
NOTES

OUT OF JOINT: REPLACING JOINT REPRESENTATION WITH LAWYER-MEDIATION IN FRIENDLY DIVORCES

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I. INTRODUCTION

Joint client representation is a practice that is fundamentally important to the legal system. The cost of obtaining private legal services has been rising over the past decade.¹ This trend poses a serious problem: while the cost of these services has skyrocketed, the ability of large segments of the population to pay for them has not matched pace.² Often times, due to the economic constraints faced by an ever-growing segment of our society, parties in need simply cannot afford to obtain independent legal representation.³ To these individuals, joint representation constitutes one of

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1. Conference of Chief Judges and Conference of State Court Adm'rs, Report: Joint Task Force on Pro Se Litigation 3 (July 2002), at <http://cosca.ncsc.dni.us/PositionPapers/TaskForceReportJuly2002.pdf> [hereinafter Task Force Report] (stating that "[a] number of social, economic and political factors—especially the rising cost of legal representation relative to inflation . . . are believed to be at the root of the increase [of self-represented litigants]").

2. Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L.Q. 407, 407 (1994). See also Task Force Report, *supra* note 1, at 3.

3. Leo J. Shapiro & Associates, *Public Perceptions of Lawyers: Consumer Research Findings*, 2002 A.B.A. SEC. LITIG. 27.

the most viable and accessible methods of obtaining adequate legal representation.

Divorce litigation is one area where an overwhelming demand for legal representation exists and where the problem of unmet legal needs is particularly pervasive.⁴ One particular subset of divorce cases, the so-called friendly divorce, appears to be an ideal candidate for joint representation. In these cases, the couple has reached agreement on the majority of marital settlement issues and requires only limited legal assistance.⁵

Problems arise, however, when there is a conflict of interest between clients who are being jointly represented—a problem that is inherent in the friendly divorce.⁶ In such cases, an attorney's ability to represent both parties zealously and in conformity with professional standards may be compromised,⁷ a problem that is exacerbated by the fact that the attorney may not contract with a client to prospectively waive or limit malpractice liability.⁸

California represents a microcosm of this national problem: access to legal services is at a premium in California, and the state has one of the highest divorce rates in the nation.⁹ Thus, for Californians, the availability of joint representation in the context of friendly divorces is of paramount importance.

In California, the tension between ensuring access to legal services and safeguarding the legal system's integrity is addressed by Rule 3-310(C) of California's Rules of Professional Conduct ("Rule 3-310(C)") and the malpractice laws governing conflicts of interest. Rule 3-310(C) allows clients to waive conflicts by providing informed, written consent.¹⁰ This

4. See Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 124 (1993-94).

5. See discussion *infra* Part II.B.1.

6. Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 425-26 (2001). See also Mary E. Chesser, Student Commentary, *Joint Representation in a Friendly Divorce: Inherently Unethical?*, 27 J. LEGAL PROF. 155, 158-59 (2003) (stating that "when an attorney represents both parties to a divorce, he cannot exhibit the 'level of partisanship' that is generally expected in a lawyer-client relationship").

7. See *Klemm v. Superior Court*, 142 Cal. Rptr. 509, 512 (Ct. App. 1977).

8. CAL. RULES OF PROF'L CONDUCT R. 3-400(A) (2004).

9. See *infra* Part II.

10. Rule 3-310(C) of the California Rules of Professional Conduct reads in full:

A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

approach permits clients to be represented by their choice of counsel and lowers the cost of legal representation by increasing the available pool of attorneys. By contrast, the malpractice laws, as established by California caselaw, set out a far stricter standard. They hold that an attorney may be held civilly liable for malpractice when representing clients with conflicting interests, even if consent is first obtained.¹¹

This situation gives rise to a serious dilemma for an attorney because it creates a conflict between the ethical duties to represent clients in the desired manner and the potential legal liability in carrying out such representation. The question then is whether this apparently irreconcilable conflict can be resolved. This is a question of some importance: if the answer is no, then it would appear that joint representation will be inaccessible to those disadvantaged individuals who may need it most, such as in friendly divorces.

This Note addresses whether the seemingly contradictory nature of California's ethics rules and malpractice case law concerning conflicts of interest in a friendly divorce can be reconciled, and whether the practice of joint representation in a friendly divorce is permissible. Part II will discuss the economic and social realities that have spurred the demand for joint representation in friendly divorce cases. Part III will present an overview of both Rule 3-310(C) and the legal precedent set by seminal California cases dealing with malpractice liability in conflicts of interest cases involving divorce. It argues that the ethical rules and malpractice law can be reconciled: they both pose a de facto bar to the practice of joint representation in friendly divorce cases. Part IV proffers a possible solution to this problem—a paradigm shift from legal representation to lawyer-mediation. Given the distinct legal and ethical duties imposed upon an attorney in a mediation setting, such a shift will enable the parties effectively to achieve their goals without compromising the quality of representation or threatening the integrity of the legal system. This solution is far superior to the current alternatives of “break-the-bank” adversarial representation, pro se representation, or public legal aid. To this end, this Note suggests that Rule 3-310(C) be revised to explicitly address friendly divorce cases and affirmatively recommend lawyer-mediation in this context.

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

CAL. RULES OF PROF'L CONDUCT R. 3-310(C) (2004).

11. See *Klemm*, 142 Cal. Rptr. at 512; *Ishmael v. Millington*, 50 Cal. Rptr. 592, 595-96 (Ct. App. 1966).

II. JOINT REPRESENTATION IN CALIFORNIA DIVORCE CASES: THE RISING TIDE

A. EXPLAINING THE DEMAND FOR JOINT REPRESENTATION

The cost of obtaining legal representation is rising.¹² This trend poses a serious problem: while the cost of professional legal services has skyrocketed, the ability of large segments of the population to pay for those services has not matched pace.¹³

The national economy has been in a state of disarray for approximately four years.¹⁴ The current economic downturn has featured significant job losses¹⁵ and a recovery rate that is far slower than anyone anticipated.¹⁶ As a result, household incomes across the country are declining and the national poverty rate is increasing.¹⁷ This economic downturn has affected primarily those with low and medium incomes, exacerbating what was already a growing gap between rich and poor in this country.¹⁸

California's economy has largely mirrored that of the nation. The degree to which California has suffered, however, has been exacerbated by preexisting economic difficulties.¹⁹ Over the past decade, both the unemployment and poverty rates have been higher in California than the national average.²⁰ As of January 2004, over one million California

12. See *supra* note 1 and accompanying text.

13. See *supra* note 2 and accompanying text.

14. See Democratic Policy Comm., *President Bush's Record of Failure on Job Creation*, at http://democrats.senate.gov/dpc/dpc-doc.cfm?doc_name=tp-108-2-110 (Mar. 24, 2004) (reporting that 2.2 million jobs have been lost since President Bush took office and that the employment sector has been slow in its recovery). See also Lynette Clemetson, *More Americans in Poverty in 2002*, *Census Study Says*, N.Y. TIMES, Sept. 27, 2003, at A1 (reporting that the nation's median household money income declined 1.1% in 2002 and that the proportion of Americans living in poverty continues to rise).

15. Democratic Policy Comm., *supra* note 14.

16. See IMF, *WORLD ECONOMIC OUTLOOK 21* (2002) (finding that economic recovery in the United States was weaker than previously predicted).

17. Clemetson, *supra* note 14.

18. See Richard B. Freeman & Lawrence F. Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries*, in *WORKING UNDER DIFFERENT RULES* 29, 31–32 (Richard B. Freeman ed., 1994).

19. See Manuel Pastor & Carol Zabin, *Recession and Reaction: The Impact of the Economic Downturn on California Labor*, in *THE STATE OF CALIFORNIA LABOR* 37, 39 (2002) (asserting that California's recent recession followed a decade of economic inequality), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1003&context=ile>.

20. See CAL. COMM'N ON ACCESS TO JUSTICE, *THE PATH TO EQUAL JUSTICE: A FIVE-YEAR STATUS REPORT ON ACCESS TO JUSTICE IN CALIFORNIA* 7 (2002); Pastor & Zabin, *supra* note 19, at 39

residents were unemployed,²¹ and almost twenty-five percent of the nation's total poverty increase occurred in California.²² Additionally, California's population is following the national trend—the increasing disparity between rich and poor.²³ The wealth gap between rich and poor—already higher than at any time in the state's history²⁴—continues to increase in the wake of recent national events.²⁵ This disparity, however, has been far more extensive than that experienced by the rest of the nation, resulting in a much narrower middle class in California than that found in other states.²⁶

In sum, the emerging picture is one of a California in which a rapidly growing class of individuals can be described as either living in poverty or low-income earners. These are individuals who, with their limited resources, have little in the way of discretionary funds.

The question that emerges is this: What are these individuals to do when they require legal representation? While the cost of legal representation is rising,²⁷ there has been no corresponding increase in Californians' ability to pay for these costs. The unfortunate reality is that this economic trend has effectively priced these individuals out of the legal services market.²⁸ Studies have shown that while many individuals faced at least one situation per year in which they required legal representation,²⁹ the majority did not hire an attorney to address the matter.³⁰ The primary reason provided was cost.³¹

(providing a graph of statistical data indicating that, over the past twenty years, California's unemployment rate has consistently been higher than the rest of the nation).

21. Press Release, California Employment Development Department, California Unemployment Rate Declines to 6.1 Percent (Feb. 27, 2004).

22. CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 20, at 7.

23. *See id.* at 42 (charting the huge disparity in the increases to the median household income of the top twenty percent and bottom forty percent of wage earners). These data indicate a growing wealth gap in California.

24. *Id.* at 8.

25. *See* Pastor & Zabin, *supra* note 19, at 52–53 (discussing how California's most recent economic recession has been exacerbated by the tragic events of September 11, 2001, which have had a deleterious effect on a few economic sectors).

26. CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 20, at 8.

27. *See supra* note 1 and accompanying text.

28. *See* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 117–18 (2001); James W. Meeker & John Dombink, *Access to the Civil Courts for those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2218 (1993) (citing an American Bar Association poll indicating that a large percentage of Americans could not afford legal help).

29. CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 20, at 5–6.

30. Shapiro & Associates, *supra* note 3, at 26.

31. *Id.* at 27.

