. The two of them were supposedly being sent off to assure that they had independent representation, but the lawyers they were being sent to, being beholden to the mediator who had referred the couple to him, was not really independent. He or she certainly wouldn't be thanked for criticizing their agreement; nor was he likely to get any more referrals. Mediators tended not to see this problem, even when it was called to their attention.

Be that as it may, this somewhat unholy alliance of mental health professionals and lawyers has hobbled along for many decades now without major incident and, if problems arose, as they could not help but do, all concerned just looked the other way. In fact, the unholy alliance might have continued in much the same way indefinitely had not something come along. That something was "certification."

For reasons that are not very clear, "certification" has recently become the call to arms in the field of divorce mediation, and it is being pushed with great fervor and intensity on both the national and local level. Divorce mediators are tired of being the step-child to the rightful heir. They want to take what they consider to be their rightful place in the pantheon of accepted practice rather than being referred to as just a "half-way" house on the road to this or that.

The problem, of course, is that the practitioners of those other processes have a degree and a license (as a lawyer or as a mental health professional) or a certification (as a financial planner). That is what permits them to call themselves a "profession," and the public to view them as such. Perhaps, if divorce mediation had one of those honorific titles as well, the general public would view it in a different light; would view it, like the practice of law and social work, as a profession. Perhaps, that is what divorce mediation needs to finally get it off the ground (to get divorce mediators more business).

There is no such thing as a license to practice divorce mediation (Since a license involves the state, and since the laws that a state enacts are greatly influenced by the financial interests of lawyers, that is not something that divorce mediators should be advocating for). Though there are degrees in dispute resolution generally, there are no degrees in divorce mediation, specifically. All that leaves is certification, and that has become the rallying cry of all of the various associations of divorce mediators. As it is argued by some that the right to bear arms guaranteed by the Second Amendment to the United States Constitution will be undermined by any attempt to place limits on the use of guns, so is it argued by its advocates that divorce mediation's very survival is dependent upon its certification, as it is only that certification that will justify divorce mediation to refer to itself as a "profession" and, as such, on a par with the legal profession and the mental health profession.

What does someone have to do to become certified in a particular field of discipline? As a general rule, he or she has to do two things. First, demonstrate the mastery of the body of knowledge which is the subject matter of the field in question. Second, demonstrate mastery of the skills involved in the practice of the field in question. In keeping with that, the proponents of certification have proposed two things. First, there will be a written or oral examination to determine that the applicant has mastered the subject matter in the field. Second, there will be a professional testing service that will be employed to observe the applicant to determine that he or she has mastered the skills involved in the practice.

That is where divorce mediation's divided house comes in. As I said, up until this point divorce mediation has been able to hobble along without paying serious attention to this problem.

However, with certification it has been forced to come face-to-face with it. That is because those behind the move to certification do not want the field made up of practitioners who conduct mediation on the basis of two very different, and in many respects incommensurate, professions of origin. That leaves us with two professions, not one. Worse, it leaves us with the problem that one of them will be viewed as having less status than the other. That will not do. Rather, they want to create one profession, which means to obliterate the distinction that has made us a house divided. Thus, there is not going to be one certification (test) for mental health professionals and another for lawyers. There is going to be one test for both.

Let us take the first of the two tests that will be administered, that to test whether the applicant has mastered the body of knowledge which is the subject of the field. With that in mind, let me give you my dictionary's definition of a profession. It is "a vocation requiring knowledge of some department of learning or science." To be sure, the professions of origin of both lawyers and mental health professionals could boast such knowledge. But on what independent knowledge would the applicants for certification as divorce mediators be tested? (We are certainly not going to test a mental health professional on his or her knowledge of the law, any more than we are going to test a lawyer on his knowledge of the principles and substantive factors that make up mental health practice). Therein lays the problem. When it comes to the substantive knowledge that informs divorce mediation practice itself, you could write it all down on the back of a postage stamp. That is because there is none. The substantive knowledge is that of the separate professions of origin of all of those who have joined together to practice divorce mediation, not divorce mediation itself.

One answer to this would be to send back all mental health professionals to law school, and to send back all lawyers to a clinical graduate school. Now they would both have a common body of knowledge (to be sure, drawn from two professions, not one) upon which they could then be tested. But we are not going to do that. It is too impractical. Thus, there is no examination that can be given that will test for this substantive knowledge.

The same is true when it comes to the second of the two tests. To be sure, though there are some practical (really political) problems here, it is possible to separate the wheat from the chaff when

it comes to mediator competence. There are some practitioners who are very good mediators and there are some who are not, and it shouldn't be too difficult for someone with experience to tell the difference. But how do you test whether someone is following the correct procedure when, because the field is made up of practitioners who come from different professions of origin, they do not follow the same procedure? After all, as a lawyer cannot do what a mental health professional does, a mental health professional cannot do what a lawyer does which, in the context here, is to answer legal questions, express legal opinions and draft legal documents.