Public perception of the justice system further supports the contention that large segments of the population cannot access legal services. A majority of the population feels that legal procedures are too costly³² and that legal services are consequently inaccessible.³³ Additionally, public views on the judicial system have polarized along class lines—a fact supported by a recent study that found that people with higher incomes are more likely to have confidence in the U.S. judicial system.³⁴

Thus, the confluence of California's economic downturn and the rising costs of legal representation have created a situation where the legal needs of a significant portion of California's population are largely unmet.³⁵

B. THE FRIENDLY DIVORCE: A PARADIGM CASE IN THE JOINT REPRESENTATION DEBATE

1. The Friendly Divorce

One area where there is an overwhelming demand for legal representation and where the problem of unmet legal needs appears to be particularly pervasive is divorce litigation.³⁶ Divorce is becoming an increasingly common part of life. Over the past thirty years, the number of divorced Americans has more than quadrupled,³⁷ with statistics indicating that nearly half of those who get married are likely to get divorced.³⁸ California has not been immune to this phenomenon.³⁹ As the frequency of divorce has increased so has the need for legal representation in this area: a

32. DIV. FOR MEDIA RELATIONS & PUB. AFFAIRS, A.B.A., PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 12, 59 (1999), available at <http://www.abanet.org/media/perception/perception2.html>.

33. *Id.* at 12, 63.

34. *See id.* at 8, 9 (stating that individuals with higher income have more confidence in the judicial system than do other demographic groups).

35. *See* CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 20, at 3, 6; Berenson, *supra* note 28, at 117–18.

36. Murphy, *supra* note 4, at 124–27.

37. Press Release, Terry Lugailla, U.S. Census Bureau, Dep't of Commerce, Numbers of Divorced and Never-Married Adults Increasing Says Census Bureau Report (Apr. 13, 1998), available at <http://www.census.gov/Press-Release/cb98-56.html>. *See also* James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 877–78 (2000).

38. *See* Divorce Magazine, *U.S. Divorce Statistics*, at <http://www.divorcemag.com/statistics/statsUS.shtml> (last visited Nov. 20, 2004).

39. *See* Michelle Deis, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. ON DISP. RESOL. 149, 149 (1985).

recent study indicates that divorce is one of the leading reasons why people seek legal assistance.⁴⁰

As divorce has become increasingly commonplace, a new phenomenon has emerged: the so-called friendly divorce. With the advent of no-fault divorce statutes in the 1970s⁴¹ and greater social acceptance of divorce,⁴² many couples part ways on amicable terms. These individuals are often able to reach agreement on the majority of marital settlement issues outside the context of the adversarial litigation process. Often times, they require legal assistance only in a very limited capacity; for example, to inform them of their legal rights, guide them through legal processes, or help them resolve bargaining impasses. Consider, for instance, the following hypothetical case.

Tom and Dianne have been married for ten years. They are the proud parents of Nichole, their three year old daughter. The couple lives in a small, two-bedroom home in Southern California and owns no other property. Tom works as a grocery clerk at a major grocery chain, earning a net income of \$20,000. Dianne is a stay-at-home mother.

Lack of time together combined with the pressure of supporting a family and raising a child have created a rift between the couple. They have mutually concluded that their differences are irreconcilable and that the time has come to obtain a divorce.

Despite the difficulties in their relationship and the fact that they are getting divorced, Tom and Dianne remain friends and share a common interest in ensuring the well-being of their daughter. They are independently able to reach the following settlement agreement: they will share custody of Nichole; Dianne will care for her Monday through Friday, and Tom will have her on the weekends. Tom will pay alimony and child support and they agree that this amount will change to reflect any future increase in Tom's annual income. The house will be sold, and the proceeds will be divided equally between them. One issue, however, remains unresolved. Tom has a 401(k) retirement plan sponsored by his employer who matches each dollar Tom invests. Prior to marrying Dianne, Tom invested approximately \$10,000. Since marrying Dianne, he has paid in another \$15,000. The present value of the pension is thus \$50,000,⁴³ and it

40. DIV. FOR MEDIA RELATIONS & PUB. AFFAIRS, *supra* note 32, at 45.

41. Deis, *supra* note 39, at 149–50.

42. Berenson, *supra* note 28, at 105.

43. This represents the \$25,000 that Tom has contributed, as well as the \$25,000 contributed by his employer through its match plan.

is expected to be worth \$100,000 at the time of Tom's retirement. Tom contends that the savings belongs to him, while Dianne believes it is community property. She wishes to liquidate the plan immediately and divide the proceeds equally. Tom vehemently opposes this course of action. He argues that, assuming the plan is community property, it should not be liquidated presently because, in addition to the value lost by not waiting for the plan to mature on a tax-deferred basis, there may be a hefty penalty charged for withdrawing the funds early. Furthermore, he fears the possible tax implications of cashing in the plan—that the income might be taxed at a higher marginal rate causing additional financial loss. Tom and Dianne are unable to resolve this impasse, and both agree that they require legal advice.

How will low-income earners like Tom and Dianne access legal services? This question takes on great import as the friendly divorce becomes more common and as ever-growing segments of the population become unable to pay for traditional adversarial legal representation.

2. Joint Representation: Addressing the Legal Needs of Parties Seeking a Friendly Divorce

Couples like Tom and Dianne, seeking to finalize a friendly divorce, are faced with four potential courses of action within the context of the traditional legal system: (1) "break the bank" adversarial representation, (2) *pro se* representation, (3) public legal aid, or (4) joint representation. A careful examination reveals that joint representation is both the most viable and desirable of these alternatives.

"Break the Bank" Adversarial Representation. The traditional means of settling a dispute within the context of the legal system is for each party to hire an attorney.⁴⁴ This default approach may no longer be tenable for large segments of the population. Not only is adversarial representation becoming inaccessible because of costs, but in many cases it is also becoming an ineffective means of satisfying client needs. This is particularly true in the context of the friendly divorce.

Adversarial representation is becoming increasingly inaccessible in divorce cases. In California, the typical cost of a traditional adversarial

44. See Anthony P. Capozzi, *Responding to the Pro Per Crisis*, CAL. BAR J., Feb. 2004, available at http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/February2004&MONTH=February&YEAR=2004&sCatHtmlTitle=Opinion&sJournalCategory=YES.

representation in a divorce case ranges from \$6000 to \$14,000,⁴⁵ though costs may be significantly higher.⁴⁶ Such fees are simply beyond the financial reach of most medium- to low-income families.⁴⁷ In my hypothetical case, even assuming that the cost of independent legal representation for Tom and Dianne was at the low end of the spectrum, it would still represent a staggering thirty percent of the family's after-tax annual income. Thus, couples like Tom and Dianne can only engage independent legal representation if they elect to "break the bank."⁴⁸

Another drawback of traditional adversarial representation is its zero-sum mentality.⁴⁹ This is counterproductive in the friendly divorce context. The advantage of the friendly divorce lies precisely in that it is "friendly"—that is, the parties are in general accord over most matters and have been able to maintain a positive relationship despite the dissolution of their marriage. The goal of these parties in seeking out legal representation is to facilitate and maintain this relationship. They are, however, unlikely to obtain such results in the context of adversarial representation.⁵⁰ As one scholar has posited:

In the family law area . . . many judges, advocates, and commentators share concerns that the adversarial system can be counterproductive, frustrating rather than advancing the real needs of the parties. The adversary system works by emphasizing the differences between the litigants, and by advancing each litigant's wishes by attacking the merits of the other's position. In order to work as designed, divorce litigation actually polarizes the divorcing couple.⁵¹

Couples seeking to finalize a friendly divorce through adversarial representation may find their problems exacerbated rather than resolved.

Consequently, in friendly divorce cases, adversarial representation does not appear to be the most desirable means of obtaining legal services.

45. See Berenson, *supra* note 28, at 117–18.

46. See GARY J. FRIEDMAN, A GUIDE TO DIVORCE MEDIATION: HOW TO REACH A FAIR, LEGAL SETTLEMENT AT A FRACTION OF THE COST 56–57 (1993) (recounting the experience of a client whose divorce proceeding lasted three years and cost her \$50,000); Judith M. Wolf, *Sex, Lies and Divorce Mediation*, ARIZ. ATTY., Nov. 1996, at 24, 26.

47. See Berenson, *supra* note 28, at 117–18.

48. See Wolf, *supra* note 46, at 26 (stating that "[i]t is not unusual to have attorney fees that exceed the parties' assets at the time of trial").

49. See FRIEDMAN, *supra* note 46, at 36.

50. See *id.* at 16–17 (describing the deleterious effects of lawyer involvement on relationships between clients).

51. Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 377 (1999) (footnote omitted).

Pro Se Representation. *Pro se* representation refers to the practice of representing oneself without the aid of an attorney.⁵² Approximately eighty to ninety percent of all divorce cases involve *pro se* representation.⁵³ Despite the fact that *pro se* representation constitutes a significant cost-saving mechanism, it is one of the least desirable alternatives to adversarial representation.⁵⁴

There are numerous drawbacks to *pro se* representation. First, *pro se* litigants are often unprepared and lack the information necessary to represent their own interests adequately.⁵⁵ As a result, they “may lose a hearing they should have won, and even if they do win, they don’t know how to get their judgment implemented.”⁵⁶ Such results have been characterized as nothing less than a “threat to substantive justice.”⁵⁷ Second, *pro se* representation places a heavy burden on an already overtaxed court system. It causes delays in the courtroom⁵⁸ as under-prepared and overwhelmed *pro se* litigants struggle to present their case and comprehend the judge’s rulings.⁵⁹ It also places an added burden on judges and court staff to provide assistance to litigants who are unfamiliar with the norms and requirements of the courthouse,⁶⁰ or who “seek additional assistance in filling out the paperwork necessary to pursue their case[.]”⁶¹ Third, the apparent savings associated with *pro se* representation are, to some degree, offset by hidden costs. These costs include the time and energy expended by individuals trying to learn and understand the law, as well as the time, expense and stress associated with making various court appearances. Fourth, *pro se* representation may not constitute a viable course of action for far more personal reasons. For many, it constitutes a daunting task that they feel incapable of undertaking; the thought of operating within the labyrinth of the legal system, or of appearing in court before a judge may cause great anxiety to many individuals and prevent them from undertaking self-representation.⁶² Finally, in the context of the

52. BLACK’S LAW DICTIONARY 565 (2d Pocket ed. 2001).

53. See Capozzi, *supra* note 44. See also Berenson, *supra* note 28, at 110.

54. See Capozzi, *supra* note 44.

55. *Id.*

56. *Id.* See also Murphy, *supra* note 4, at 125–26 (reporting that judges often find that litigants receive unfair results due to a lack of legal representation).

57. Berenson, *supra* note 28, at 115.

58. Murphy, *supra* note 4, at 125.

59. Capozzi, *supra* note 44.

60. *Id.*

61. Berenson, *supra* note 28, at 112.

62. Paula L. Hannaford-Agor, *Helping the Pro Se Litigant*, CT. REV., Winter 2003, at 4.

friendly divorce, *pro se* representation would seem to offer no solution to the underlying problem.

As previously discussed, there are two primary obstacles facing most couples in friendly divorces. First, they face an information gap—lacking the necessary knowledge of the law and legal process to make informed decisions. Second, they often reach a bargaining impasse on one particular issue. *Pro se* representation does not provide a solution to either of these problems because it merely formalizes, for legal purposes, the already existing relationship between the parties without providing any added value.

Let us consider *pro se* representation in the context of our hypothetical case. If Tom and Dianne elect *pro se* representation, they will not obtain the counsel required to resolve their impasse. Moreover, it is unlikely that they will obtain the relevant legal knowledge as they must independently undertake complex legal research—a time consuming and potentially frustrating process. Assuming that Tom and Dianne are able to find the legal rules addressing the 401(k) plan, it is far from certain that either will be able fully to understand their meaning and significance. In fact, it is entirely plausible that each of them will interpret the law differently. This might pit the two against each other in a manner far more adversarial than that which previously characterized their relationship. What started off as a friendly divorce might rapidly deteriorate into a hotly contested battle. Consequently, the serious drawbacks of *pro se* representation render it a method that should be used only as a last resort.

Public Legal Aid. Public legal aid does not provide a panacea for those seeking to access legal services. Several fundamental flaws pervade the foundation of California's public legal aid system. First and foremost, adequate public services are often unavailable⁶³ because few financial resources have been invested to create an adequate support system.⁶⁴ In fact, California has devoted significantly fewer funds to public legal services than other states—approximately one-third of the per person spending undertaken by states such as New Jersey and Minnesota.⁶⁵ Second, many individuals are simply unaware that programs exist or that they are entitled to the services provided. Finally, low-income individuals

63. See Murphy, *supra* note 4, at 124–27.

64. See CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 20, at 33 (stating that California “still lags far behind many other states and nations with comparable economies in government funding for legal services”); Capozzi, *supra* note 44 (noting that in California there are 10,000 poor people for every legal aid attorney).

65. CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 20, at 33.

who are technically above the poverty line are ineligible to receive services despite the fact that they are unable to afford legal representation independently.⁶⁶ Thus, in our hypothetical friendly divorce, Tom and Dianne would be unable to access public legal services because the family's annual income of \$20,000 is \$2000 above the cut-off line in California.⁶⁷

Joint Representation. For couples like Tom and Dianne, joint representation is often the most viable means of obtaining legal assistance within the traditional framework. The term joint representation refers to situations where "one lawyer simultaneously represents two or more clients in a particular matter."⁶⁸ In Tom and Dianne's case, this would entail jointly meeting with an attorney to discuss the potential legal implications of their settlement, sorting through the morass of legal forms and procedures involved in the divorce proceeding, and resolving any outstanding issues or questions related to the divorce.

There are numerous advantages to this approach. First, joint representation significantly reduces the cost of legal services by effectively halving the cost of attorneys' fees.⁶⁹ Second, joint representation helps to maintain an amicable relationship between the opposing parties by circumventing the zero-sum mentality associated with the adversarial approach.⁷⁰ Joint representation is instead characterized by a mentality of mutual gain, which significantly reduces the likelihood that a minor impasse between the parties will degenerate into full-blown, protracted and expensive litigation.⁷¹ Divorces are handled more quickly and efficiently, providing clients with significant savings and helping to protect fragile interpersonal relationships.

This is not to say that joint representation is appropriate in all situations, or that it is the cure-all for the legal needs of the economically disadvantaged. To the contrary, there are numerous circumstances where it

66. See *id.* at 6, 9; Berenson, *supra* note 28, at 118; Murphy, *supra* note 4, at 126.

67. See Meeker & Dombrink, *supra* note 28, at 2218 (stating that California's Legal Services Program is "unable to serve families of four with annual incomes over \$18,000 a year").

68. Bassett, *supra* note 6, at 390.

69. See *id.*

70. *Id.*

71. See John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 747 (citing the potential for "peaceful resolution of a dispute without litigation and contentiousness" as one motivation for engaging in joint representation).

would be wholly inappropriate.⁷² Joint representation, however, appears to be the most appealing alternative available in the context of a friendly divorce.

Joint representation constitutes an effective and cost-efficient means of addressing legal issues that implicate some of “our most important and basic societal needs.”⁷³ The public has not failed to notice the advantages of joint representation in the friendly divorce context. The escalating costs and protracted litigation associated with traditional divorce proceedings are leading a growing number of individuals to joint representation as an affordable means of meeting their legal needs.⁷⁴ Unfortunately, they will find that joint representation for friendly divorce is unavailable in California.

III. CALIFORNIA’S DE FACTO BAR TO JOINT REPRESENTATION IN THE FRIENDLY DIVORCE

California, unlike several other states,⁷⁵ has not issued a definitive statement regarding the acceptability of joint representation in a friendly divorce. Attorneys are therefore required to undertake independent research to determine whether or not they may engage in the practice. When searching for guidance in California’s ethical rules and case law, attorneys are faced with a conundrum: while the ethical rules seemingly permit joint representation in the friendly divorce, malpractice laws appear to bar it. On closer examination, however, it becomes apparent that no such contradiction exists: both the ethics rules and malpractice laws effectively bar the practice of joint representation in a friendly divorce.

A. OVERVIEW OF RULE 3-310(C) AND MALPRACTICE LAWS: CONFLICTS OF INTEREST

The legal profession’s self-regulatory nature makes it distinct from most others. Attorneys and judges, as practicing members of the legal community, are charged not only with putting in motion the machinery of

72. Joint representation of adverse interests in the context of a litigated case, for example, would be inappropriate because it would be “per se inconsistent with the adversary position of an attorney in litigation.” *Klemm v. Superior Court*, 142 Cal. Rptr. 509, 512 (Ct. App. 1977). For a more detailed discussion of such situations, see *infra* Part III.

73. Capozzi, *supra* note 44.

74. See Andrew S. Morrison, Comment, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CAL. L. REV. 1093, 1093 (1987). See also Chesser, *supra* note 6, at 155.

75. Bassett, *supra* note 6, at 426–27 nn.172–73 (describing the firm stance against joint representation in divorce cases taken by numerous states).

justice, but also with the daunting task of creating the very rules of conduct that govern the legal profession. To this end, the State Bar and Supreme Court of California have compiled the Rules of Professional Conduct of the State Bar of California, which establish the professional standards and responsibilities of members of the legal profession for disciplinary purposes.⁷⁶ Rule 3-310(C) addresses the issue of conflicts of interest by recommending the appropriate course of conduct for attorneys who, during the course of joint representation, determine that their clients have adverse interests.⁷⁷ Specifically, it states that both potential and actual client conflicts may be waived by obtaining the informed written consent of both clients.⁷⁸

In contrast, a cause of action lying in malpractice is encompassed by the traditional framework of tort law.⁷⁹ As such, malpractice law only renders attorneys civilly liable for their conduct.⁸⁰ Unlike the ethical rules, which are designed as a self-regulating mechanism for the legal profession, the malpractice law's primary function is to offer redress to those who are harmed by their legal representatives' negligent conduct. Consequently, as stated in the Rules of Professional Conduct, they are not "deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the nondisciplinary consequences of violating such a duty."⁸¹ Rather, different standards apply to a cause of action in tort and an ethical violation, including causes of action stemming from conflicts of interest violations.⁸² Although no California case has directly addressed the liability of an attorney in the context of a friendly divorce, existing case law firmly supports the conclusion that attorneys who elect to represent both parties in such cases violate the fundamental duty to exercise the level

76. CAL. RULES OF PROF'L CONDUCT R. 1-100(A) (2004).

77. CAL. RULES OF PROF'L CONDUCT R. 3-310(C) (2004). *See also supra* note 10 and accompanying text.

78. CAL. RULES OF PROF'L CONDUCT R. 3-310(C) (2004).

79. *See Budd v. Nixen*, 491 P.2d 433, 436 (Cal. 1971); CALIFORNIA JURY INSTRUCTIONS CIVIL BAJI No. 6.37 (Paul G. Breckenridge, Jr. ed., 8th ed. 1994) (describing negligence standards). *See generally* W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, PROSSER & KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984) [hereinafter PROSSER & KEETON] (stating the elements of a negligence cause of action).

80. *See Budd*, 491 P.2d at 436; *Gambert v. Hart*, 44 Cal. 542, 553 (1872).

81. CAL. RULES OF PROF'L CONDUCT R. 1-100(A) (2004).

82. The elements of a cause of action for legal malpractice based on negligence are (1) the existence of a professional duty to use the skill and diligence commonly exercised by other members of the legal profession, (2) breach of that duty, (3) a proximate causal connection between the negligent conduct and the resulting injury, and (4) actual loss or damage. *Budd*, 491 P.2d at 436. *See also* PROSSER & KEETON, *supra* note 79, § 30.

of skill and diligence required by law and thus become civilly liable—even if they obtain the informed written consent of both clients.⁸³

This preliminary examination of both rule 3-310(C) and the malpractice cases addressing conflicts of interest brings to light a troubling reality: there is an apparent conflict between the two because the former appears to permit what the latter prohibits; namely, the possibility of continuing representation despite the existence of an actual conflict of interest. This conflict is particularly problematic for attorneys in the context of a friendly divorce because such cases fall into this zone of legal uncertainty.

B. MALPRACTICE AND THE FRIENDLY DIVORCE: A SPECTRUM OF LIABILITY

California courts have long acknowledged the potential malpractice liability incurred by attorneys who elect to undertake a joint representation in the context of a divorce.⁸⁴ An examination of the existing case law addressing this issue reveals a spectrum of liability in such cases.⁸⁵

A conflict of interest between jointly represented clients “occurs whenever their common lawyer’s representation of the one is rendered less effective by reason of his representation of the other.”⁸⁶ Conflicts of interest cases are divided into two distinct categories: potential and actual conflicts. Potential conflicts are those in which, at the outset of representation, circumstances exist that raise the specter of an actual and direct conflict of interest arising at some future point in time.⁸⁷ Potential conflicts are omnipresent in joint representation because serving two distinct parties creates the possibility that their interests may, at some point,

83. See *Klemm v. Superior Court*, 142 Cal. Rptr. 509, 512 (Ct. App. 1977). The court in *Klemm* found that:

[t]hrough an informed consent be obtained, no case we have been able to find sanctions dual representation of conflicting interests if that representation is in conjunction with a trial or hearing where there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another.