Ironically, even if all divorce mediators were lawyers, there would still be a problem here. That is because lawyers in the field do not necessarily follow the same procedure. Some will perform all of the legal functions necessary, including processing the parties' divorce papers. Others will go no further than to help the two of them come to an agreement, insisting that they must then go to another lawyer or lawyers to draft the agreement. Even if the mediator is willing to draft the agreement, he or she may still insist that they each consult with their own separate lawyers before the mediator will see to its execution. Even then, some lawyers in the field will not be willing to process their divorce papers. In fact, one might properly characterize divorce mediation as a practice in search of a process.

This, again, is where divorce mediation's divided house comes in. Those behind the move for certification want to create a profession and they see certification as the means to do it. But they want it to be one profession and not, as is currently the case, two professions doing somewhat parallel, but nevertheless different things. Most important, they want to eliminate any special status that one of the current groups of practitioners has based on the fact that they have a license to practice law. In short, they want to eliminate divorce mediation's divided house.

[In Part II (next issue), we will consider how the proponents of certification propose to eliminate divorce mediation's divided house]

Lenard Marlow, a graduate of Columbia University School of Law, has been a practicing attorney for over fifty years. A fellow of the American Academy of Matrimonial Lawyers, he has worked exclusively in the field of family law for over forty-five years. As a pioneer in the field

of divorce mediation, he is the founder of Divorce Mediation Professionals, one of the oldest and largest divorce mediation facilities in the United States. Past president of the New York State Council on Divorce Mediation, and a respected leader in the field, he has lectured extensively on the subject, both in the United States and Canada, as well as in Europe and South America, where he has conducted numerous trainings and workshops.

DIVORCE MEDIATION: A HOUSE DIVIDED (Part II)

By Lenard Marlow

As a follow-up to Part I of this article (with the same title) that was published in the Spring 2013 issue of *The Professional Family Mediator*, we continue with Part II by asking the critical question: How do the proponents of family mediator certification propose to eliminate divorce mediation's divided house?

This question was answered by the panel members of a plenary discussion at APFM's First Annual Conference in Cape Cod. The panel was asked the question of whether divorce mediators who were mental health professionals should be allowed to draft the parties' ultimate agreement. All of the panel members were lawyers (one was also a mental health professional) and they all argued that mental health professionals *should* write up the agreements. In other words, it did not take any special competence that could only be acquired by going to law school to do that. Needless to say, this is not an argument that a panel of mental health professionals would likely have felt comfortable making. In fact, it would have been very presumptuous for someone who was not a lawyer to suggest that he or she was qualified to perform what was obviously a legal function. As one of the panel members stated in his handout, "We should be carefully training new mediators . . . to make sure they are not giving legal advice, holding themselves out as lawyers, or practicing law in any manner . . ." Obviously, that would be the unauthorized practice of law. Nevertheless, and somewhat incredibly, that same panelist went on to insist that "we should be standing for mediation agreements to be uniformly excluded from such a definition."

How did he justify excluding the preparation of mediation agreements as representing the practice of law? He started by saying that "Settlement agreements in divorce mediation should be no different from settlement agreements in other matters." He then argued that students, clerks and volunteers are not only routinely employed "to mediate in small claims, municipal and landlord tenant courts" but that the court "trains and requires the mediators to prepare settlement agreements when the process is successfully completed." If that does not constitute the unauthorized practice of law, then neither does a divorce mediator's preparing the parties' ultimate agreement.

The document prepared by a divorce mediator is not a "settlement agreement" consisting of one or two pages. It is a very comprehensive agreement (When the parties have children, my agreements typically run to at least fifty or more double-spaced pages, not including attachments). None of us would suggest that a student, clerk or volunteer would be competent to prepare a partnership agreement for two people who were planning to go into business together. What makes them more competent to prepare an agreement for the two of them when they are dissolving their business? Nothing, and referring to it as a “settlement agreement” does not change that.

There was another argument made that was no better. This was based on the fact that so many people today get divorced *pro se* (acting as their own attorneys). They not only process their divorce papers on their own, but they also prepare (draft) their property settlement agreement or separation agreement by themselves, without anyone else’s assistance. Let us grant that the attorney who advanced this argument has established that the parties who appeared *pro se* were competent to prepare their own agreement and perform an act that we thought was strictly within the competence of lawyers alone. Let us go further and assume that, carried away by what they have done, one of them decides to help others who find themselves faced with a similar problem. He is going to hold himself out not as a divorce mediator but as a divorce consultant. In other words, like divorce mediators who are mental health professionals, he is going to prepare the agreements that divorcing husbands and wives have come to and will ultimately sign.

And, like a mental health professional now acting in the same capacity as a divorce mediator, he is going to charge them for his services.

Are any of us going to feel comfortable with this? To put it more directly, will even the attorney who used this as the basis for her contention that mental health professionals acting as divorce mediators should be permitted to do this feel comfortable with this suggestion? The question is a rhetorical one. As a matter of public policy, we do not want to give lawyers such a monopoly when it comes to the law that private citizens cannot do their own legal work, whether they are competent to do so or not. But, this does not mean that we are willing to expose the general public to their incompetence.