Id.

84. *Id.*; *Ishmael v. Millington*, 50 Cal. Rptr. 592, 595–96 (Ct. App. 1966). See also *Woods v. Superior Court*, 197 Cal. Rptr. 185 (Ct. App. 1983).

85. See *infra* Figure 1.

86. *Spindle v. Chubb/Pac. Indem. Group*, 152 Cal. Rptr. 776, 780–81 (Ct. App. 1979). See also *Hammitt v. McIntyre*, 249 P.2d 885, 889–91 (Cal. Ct. App. 1952) (holding that a lawyer may not represent both a civil defendant and its insurer at trial where the insurer seeks to establish no coverage for the defendant); *Pennix v. Winton*, 143 P.2d 940, 946 (Cal. Ct. App. 1943).

87. *Lessing v. Gibbons*, 45 P.2d 258, 261 (Cal. Ct. App. 1935); L.A. County Bar Ass’n, Formal Op. 471 (1992).

become adverse.⁸⁸ By contrast, actual conflicts cases are those in which the interests of the jointly represented clients have become directly adverse and the attorney is no longer able to advance both parties' interests simultaneously.⁸⁹

At the nonliability end of the spectrum are prelitigation divorce cases involving potential conflicts of interest. California courts have concluded that no malpractice liability exists if an attorney who undertakes such a case first obtains the clients' informed written consent.⁹⁰ These are the uncontested divorces⁹¹ in which the clients seek legal assistance to effectuate a preexisting arrangement. The courts have reasoned that, in such circumstances, the lawyer is acting as a mere scrivener⁹² and is not offering the legal advice required to sustain a malpractice claim.⁹³

Farther along the spectrum are cases involving potential conflicts in an actual court proceeding. Courts adopt a heightened level of scrutiny in these cases due to concern that an appearance before the court places a seal of legitimacy upon this practice.⁹⁴ Despite a heightened level of review, it is well established that "if the conflict is merely potential . . . then with full disclosure to and informed consent of both clients there may be dual representation"⁹⁵ in the context of a divorce proceeding. This approach centers on the courts' view that, because the conflict is potential, there is no point of contention that could justifiably lead one of the parties to question the efficacy of their legal services on conflicts grounds.⁹⁶ Consequently,

88. *Lessing*, 45 P.2d at 261.

89. *See Spindle*, 152 Cal. Rptr. at 780–81.

90. *See In re Marriage of Egedi*, 105 Cal. Rptr. 2d 518, 523–24 (Ct. App. 2001) (holding that, as a matter of law, spouses in a marital proceeding can waive a conflict of interest to settle property and support issues); *Davidson v. Davidson*, 204 P.2d 71, 75–77 (Cal. Ct. App. 1949) (holding that where a wife chose not to contest her divorce and repeatedly refused to employ counsel at the urging of her husband's attorney, the acts of the husband's attorney of negotiating her property settlement agreement and preparing her for waiver of notice did not constitute unethical conduct).

91. CAL. RULES OF PROF'L CONDUCT R. 3-310(C) committee's note (2004).

92. *Egedi*, 105 Cal. Rptr. 2d at 522–24; Richard E. Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 229 (1982).

93. *Egedi*, 105 Cal. Rptr. 2d at 523 (stating that "[a] single attorney acting as a scrivener should not advise the parties of the pros and cons of their agreement so that they might 'unagree.' This would defeat the very purpose for which they sought assistance."). *See also In re Marriage of Friedman*, 122 Cal. Rptr. 2d 412, 416–17 (Ct. App. 2002).

94. *See Gregory v. Gregory*, 206 P.2d 1122, 1126 (Cal. Ct. App. 1949); *Davidson*, 204 P.2d at 77.

95. *Klemm v. Superior Court*, 142 Cal. Rptr. 509, 512 (Ct. App. 1977).

96. *Id.* (holding that joint representation was not improper because the conflict between husband and wife was only potential: the wife did not want child support from the husband, and the husband did not want to pay support for the children, and consequently there was no point of difference between the parties).

there is only a minimal risk that the attorney will later be subjected to a malpractice suit or that the validity of the agreement will be challenged on grounds of inadequate representation.

Finally, cases involving actual conflicts of interest in the context of a court proceeding are on the liability end of the spectrum. The courts have held that even with the informed written consent of the clients, an attorney can still be held liable for malpractice.⁹⁷ There are two reasons for this. First, the courts have made a context-specific argument, stating that

[s]uch representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.⁹⁸

Second, the courts have expressed concern over finality. Where actual conflicts exist, the possibility that any agreement reached by the parties will later be overturned is very real.⁹⁹

In the words of one court, “the validity of any agreement negotiated without independent representation of each of the parties is vulnerable to easy attack as having been procured by misrepresentation, fraud and overreaching.”¹⁰⁰ This raises serious concerns that participants in the judicial process will be unable to rely on court decisions in planning their future conduct. Furthermore, the possibility of constant appeals and relitigation increases the costs of legal proceedings and poses an additional threat to the judicial system. Consequently, the courts have attempted to safeguard public opinion of the judicial system by barring joint representation of actually conflicting interests in litigation.¹⁰¹

97. *Id.* at 514.

98. *Id.*

99. *Id.* See also *Gregory*, 206 P.2d at 1127 (affirming the trial court’s decision to invalidate a monetary and custody settlement reached in the context of a jointly represented divorce).

100. *Klemm*, 142 Cal. Rptr. at 514.

101. They have achieved this end by requiring attorney withdrawal in these situations. See *id.* at 512.

Figure 1 represents the spectrum of malpractice liability in divorce cases.

FIGURE 1.

	Potential Conflict	Actual Conflict
Pre Litigation	No Malpractice Liability	
Court Proceeding	No Malpractice Liability	Malpractice Liability

In order to determine where friendly divorces fall on this spectrum, it is necessary to analyze them with respect to two factors: (1) setting (prelitigation versus court proceeding) and (2) nature of the conflict (potential versus actual). First, friendly divorces occur prior to litigation. Parties in these cases seek to resolve their dispute without subjecting themselves to entanglement in the morass of official legal proceedings. Ideally, joint representation provides them with the assistance required to achieve this goal. Second, the conflict of interest in a friendly divorce is in its nature. As previously described, friendly divorces involve disagreement between the parties about at least one issue.¹⁰² Some scholars have argued that this entails only a potential conflict because the shared goal of obtaining a divorce unifies the parties' interests and renders any disagreement regarding the nature of the settlement incidental.¹⁰³ California courts, however, have adopted a contrary view, holding that disagreement over an individual issue is sufficient to generate an actual conflict.¹⁰⁴ The friendly divorce thus falls somewhere between litigated potential-conflicts cases and litigated actual-conflicts cases. The issue of potential malpractice liability in this context is, consequently, placed into a limbo of legal uncertainty.

102. See *supra* Part II.B.1.

103. See Kristi N. Saylor, *Conflicts of Interest in Family Law*, 28 FAM. L.Q. 451, 453-54 (1994) (stating that "[d]espite the parties' early affirmations that they have reached an agreement, *potential* conflict lurks in every divorce" (emphasis added)).

104. See *Klemm*, 142 Cal. Rptr. at 512 (stating that a conflict is potential only where there is "no existing dispute or contest between the parties represented" (emphasis added)).

FIGURE 2.

	Potential Conflict	Actual Conflict
Pre Litigation	No Malpractice Liability	Unknown
Court Proceeding	No Malpractice Liability	Malpractice Liability

A careful analysis of friendly divorces, however, reveals that California's courts would likely deem joint representation in friendly divorces impermissible. This prediction is based on the specific factors considered by the courts in assessing liability: (1) whether the attorney is engaged in the practice of law; and (2) the degree to which the conflict poses a danger to the integrity of the justice system.

As previously discussed, where the attorney is not practicing law there is a minimal danger of malpractice liability and the court will allow the practice of joint representation despite the existence of a conflict.¹⁰⁵ Unlike "uncontested" divorce cases, in which the attorney is acting as a mere scrivener, attorneys jointly representing clients in friendly divorces provide legal advice and information that is then applied to the clients' particular needs.¹⁰⁶ The attorney's actions constitute the practice of law.¹⁰⁷ As a by-product, the potential for malpractice liability is exponentially higher in friendly divorces than in "uncontested" divorces, and the courts will scrutinize the practice with a greater degree of skepticism and wariness.

The likelihood of malpractice liability being imposed in jointly represented friendly divorces is further increased by the nature of the conflict. The actual conflicts in friendly divorces raise the same concerns regarding the judicial system's integrity that underlies the prohibition of joint representation in litigated actual conflicts cases. Like those cases, the presence of an actual conflict would render any agreement reached in the context of a friendly divorce easily susceptible to later attack.¹⁰⁸ Furthermore, when this added risk of overturned agreements is combined

105. See *supra* text accompanying notes 90–93 (discussing the lawyer qua scrivener).

106. See Bassett, *supra* note 6, at 390.

107. See Morrison, *supra* note 74, at 1135; Sandra E. Purnell, Comment, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 993 (1985) ("When assessing an attorney's possible conflict of interest, courts tend to be more liberal in finding an activity to be the practice of law when such a finding will protect the interests of the client.").

108. See Klemm, 142 Cal. Rptr. at 514.

with the higher duty of care imposed in the context of a friendly divorce,¹⁰⁹ the attorney's potential malpractice liability is dramatically increased. These two by-products of joint representation in friendly divorces—undermining finality and risk of increased malpractice liability—threaten the integrity of the judicial system. Although the integrity of the judicial system is not directly implicated in these cases—meaning that the law-related activities take place entirely outside the official forum of the courtroom—the public generally fails to draw such fine distinctions. Rather, it associates the activities of an attorney outside the courtroom with the workings of the justice system as a whole.¹¹⁰ Thus it is likely that any doubts about the adequacy and fairness of joint representation will be attributed to systemic failings of the legal profession and judicial system generally.¹¹¹ The elevated risk of such negative ramifications makes California courts unlikely to permit attorneys to undertake joint representation in friendly divorces.¹¹²

Practical considerations related to malpractice liability further discourage attorneys from undertaking joint representation in friendly divorce cases. First, as was previously noted, the demand for joint representation has been spurred on by the downturn in the economy.¹¹³ ABA statistics, however, indicate that malpractice claims increase in times of economic hardship.¹¹⁴ As a result, attorneys find themselves most at risk of potential malpractice suits at precisely the time when clients are most likely to seek joint representation. Additionally, even if attorneys firmly believe that they ultimately will not be held liable for malpractice, they will very likely have to endure an official court proceeding and defend their performance. Beyond the obvious expense and inconvenience associated with defending a civil suit, the attorneys must also consider the potential impact on their reputation among clients and within the professional community. Acknowledging the severity and high probability of such consequences, the American Academy of Matrimonial Lawyers has warned that a lawyer should not represent both a husband and wife even if they

109. See *Ishmael v. Millington*, 50 Cal. Rptr. 592, 595–96 (Ct. App. 1966).

110. See *Morrison*, *supra* note 74, at 1121 (stating that local bar associations are concerned with safeguarding the legal profession's reputation and that these concerns extend to the conduct of lawyers in the context of mediation).

111. See *In re A.C.*, 96 Cal. Rptr. 2d 79, 84 (Ct. App. 2000).

112. See Figure 3.

113. See *supra* Part I.

114. See generally STANDING COMM., A.B.A., LAWYER'S PROFESSIONAL LIABILITY: PROFILE OF LEGAL MALPRACTICE CLAIMS: 1996–1999 (finding that claims against lawyers appear to mirror the economy).

request it.¹¹⁵ Consequently, attorneys are far less likely to engage in the practice of joint representation at the time when it is most needed.

FIGURE 3.

	Potential Conflict	Actual Conflict
Pre Litigation	No Malpractice Liability	Malpractice Liability
Court Proceeding	No Malpractice Liability	Malpractice Liability

As the foregoing describes, California's malpractice laws serve as a de facto bar to the practice of joint representation in friendly divorce cases. This poses a serious dilemma for attorneys who elect to turn to California's ethical rules for guidance, because California's Rules of Professional Conduct seemingly adopt the contradictory position of permitting joint representation in friendly divorces.

C. JOINT REPRESENTATION, ETHICAL PRACTICES AND THE FRIENDLY DIVORCE: MUTUALLY EXCLUSIVE?

Never far from the minds of practicing attorneys is concern over potential ethical sanctions stemming from the representation of conflicting interests.¹¹⁶ It is particularly pervasive in the area of divorce because conflicts of interest are inherent in those cases.¹¹⁷ This concern exists with good cause: conflicts of interests are among the leading causes of official allegations of ethical misconduct.¹¹⁸ In California, attorneys seeking to determine their ethical duties in conflicts cases turn to Rule 3-310(C) of California's Rules of Professional Conduct.

Rule 3-310(C) posits that jointly represented clients may waive an actual conflict by providing informed written consent. Although friendly

115. Chesser, *supra* note 6, at 161.

116. See STATE BAR OF CAL., 2002 REPORT ON THE STATE BAR OF CALIFORNIA DISCIPLINE SYSTEM 39 (2003), available at http://www.calbar.ca.gov/calbar/pdfs/reports/2002_Annual-Discipline-Report.pdf. The California State Bar has a toll-free phone service, which provides California attorneys with information and research assistance on ethical questions. *Id.* In 2002, conflict of interest was the issue raised second most frequently by inquiries made to this hotline. *Id.*

117. Chesser, *supra* note 6, at 158.

118. See STATE BAR OF CAL., *supra* note 116, at 4-5 (showing that the second-leading basis of allegations of misconduct made to the Office of the Chief Trial Council is failure to satisfy duties owed to clients, the category under which conflicts of interest violations fall).

divorces are not explicitly addressed,¹¹⁹ this language appears to permit joint representation in such cases. This would seem to place the ethical rules in direct conflict with California's malpractice laws. A closer examination of the rules, however, reveals that no such conflict exists; the ethical rules bar the practice of joint representation in a friendly divorce.

Each ethical rule does not exist in a void. Rather, the Rules of Professional Conduct must be understood as an ecosystem, each rule working in conjunction with the others in a symbiotic relationship. The various parts contribute to the function of the body of rules as a whole.¹²⁰ When analyzing the conflict between Rule 3-310(C) and California's malpractice law, the significance of several other ethical rules must be considered, namely the duty of competent representation and the duty of loyalty. Attorneys have a duty to perform legal services competently for their clients.¹²¹ Competence in rendering legal services, as defined by California's Rules of Professional Conduct, requires that an attorney "apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service."¹²²

Concurrently with the duty of competent representation, an attorney owes clients a duty of loyalty—that is, "the duty to represent a client with undivided loyalty and to exercise independent judgment on the client's behalf."¹²³ Where joint clients have conflicting interests, there can be a tension between the attorney's duty to maintain the confidence and secrets of one client and the duty to inform the other client.¹²⁴ These problems can,

119. While the discussion section of Rule 3-310 of the California Rules of Professional Conduct does reference "'uncontested' marital dissolution," this must be distinguished from the "friendly divorce." CAL. RULES OF PROF'L CONDUCT R. 3-310 committee's note (2004). The term "uncontested marital dissolution" refers to a situation where the parties are in *full* agreement on *all* issues and the attorney is acting as a mere scrivener, a situation distinct from the friendly divorce.

120. See MODEL RULES OF PROF'L CONDUCT pmb. ¶¶ 15–16 (2003) ("The Rules presuppose a larger legal context shaping the lawyer's role . . . [and they] provide a framework for the ethical practice of law"). See also *People v. Donaldson*, 113 Cal. Rptr. 2d 548, 556 (Ct. App. 2001) (stating that "where there is no conflict with the public policy of California, the Model Rules may serve as a collateral source for guidance on proper professional conduct in California").

121. Rule 3-110(A) of the California Rules of Professional Conduct reads in full: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." CAL. RULES OF PROF'L CONDUCT R. 3-110(A) (2004).

122. CAL. RULES OF PROF'L CONDUCT R. 3-110(B) (2004).

123. See *Commercial Standard Title Co. v. Superior Court*, 155 Cal. Rptr. 393, 400 (Ct. App. 1979) (A "lawyer has the duty of undivided loyalty. He may not acquire an adverse interest to his client. He should not be forced to choose between conflicting interests."); *L.A. County Bar Ass'n, Formal Op. 435*, (1985).

124. See *Klemm v. Superior Court*, 142 Cal. Rptr. 509, 512 (Ct. App. 1977) (stating that situations exist in which "the duty of loyalty to different clients renders it impossible for an attorney, consistent

in turn, impair a lawyer's ability to represent a client competently and with undivided loyalty.¹²⁵ Additionally, unlike conflicts of interest, neither of these ethical duties can be waived by client consent.¹²⁶

The ABA's Model Rules of Professional Conduct ("Model Rules") support this interpretation of the interplay amongst the ethical rules. Although not binding in California,¹²⁷ the Model Rules may nevertheless be considered a source of persuasive authority.¹²⁸ Using the Model Rules as a source of guidance is a common practice, particularly in situations where neither the rules of professional conduct nor their comments are sufficient to provide a clear and definitive answer.¹²⁹ Model Rule 1.7 addresses conflicts of interest.¹³⁰ Comment 5 to Model Rule 1.7 states that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."¹³¹ This language implies that the onus is on the attorney to carefully analyze a given situation in order to determine the appropriateness of continued representation. In doing so, attorneys should consider their various ethical obligations, such as the duties of loyalty and competent representation. If an attorney determines that she is incapable of satisfying *all* of her ethical and professional obligations, then not only is the informed client's consent insufficient to permit continued representation, but the attorney is *barred from soliciting* consent. If such an approach is applied in California, the apparent conflict between the ethical rule and malpractice law would quickly dissipate because a client waiver of an actual conflict of interest, even if informed, would be impermissible.

with ethics and the fidelity owed to clients, to advise one client as to a disputed claim against the other"); Chesser, *supra* note 6, at 159.

125. See *Klemm*, 142 Cal. Rptr. at 512; Chesser, *supra* note 6, at 158–59.

126. CAL. RULES OF PROF'L CONDUCT R. 3-400(A) (2004) (stating that "[a] member shall not . . . [c]ontract with a client prospectively limiting the member's liability to the client for the member's professional malpractice").

127. See *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503 n.6 (Cal. 1994) (en banc); *People v. Ballard*, 164 Cal. Rptr. 81, 83 (Ct. App. 1980).

128. CAL. RULES OF PROF'L CONDUCT R. 1-100(A) (2004) (stating that, although not binding, members may consider the "[e]thics opinions and rules and standards promulgated by other . . . bar associations"). See also *Flatt v. Superior Court*, 885 P.2d 950, 954 (Cal. 1994) (en banc) (examining both California's Rules of Professional Conduct and the Model Rules of Professional Conduct to establish an attorney's duty of loyalty).

129. See *Flatt*, 885 P.2d at 954.

130. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003).

131. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 5 (2003).

The attorney in such a case would have an ethical duty to decline representation.¹³²

It appears that the California courts have adopted this approach to interpreting the ethical rules, as demonstrated by the policy reasoning provided in their ethics cases. The courts have explicitly stated that informed consent to conflicting representation in litigation is impossible.¹³³ The reasoning behind this stance is not that an individual is incapable of reaching an informed and competent decision to continue to be represented by an attorney with conflicting interests. Rather, their refusal to permit such consent is predicated on the notion that an actual conflict in a litigation setting renders the legal professional unable to fulfill the ethical obligations of competent representation and loyalty.¹³⁴ For instance, in *In re A.C.* the court, quoting the decision in *Comden v. Superior Court*,¹³⁵ stated that “where doubt may becloud the public’s view of the ethics of the legal profession and thus impugn the integrity of the judicial process, it is the responsibility of the court to ensure that the standards of ethics remain high.”¹³⁶ The court then went on to state that, in such situations,

the client’s recognizably important right to the counsel of her choice must yield to important considerations of ethics that run to the very integrity of our judicial process. Simply, the preservation of public trust within the scrupulous administration of justice and in the integrity of the bar is paramount. Accordingly, where the court justifiably finds an actual conflict of interest, “there can be no doubt” it may decline a proffered waiver.¹³⁷

Similarly, in *Wheat v. United States* the Supreme Court, quoting the language of *United States v. Dolan*,¹³⁸ stated that when a trial court finds an actual conflict of interest

the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court,

132. It should be noted that this interpretation of the ethical rules may be applicable to contexts outside that of the friendly divorce. If such is the case, then it would seem that Rule 3-310(C)(2), with its permissive stance on representing actually conflicting interests, would be in conflict with the general ethical rules governing attorney conduct. Consequently, it could be argued that Rule 3-310(C)(2) should be removed from California’s Rules of Professional Conduct. That argument, however, is beyond the scope of this Note.