However, the irresponsibility here goes beyond that. In the name of certification and the need that it has created to erase any distinction between the two principal disciplines that have contributed to this field, we seem willing to reduce to literally nothing the skills that go into becoming a lawyer. If I were to suggest that, on the basis of the two weeks that I spent in a Psych 101 course, I am competent to do psychotherapy, I would be laughed out of the room. But, that is exactly what we are saying when it comes to the practice of law. There is nothing so special about it. If you can read English, you can read and understand a legal decision. And if you can write in English, you can draft a separation agreement.

One panelist went further; in a private conversation he said that, on the same basis, a divorce mediator who was not an attorney could even express a legal opinion! No, he can't. To express a legal opinion is to make a prediction as to what a court will do in a particular situation. The problem, as any competent lawyer will tell you, is that it is not possible to know that with any reliable certainty, which is why a responsible lawyer will be very careful when it comes to expressing a legal opinion. I won't even get into the fact that any opinion that a mediator expresses cannot help but favor one of the parties, which is why a competent mediator will be very careful when it comes to expressing any legal opinion. He is supposed to be a neutral third party, not an advocate for one of the parties.

The same is true when it comes to drafting a legal document. Knowing how to write a letter to a friend does not make one competent to draft an agreement, particularly one as complicated as the one under discussion here, which in most instances is going to define the parties' financial relationship with one another for years to come. In fact, drafting is one of the most difficult tasks a lawyer is required to perform, and if the truth be told, far too many lawyers are seriously deficient in this area.

What is the answer here? Pursuing that would take us too far afield here. All that I am going to say is that the answer is not to push for certification at the expense of blurring the distinction between being a lawyer and not being a lawyer. Providing legal information, expressing legal opinions and drafting legal documents are not activities which any divorce mediator has the right to engage in unless he is a lawyer, and to suggest otherwise is irresponsible.

There is one final problem here and it, too, bears on the issue of responsibility. Those who are championing the idea that non-lawyer divorce mediators should have the right to draft the couple's ultimate agreement, and who have based that on the fact that students, clerks and volunteers are permitted to do that in small claims, municipal and landlord-tenant courts, have implied that there is judicial authority for this. In other words, they are suggesting that it has been determined, as a matter of law, that this does not constitute the unauthorized practice of law. But, that is simply not the case. To be sure, it is our public policy to encourage private citizens to resolve their disputes quickly and inexpensively and to give them whatever assistance is necessary for that purpose. That is why the courts mentioned enlisting the help of students, clerks and volunteers. But, they are not really performing legal services. They are simply acting as intermediaries. For the same public policy reason, the court then allows them to write down the settlement agreement that the parties have come to, which is little more than a ministerial act, and certainly not the act of lawyering that is involved in drafting a complex separation agreement.

If there is really no formal judicial sanction for this practice, why have lawyers not questioned it? They have certainly questioned lawyers drafting agreements for the parties under these circumstances, and there are numerous ethics opinions taking lawyers to task for doing this. If it

is not clear whether it is ethical for a lawyer acting as a mediator to prepare the ultimate agreement that the parties will sign, how can it be argued that there is no question that it is appropriate for a non-lawyer mediator to do this?

That raises another question: If the organized bar has questioned the propriety of an attorney acting as a mediator to draft the parties' ultimate agreement, why have they not questioned the fact that all of these students, clerks and volunteers are drafting "settlement agreements"? They have not questioned it because they do not care. The organized bar does not make its living in small claims, municipal or landlord tenant court. Nor do they make their living with divorcing husbands and wives who represent themselves *pro se*; couples who appear *pro se* cannot afford their services. But, they do make their living in those instances when divorcing husbands and wives turn for help, whether it is to divorce mediators or divorce lawyers, and as experience has taught us, they are not going to look away. On the contrary, they are going to be zealous advocates for their own cause, which is not to have people who are not lawyers and who therefore do not have the benefit of a legal education, take food out of their mouths. In short, they are going to challenge non-lawyers who have been encouraged to engage in this practice to defend the charge that they are engaged in the unauthorized practice of law.

This is where the issue of responsibility comes in. If any state or national organization passes a resolution authorizing non-lawyers to draft the parties' ultimate agreement, it should include a warning, to read something like the following:

"WARNING: The adoption of this resolution authorizing non-lawyer divorce mediators to draft or supervise the execution of the parties' ultimate agreement does not constitute a legal opinion and such conduct does not represent the unauthorized practice of law, and it should not be so construed. It is just the expression of the opinion of this organization, many of whose members are not lawyers. Accordingly, any non-lawyer mediator who is considering performing any of these services should not rely exclusively on the opinion expressed by this organization. Rather, they should consult with their own attorney and ask him or her to provide them, in writing, their opinion that such conduct is not in violation of the law and will not subject them to the charge of the unauthorized practice of law."

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