133. *Klemm v. Superior Court*, 142 Cal. Rptr. 509, 512 (Ct. App. 1977).

134. *See In re A.C.*, 96 Cal. Rptr. 2d 79, 84 (Ct. App. 2000); *Klemm*, 142 Cal. Rptr. at 512.

135. *Comden v. Superior Court*, 576 P.2d 971, 973 (Cal. 1978).

136. *A.C.*, 96 Cal. Rptr. 2d at 84.

137. *Id.*

138. *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978).

but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court¹³⁹

The courts' concerns in conflicts of interest cases thus appears to be two-fold. First, they wish to maintain the integrity of the judicial system. The courts' primary concern is that the quality of representation afforded to clients will suffer; sometimes a client's faith in an attorney's ability to overcome the conflict of interest may exceed the attorney's actual ability to do so. Second, they are determined to safeguard public confidence in the judicial process. The concern is that, regardless of the attorney's actual performance, the public will come to believe that the attorney has acted incompetently or without loyalty and will conclude that the integrity of the judicial process has been compromised.

The courts have thus acknowledged the tension between competing ethical rules. They have determined that, ultimately, the desire to give effect to the client's legitimate interests regarding choice of legal representation must give way to the crucial need to safeguard the legitimacy of the judicial process.¹⁴⁰ Consequently, the practice of joint representation in the context of a friendly divorce has been effectively barred in California.

IV. SHIFTING THE PARADIGM: A CALL FOR LAWYER-MEDIATION IN FRIENDLY DIVORCES

A combination of California's malpractice laws and ethical rules prohibits joint representation in friendly divorce cases. This poses a serious dilemma because joint representation constitutes the only viable means of accessing legal services within the traditional legal framework for large segments of the population. An alternative does exist. By shifting away from the traditional legal framework and into lawyer-mediation, parties in need will be able to access the services they require, while attorneys will not face the threat of potential malpractice liability or ethical sanctions.

139. *Wheat v. United States*, 486 U.S. 153, 162 (1988) (holding that a district court must be allowed substantial latitude in refusing waivers of conflicts of interest).

140. *A.C.*, 96 Cal. Rptr. 2d at 84.

A. ADVANTAGE, MEDIATION: MEDIATION'S APPEAL IN FRIENDLY DIVORCES

Mediation is the practice of negotiating a dispute with the assistance of a "third-party neutral" who aids the primary parties and resolves any existing differences.¹⁴¹ The mediator employs techniques that enable "communication, promot[e] understanding, [assist] . . . in identif[ication] and explor[ation of] issues, interests and possible bases for agreement, and in some matters, help[] parties evaluate the likely outcome in court or arbitration if they cannot reach settlement through mediation."¹⁴² Although mediators provide assistance in resolving disputes, parties are not bound to abide by their recommendations.¹⁴³

Mediation has numerous advantages as a means of conflict resolution in the context of a friendly divorce.

Cost Savings. One of mediation's most attractive features is the significant cost savings it offers over traditional adversarial representation.¹⁴⁴ Mediation, like joint representation, halves the expense of the adversarial process by "avoiding the traditional two-attorney fight in the settlement process."¹⁴⁵ It offers additional savings by circumventing the lengthy and expensive formal discovery process.¹⁴⁶ According to studies, mediated divorce cases generally cost between \$2000 and \$5000.¹⁴⁷ Given the limited nature and scope of conflicts in friendly divorce cases and the parties' genuine desire to reach a resolution, it is likely that friendly divorces would fall on the low-end of this cost spectrum. This constitutes an eighty percent savings over the median cost of an adversarial divorce.¹⁴⁸ Additionally, mediation reduces the likelihood of costly postagreement

141. See EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 181 (2d ed. 2001); Judith P. Meyer, *The Pros and Cons of Mediation*, *DISP. RESOL. J.*, Summer 1997, at 9, 11, 13.

142. JAMS, *Ethics Guidelines for Mediators*, at <http://www.jamsadr.com/mediation/ethics.asp> (last visited Nov. 20, 2004).

143. Michelle D. Gaines, *A Proposed Conflict of Interest Rule for Attorney-Mediators*, 73 *WASH. L. REV.* 699, 700 (1998); Purnell, *supra* note 107, at 988.

144. See H. WARREN KNIGHT, COLEMAN F. FANNIN, RICHARD CHERNICK & SUSAN W. HALDEMAN, *CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION* § 3:64.1 (2003); Leonard L. Riskin, *Mediation and Lawyers*, 43 *OHIO ST. L.J.* 29, 53 (1982).

145. See Crouch, *supra* note 92, at 220.

146. See King, *supra* note 51, at 438-39.

147. FRIEDMAN, *supra* note 46, at 19; Wolf, *supra* note 46, at 26.

148. See *supra* Part II.B.2. Other studies have shown less dramatic but equally significant savings. See King, *supra* note 51, at 437.

disputes,¹⁴⁹ a potential economic windfall to clients. Mediation provides parties an economically efficient means of obtaining a friendly divorce.

Time Savings. Mediation also offers the advantage of significant savings of litigation time. Achieving a final resolution in a divorce case within the traditional legal framework often takes up to two years.¹⁵⁰ This can cause tremendous frustration, uncertainty, and general psychological distress to parties who are anxious to move on with their lives. In contrast, reaching a divorce agreement via mediation generally takes between four and twelve weeks.¹⁵¹ Again, because of the limited nature and scope of conflicts in friendly divorces, it is likely that mediation in this context would lie on the shorter end of the time spectrum. Thus, by turning to mediation, parties seeking a friendly divorce could more easily and efficiently reach a mutually acceptable divorce agreement.

Additionally, mediation offers potentially significant time savings to an overburdened judiciary. “[I]f cases awaiting trial can be diverted through settlement, backlogs will be reduced and cases that cannot—or should not—be settled will go to trial more quickly.”¹⁵²

Maintaining Relationships. Mediation offers the added advantage of promoting healthy relationships between the parties. Mediation, like joint representation, is characterized by a mentality of mutual gain. It thus circumvents the zero-sum approach associated with adversarial representation, thereby facilitating settlement.¹⁵³ This significantly reduces the probability that animosity and antagonism will develop between the parties.¹⁵⁴

Furthermore, unlike adversarial representation, where the “psychological aspects of dissolution are often ignored . . . because there is no practical way to deal with them,”¹⁵⁵ mediation presents the parties with an opportunity to enhance their psychological well-being. It allows them to address their feelings, understand each other’s perspectives, and develop communication skills that will facilitate their future dealings.¹⁵⁶ This is

149. See King, *supra* note 51, at 437.

150. Wolf, *supra* note 46, at 26.

151. FRIEDMAN, *supra* note 46, at 18; Wolf, *supra* note 46, at 26.

152. King, *supra* note 51, at 438. See also BRUNET & CRAVER, *supra* note 141, at 263.

153. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1502. See also Crouch, *supra* note 92, at 220.

154. See Singer, *supra* note 153, at 1502.

155. Wolf, *supra* note 46, at 27.

156. Singer, *supra* note 153, at 1502–03. See also BRUNET & CRAVER, *supra* note 141, at 263; King, *supra* note 51, at 378.

particularly important in the context of a divorce, because there are often continued dealings between the parties that extend beyond the dissolution of the legal relationship.¹⁵⁷

Social Costs. Some scholars have argued against the practice of mediation, citing potential social costs. These arguments, however, are inapplicable in the friendly divorce context.

One argument raised against mediation is that it threatens fairness by increasing the likelihood of substantially inequitable outcomes. This argument is predicated on the absence of formal legal safeguards; sanctions imposed by the traditional adversarial framework are absent from mediation.¹⁵⁸ It is argued that, consequently, preexisting power imbalances between the parties and disparities in information access will lead to unfair outcomes.¹⁵⁹ This argument centers on the notion that women will be disproportionately disadvantaged in the context of divorce cases.¹⁶⁰

Careful analysis reveals that this argument holds little weight. Although there are no formal legal safeguards such as those offered by traditional adversarial representation, mediation is not bereft of protection against unfair dealing. The mediator's professional and ethical duties adequately safeguard party interests.¹⁶¹

First, mediators serve a quasi-discovery function; they must ensure that the parties have access to sufficient information upon which to make an informed decision.¹⁶² Mediators satisfy this duty by identifying the information already in the parties' possession that is relevant to the agreement and by presenting them with additional information that lies outside the scope of their knowledge or expertise, such as legal information. Based on their knowledge and experience, the mediators are likely to recognize if certain sources of relevant information are missing from the documents disclosed by either party.¹⁶³ In such situations, the mediator can inform the parties about the missing information, as well as

157. This is particularly true when a divorcing couple has a child. This generally requires regular communication pertaining to the child's health care, schooling, and custody arrangements.

158. See BRUNET & CRAVER, *supra* note 141, at 278.

159. See Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 526-27 (1991); Purnell, *supra* note 107, at 1011.

160. *But see* King, *supra* note 51, at 442-43 (acknowledging that while some commentators fear women will be disadvantaged, there is data that allays these fears).

161. See Maute, *supra* note 159, at 504, 506.

162. See FRIEDMAN, *supra* note 46, at 31; Maute, *supra* note 159, at 506.

163. For example, the mediator would likely notice a failure by one of the parties to submit tax returns as confirmation of claimed annual earnings.

how it might be located.¹⁶⁴ Finally, the mediator can provide an additional safeguard by incorporating a contract provision stipulating that lying about or concealing information will render the contract subject to revision or rescission.¹⁶⁵

Second, mediators serve to overcome, rather than enforce, existing power imbalances between parties. “A mediator can help equalize the parties’ interaction by enforcing egalitarian communication practices such as turn-taking, listening, and paraphrasing; by preventing lengthy tirades; and by clarifying or interpreting the weaker party’s ideas to assure that they receive a fair hearing.”¹⁶⁶ If the power imbalances between the parties cannot be overcome, the mediator has a duty to terminate the mediation.¹⁶⁷

Finally, the mediator has a duty to ensure that the final agreement reached by the parties is equitable.¹⁶⁸ A mediator must not endorse, finalize or ratify an agreement that she reasonably knows would constitute “a miscarriage of justice, or . . . would not receive court approval.”¹⁶⁹

These informal safeguards provide adequate protection for party interests, particularly in the context of a friendly divorce where those interests are predominantly aligned. This conclusion is supported by a recent study regarding mediation’s impact on women’s interests in divorces cases. Not only did it indicate that women do not feel disadvantaged by mediation,¹⁷⁰ as opponents claim, but it further proved that women are actually more satisfied with the results than are men.¹⁷¹ The concern over inequitable outcomes does not serve as a compelling argument against mediation in friendly divorce cases.

Other mediation opponents argue that abandoning the traditional adversarial system carries tremendous social costs. They contend that when cases are shifted out of litigation and into mediation, important social issues are not brought to public attention or resolved in a manner that benefits the public at large.¹⁷² This argument is predicated on two assumptions. First, it assumes that the dispute shifted to mediation

164. Wolf, *supra* note 46, at 34. *See also* FRIEDMAN, *supra* note 46, at 31.

165. FRIEDMAN, *supra* note 46, at 34.

166. Purnell, *supra* note 107, at 1011.

167. Maute, *supra* note 159, at 504–05; *See also* JAMS, *supra* note 142.

168. *See* FRIEDMAN, *supra* note 46, at 27, 30; Maute, *supra* note 159, at 504–05.

169. Maute, *supra* note 159, at 504–05.

170. *See* King, *supra* note 51, at 442–43.

171. Wolf, *supra* note 46, at 33–34.

172. *See* BRUNET & CRAVER, *supra* note 141, at 277; Maute, *supra* note 159, at 507–08.

“involves important unsettled questions of law.”¹⁷³ Second, it assumes that the shift to mediation will be all encompassing; in other words, that all friendly divorce cases will ultimately be resolved through mediation rather than litigation. Neither of these assumptions, however, is applicable in the context of a friendly divorce. Divorce law, unlike newly emerging and unsettled fields such as internet law, has been practiced for hundreds of years.¹⁷⁴ The rules and processes surrounding divorce law are, consequently, well established.¹⁷⁵ Furthermore, friendly divorces—although gaining in popularity—still constitute a limited subset of divorce cases. The concern that novel issues in the field of divorce law will not be resolved in a public forum and in a precedent-setting fashion is consequently unfounded because there is an overlap between the issues addressed in adversarial and friendly divorces.

The practice of mediation in the context of a friendly divorce thus offers significant benefits to clients without raising any of the social concerns that might apply in other contexts.

B. A CASE FOR THE LAWYER-MEDIATOR IN FRIENDLY DIVORCES

While mediation is clearly a desirable means of resolving friendly divorces, a particular subset of mediation—lawyer-mediation—would be even more effective in such cases.

Lawyer-mediation refers to the practice of having an attorney serve as the third-party neutral in mediation. This adds value to the mediation process in the form of the attorney’s legal knowledge and familiarity with the judicial process. “In a divorce case, for example, the attorney-mediator may explain the state’s marital property system to the parties. . . . Additionally, the attorney-mediator might explain the policies or nonlegal concerns that might influence a court’s decision.”¹⁷⁶

The lawyer-mediator’s ability to bring the law—or at least the shadow of the law—to the mediation table is significant in several respects. For instance, “bargaining in the shadow of the law”¹⁷⁷ provides society with

173. See Maute, *supra* note 159, at 522.

174. See Gary H. Nichols, Note, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV. 397, 460 (1999).

175. GORDON IRELAND & JESUS DE GALINDEZ, *DIVORCE IN THE AMERICAS* 1 (1947).

176. Purnell, *supra* note 107, at 1008.

177. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). Robert Mnookin and Lewis Kornhauser assert that divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child

additional protection against the “threat to public values” posed by divorce mediation.¹⁷⁸ When parties bargain in the shadow of the law, it implies that they are contemplating the public values the law is designed to further and will incorporate them, to one degree or another, into their final agreement.

Additionally, acquiring legal knowledge in the context of mediation rather than adversarial representation may be particularly advantageous to clients. In the latter setting, the law acts as a rigid framework that defines a narrow set of rights and means of redress, and thus constrains the parties while they craft possible solutions. In the former setting, by contrast, the law serves as a backdrop against which the parties can frame the agreement if they themselves elect to do so.¹⁷⁹ Thus, the agreement may mirror the likely judicially imposed outcome or creatively deviate from the legal norm.¹⁸⁰

Finally, the lawyer-mediator can enable the parties to draft a contract reflecting their final agreement. Possessing a wealth of legal knowledge and practical experience, the lawyer-mediator would be in a far better position than would a nonlawyer mediator to draft a binding legal document that comports with the technical requirements imposed by the judicial system. This activity might seem to overlap with the lawyer-mediator’s duty as lawyer, rendering lawyer-mediators subject to possible malpractice or ethical sanctions. This is not the case, however, because the attorney would merely be acting as a scrivener, formalizing in legal language the parties’ mutual agreement.

One argument against lawyer-mediation has been that the distinction between lawyer qua mediator and lawyer qua lawyer is one based on semantics, that the function of the lawyer in mediation is indistinguishable from those of the lawyer in a joint representation. Consequently, it is suggested that attorneys who elect to undertake a mediation in which they proffer any legal information ought to be subject to legal malpractice liability and ethical censure.¹⁸¹

The argument is two-fold. First, it is suggested that clients who hire an attorney as a mediator are likely to believe that they are receiving both the

support, marital property, and custody give each parent certain claims based on what they would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.

Id.

178. See *supra* Part IV.A.

179. See Riskin, *supra* note 144, at 40–41; Purnell, *supra* note 107, at 1008.

180. Purnell, *supra* note 107, at 1008–09.

181. See BRUNET & CRAVER, *supra* note 141, at 251; KNIGHT ET AL., *supra* note 144, § 3:125.

services of lawyer and mediator.¹⁸² It has been well established by case law that where individuals reasonably believe they are receiving legal advice, the attorney has assumed a fiduciary duty as their legal representative.¹⁸³ The lawyer-mediator will thus be subject to legal malpractice claims.

Second, it is posited that lawyer-mediators are engaged in the practice of law because they provide specialized legal knowledge that, by its very nature, cannot be neutral. As discussed, the advantage of lawyer-mediators is their ability to make legal knowledge and information available to the parties and allow them to “bargain in the shadow of the law.” Opponents of mediation argue that imparting such legal information is a partisan exercise because “[j]ust by raising some legal principles he feels are relevant (and omitting others he feels are not), the mediator is applying law to specific facts, and in the process may benefit one party at the expense of the other.”¹⁸⁴ Lawyer-mediators, by offering partisan legal advice, are thus engaged in the practice of law and become subject to malpractice liability and ethical censure.

These arguments are unpersuasive. First, adequate safeguards exist to ensure that clients are clear on the distinction between the lawyer qua mediator and lawyer qua lawyer. Lawyer-mediators are required to inform parties of the distinction between mediation and legal representation, and make explicit the fact that the former is being undertaken.¹⁸⁵ They should explain that they will neither represent nor advocate either party’s interests.¹⁸⁶ A lawyer-mediator who “offers an evaluation of a party’s position or of the likely outcome in court or arbitration, or offers a recommendation with regard to settlement”¹⁸⁷ also ought to indicate that it is being proffered for the benefit of both parties in an effort to facilitate agreement, rather than in a partisan fashion. As an additional safeguard, lawyer-mediators frequently seek the parties’ written acknowledgment of their disclaimer of representation.¹⁸⁸ Consequently, there is a minimal risk that a lawyer-mediator could later become subject to a legal malpractice claim.

Second, the argument that providing legal information is an inherently partisan activity suffers from significant logical flaws. Mediation is

182. See Morrison, *supra* note 74, at 1121.

183. See, e.g., *Togstad v. Vesely*, 291 N.W.2d 686, 692–93 (Minn. 1980).

184. See Morrison, *supra* note 74, at 1135.

185. JAMS, *supra* note 142.

186. *Id.*

187. *Id.*

188. See KNIGHT ET AL., *supra* note 144, § 3:125.

predicated on the idea that a neutral third party can facilitate negotiations between interested parties, in part, by providing them with information that lies outside the scope of their knowledge. There appears to be no reason why imparting information pertaining to the law would be more partisan than imparting any other type of specialized information. Thus, by the logic of this argument, a mediator who elects to present the parties with any information, or omits to do so, would be undertaking a partisan act that breaches the duty of neutrality. Mediators would, consequently, be reduced to passive spectators, and the entire purpose and function of the mediation process would be entirely undermined. Thus, the notion that the distinction between lawyer qua lawyer and lawyer qua mediator is destroyed by imparting legal information has little merit.

The critical distinction between legal representation and mediation has been formally recognized in the revised Model Rules of Professional Conduct. Over the years, scholars have expended a great deal of time and energy debating whether lawyer-mediation was encompassed by the ethical rules governing the practice of law.¹⁸⁹ This debate was recently rendered moot by the revised Model Rules. Model Rule 2.4 now explicitly distinguishes between the practice of law and mediation.¹⁹⁰ Additionally, the distinction between legal practice and lawyer-mediation can be inferred from the fact that the American Arbitration Association (“AAA”), American Bar Association (“ABA”), and Society of Professionals in Dispute Resolution (“SPIDR”) have jointly promulgated a comprehensive, though unofficial, set of ethical guidelines specifically for mediators.¹⁹¹

Furthermore, California courts have acknowledged that a lawyer who assumes the mediator’s role does not thereby assume an attorney’s duties and liabilities.¹⁹² In fact, the courts have held that the lawyer-mediator is not de facto engaging in the practice of law even when required to give an

189. This debate revolved around Rule 2.2 of the Model Rules of Conduct and the question of whether it was intended to encompass lawyer-mediation. For an overview of the arguments see Maute, *supra* note 159, at 511–13. The debate was rendered moot by the 2003 revision of the Model Rules, which deleted Model Rule 2.2. MODEL RULES OF PROF’L CONDUCT R. 2.2 (2003).

190. Model Rule 2.4 provides as follows:

(a) A lawyer serves as a third party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third party neutral and a lawyer’s role as one who represents a client.

MODEL RULES OF PROF’L CONDUCT R. 2.4 (2003).

191. Gaines, *supra* note 143, at 706.

192. *Furia v. Helm*, 4 Cal. Rptr. 3d 357, 364 (Ct. App. 2003).

opinion predicated on specialized legal knowledge.¹⁹³ Additionally, there is evidence to suggest that, at least in limited circumstances, California courts would be willing to grant mediators complete immunity from suit.¹⁹⁴

Lawyer-mediation thus offers many of the advantages of joint-representation without rendering the attorney liable for legal malpractice or potential ethical repercussions.

C. A CALL FOR CHANGE: SUGGESTED AMENDMENTS TO RULE 3-310(C)
OF CALIFORNIA'S RULES OF PROFESSIONAL CONDUCT

Having established that lawyer-mediation effectively addresses the legal needs of economically disadvantaged people in friendly divorce cases, this section proposes a means of effectuating the transition from the traditional legal framework to lawyer-mediation.

Although gaining in popularity, mediation is often overlooked as a means of solving legal problems.¹⁹⁵ Most attorneys fail to consider mediation as an alternative to traditional adversarial representation or regard it as a practice that lies outside the scope of their expertise.¹⁹⁶ Additionally, the few attorneys who do consider lawyer-mediation as an alternative are discouraged from pursuing it because of the uncertainty surrounding their potential malpractice liability and ethical duties.¹⁹⁷ Lawyer-mediation is, consequently, practiced relatively infrequently. Thus, it is necessary to find a means of making attorneys aware of lawyer-mediation and actively encouraging them to undertake this practice in friendly divorce cases.¹⁹⁸

193. See *id.* at 365.

194. See *Howard v. Drapkin*, 271 Cal. Rptr. 893, 898-99 (Ct. App. 1990) (conferring immunity on a psychologist working on a domestic relations case and suggesting in dicta that similar immunity would be awarded to mediators related to the judicial process).

195. See BRUNET & CRAVER, *supra* note 141, at 181 (suggesting that attorneys have only recently begun to acknowledge that clients should be informed of available alternative dispute resolution procedures).

196. Craig A. McEwan, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1352 (1995).

197. Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 332 (1984). See also *supra* Part IV.B.

198. It is far more efficient to make attorneys aware of this alternative than it would be to educate the public. There is a closed universe of lawyers, and it is possible to educate them in a cost efficient manner by acknowledging the practice of mediation in commonly read ethical rules or through ABA notification. The efficacy of such an approach is demonstrated by one study indicating that approximately seventy percent of those who engaged in mediation did so at the prompting of their attorney. See King, *supra* note 51, at 441.

The most effective means of making attorneys conscious of lawyer-mediation in the context of a friendly divorce would be to directly address this alternative in California's Rules of Professional Conduct. As previously discussed, joint representation in friendly divorces raises a host of ethical concerns for practicing attorneys. When approached by two potential clients seeking joint representation in a friendly divorce, attorneys will immediately look to the ethical rules to determine if they are permitted to undertake the representation. If those rules directly addressed the ethical censure and malpractice liability implicated by joint representation in friendly divorces and affirmatively guided attorneys towards lawyer-mediation instead, many attorneys would present the alternative to their clients.¹⁹⁹

The Discussion Section of Rule 3-310(C) addressing actual conflicts currently reads as follows:

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, § 962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

This Note suggests that the following language, shown here in italics, be added to the discussion section of Rule 3-310(C) to acknowledge formally the bar on joint representation in friendly divorces and affirmatively guide attorneys to mediation:

199. Attorneys would certainly have incentive to take on such representation despite the fact that they are likely to earn less money than in the context of a traditional adversarial representation. First, given the failing economy, a flooded market for lawyers, and the fact that increasing numbers of prospective clients are undertaking *pro se* representation, many attorneys are likely to view the opportunity for paid employment as a boon. Second, attorneys who undertake mediation devote significantly less time to the process than they would in the context of a litigated case. Thus, while earnings are commensurate with this reduced level of work, the attorney will have the added benefit of available time to take on other cases.

Subparagraphs (C)(1) and (C)(2) are intended to apply to *most* types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an “uncontested” marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g. Evid. Code § 962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

*One exception to the permissive language of subparagraph (C)(2) is the “friendly divorce” case. When an actual conflict exists between divorcing parties in a prelitigation setting, the attorney’s ability to fulfill the ethical duties of loyalty and competent representation are compromised. Attorneys should therefore refuse to undertake joint representation in these cases. This approach mirrors California common law, which holds that joint representation in a friendly divorce subjects the attorney to potential malpractice liability. An attorney faced with a request for joint representation in the context of a friendly divorce should, instead, consider providing assistance to the parties under the rubric of lawyer-mediation. *(footnote)*

**Prior to undertaking such mediation, a lawyer should refer to the relevant rules of conduct governing mediation. These rules have been codified in “The Model Standards of Conduct for Mediators” by the American Arbitration Association (AAA), American Bar Association (ABA), and the Society of Professionals in Dispute Resolution (SPIDR).*

To better understand the potential impact of the proposed rule change, let us return to our hypothetical divorce case.

When last we left them, Tom and Dianne had reached an impasse regarding Tom’s pension plan that threatened to derail their friendly divorce.²⁰⁰ As our hypothetical resumes, the couple has realized that they cannot afford independent representation. They are also concerned that hiring separate attorneys might prove to be divisive and could poison their relationship. They consequently attempt to obtain joint representation in an effort to acquire the legal advice needed to finalize an agreement.

200. See *supra* Part II.B.1.

The couple contacts divorce attorney Bob Johnson and explains their situation. Mr. Johnson advises them that he will have to determine whether joint representation is appropriate under the circumstances. Turning to California's Rules of Professional Conduct, he comes upon Rule 3-310(C) and the appended discussion. Dissuaded by the revised comment from undertaking the joint representation, he is intrigued by the proffered alternative of lawyer-mediation. Referring to the relevant rules governing mediation, he determines that he can effectively undertake this process. He subsequently contacts Tom and Dianne and requests that they meet with him the following week.

At the preliminary meeting, Mr. Johnson informs Tom and Dianne that he is unable to jointly represent them, but explains that an alternative does exist. Mr. Johnson then presents them with the option of mediation. He explains to them in detail the differences between mediation and legal representation and informs them that he will not be advocating or advancing either of their positions. Rather, he explains, he will facilitate their efforts to reach a resolution on their own and provide them with legal information relevant to their issues of dispute.

Tom and Dianne are intrigued by the idea and, after discussing fee arrangements and the process's expected duration with Mr. Johnson, are willing to attempt mediation. Mr. Johnson then requests that they sign an informed consent form, detailing that he is not providing them with legal services but is rather serving in the role of mediator. As an additional safeguard, Mr. Johnson also explains the conflicts of interest issue to Tom and Dianne and obtains a waiver from them.

Next, Mr. Johnson has Tom and Dianne explain their situation in some detail. They outline the issues they have independently resolved and the bases on which they resolved them, then present an overview of their dispute regarding the 401(k) plan.

After learning the details of the dispute, Mr. Johnson requests that Tom provide all records pertaining to the plan. This includes records of the date it was started, dates and amounts of all payments made into the plan, and the expected value at maturation. The first session thus concludes and a second session is scheduled for two weeks after Mr. Johnson receives Tom's documents.²⁰¹

201. This two week period would give Mr. Johnson ample time to research the legal issues surrounding the pension.

After receiving the documents and diligently researching the matter, Mr. Johnson provides Tom and Dianne with the following information: Under California law, 401(k) funds that were accumulated prior to the marriage (\$20,000) are Tom's sole property. The remaining funds (\$30,000) are community property. If the 401(k) is liquidated, the added income will be taxed at a higher marginal rate.

Having provided the parties with a legal backdrop against which to frame their negotiations, Mr. Johnson attempts to facilitate an agreement by promoting communication between them. He requests that they express not only their desired outcome, but also the reasons underlying those desires. Dianne expresses that she wants to immediately liquidate the 401(k) because she has grave concerns about her ability to pay for a new apartment and new furniture prior to finalizing the sale of the house. Tom explains that he has long-term concerns: by waiting an additional few years, they will get a substantial lump sum that will help them put their daughter through college. He is worried that the cost of the various penalties and taxes will erode much of the short term benefits of immediate liquidation.

With this new-found understanding of each other's concerns, the couple is able to reach the following solution: rather than evenly splitting the proceeds from the sale of the house, Dianne will receive a larger portion—one sufficient to cover her rent and new furniture. In return, she agrees to allow the 401(k) to mature and to accept a reduced share of the plan's ultimate value on the date it matures or is prematurely liquidated. Dianne's short-term needs and Tom's long-term concerns are thus addressed in a manner acceptable to both of them.

Mr. Johnson, having facilitated a fair and equitable agreement between Tom and Dianne, now applies his legal expertise in the role of scrivener and drafts a formal contract reflecting the couple's agreement. At a final session, the parties review a draft of the contract and ensure that it accurately reflects the agreed upon terms. Once this process is complete, Mr. Johnson, with his wealth of practical legal experience in the field of divorce, guides the parties through the formal legal processes required to obtain formal recognition of the divorce and marital settlement.

Thus, thanks to a "friendly nudge" from revised Rule 3-310(C) in the direction of lawyer-mediation, Tom and Dianne could obtain a divorce in a matter of weeks without destroying their friendship or depleting their financial resources.

V. CONCLUSION

A society can be measured by the degree to which it grants citizens access to the judicial system. By this yardstick, our society has failed to measure up in at least one important area of legal need—divorce law. Large segments of the population, in need of legal assistance for their divorce, are unable to access traditional legal services because of cost concerns.²⁰² For these individuals, joint representation is the most viable means of accessing the legal services they require.²⁰³

One subset of divorce cases—friendly divorces—warrants particular attention. In these cases, the couple has reached agreement on most marital settlement issues and requires only limited legal assistance.²⁰⁴ Like other divorce cases, friendly divorces implicate some of our most fundamental social needs and concerns.²⁰⁵ In addition, society has a special interest in promoting friendly divorces because they involve less psychological and financial burdens on couples and impose less of a demand on an overburdened judicial system.²⁰⁶ Consequently, the practice of joint representation appears to be particularly beneficial in this context.

This Note, however, has demonstrated that a combination of California's malpractice laws and ethical rules bar the practice of joint representation in friendly divorce cases.²⁰⁷

The most effective means of addressing this problem is to amend California's Rules of Professional Conduct to explicitly address joint representation in the friendly divorce context; the amendment could guide attorneys towards the alternative of lawyer-mediation in this context.²⁰⁸ Initiating this paradigm shift from adversarial representation to lawyer-mediation will enable attorneys to meet the quasi-legal needs of parties undertaking a friendly divorce without having to fear the Damoclean sword of malpractice liability and ethical censure.

202. *See supra* text accompanying notes 3, 33.

203. *See supra* Part II.B.2.

204. *See supra* Part II.B.1.

205. Capozzi, *supra* note 44.

206. *See supra* Part II.B.2.

207. *See supra* Part III.

208. *See supra* Part IV.