



1983

Domestic Relations Advocacy - Is There a Better Alternative

William D. Kraut

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [Family Law Commons](#)

Recommended Citation

William D. Kraut, *Domestic Relations Advocacy - Is There a Better Alternative*, 29 Vill. L. Rev. 1379 (1983).
Available at: <https://digitalcommons.law.villanova.edu/vlr/vol29/iss6/5>

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1983-84]

DOMESTIC RELATIONS ADVOCACY — IS THERE A BETTER ALTERNATIVE?

WILLIAM D. KRAUT†

Discourage Litigation. Persuade neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, expenses, and a waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good man.

Abraham Lincoln
Notes for a law lecture
July 1, 1850¹

I. INTRODUCTION

ATTORNEYS are trained to think as adversaries.² Examine the definitions of the typical terms used for settlement of disputes: advocacy, mediation, arbitration, conciliation.³ Each of these words implies the concepts of conflict, dispute or contention. These con-

† Partner, Kraut & Kraut, West Chester, Pennsylvania B.A., Belknap College, 1969; J.D., Delaware Law School, 1975. The author also currently serves as the Chester County Child Custody Conciliator.

1. F. HILL, *LINCOLN THE LAWYER* 102 (1906).

2. Harvard University President Derek C. Bok noted the phenomenon in his 1983 annual report to the university's board of overseers. Urging change in the way attorneys are trained, he stated:

Look at a typical catalog. The bias toward preparing students for legal combat is evident in the required first-year course in civil procedure, which is typically devoted entirely to the rules of federal courts with no suggestion of other methods for resolving disputes. Looking further, one can discover many courses in the intricacies of trial practices, appellate advocacy, litigation strategy, and the like — but few devoted to methods of mediation and negotiation. Throughout the curriculum, professors spend vast amounts of time examining the decisions of appellate courts, but make little effort to explore new voluntary mechanisms that might enable parties to resolve various types of disputes without going to court in the first place.

Bok, *What Are American Law Schools Doing Wrong?*, *STUDENT LAW.*, Sept. 1983, at 46, 50.

3. Following are "legal" and "ordinary" definitions of these words:

	BLACK'S LAW DICTIONARY (5th ed. 1979)	WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976)
advocacy	The act of pleading for, supporting, or recommending active espousal.	1: the protection or work of an advocate 2: The action of advocating, pleading for or supporting.

(1379)

cepts are the base of the advocacy system which promotes disorder, and has been developing in the common law for centuries.

Advocacy is the system taught in all our law schools and practiced in our courts. It is the system our clients expect, and pay for in more than just monetary terms. Advocacy creates psychological breakdowns in families and destroys communication, which is vitally necessary in domestic as well as other disputes.⁴ It is a gross expense to the community as well as the litigants.⁵

Without tracing a detailed history of the world, one finds that

mediation	Intervention; interposition; the act of a third person in intermediating between two contending parties with a view to persuading them to adjust or settle their dispute; settlement of dispute by action of intermediary (neutral party).	intervention between conflicting parties or viewpoints to promote reconciliation, settlement, compromise or understanding.
arbitration	The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard.	the act of arbitrating; the hearing and determination of a case between parties in controversy by a person or persons chosen by the parties or appointed under statutory authority instead of by a judicial tribunal provided by law.
conciliation	The adjustment and settlement of a dispute in a friendly, unantagonistic manner.	(b): the intervention in a dispute by an outsider who seeks to achieve agreement between the disputing parties; <i>specif</i> : the mediation of a . . . dispute by a third party, governmental or private, having no power to compel settlement of the dispute but relying only on persuasion and suggestion.

4. See Comment, *The Best Interests of the Divorcing Family — Mediation Not Litigation* 29 LOY. L. REV. 55, 57 (1983). The author asserts that “[t]he adversary approach is incapable of adequately resolving family disputes Instead of alleviating existing tensions and conflicts, adjudication intensifies and aggravates the situation.” *Id.* at 74.

5. According to some experts, the public cost of litigation threatens to increase dramatically if present trends continue. In a speech to the American Bar Association, Chief Justice Warren Burger referred to Stanford Professor John Barton's prediction that “by the early 21st century the federal appellate courts alone will decide approximately one million cases each year” and that the federal “bench would include over 5,000 active judges,” with the Federal Reporter expanding by “more than 1,000 volumes each year.” Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274, 275 (1982) (quoting Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975)). *But see* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 62 (1983) (Barton's projections are “naive” and “undocumented”).

mediation, as a remedy, was practiced by the Chinese of old, and is still used in the modern People's Republic of China.⁶ Also, the ancient Hebrews used mediation, and in both Israel and Jewish communities throughout the world mediation is still used to resolve disputes.⁷ Equally well known is the use of mediation by the early Quakers.⁸

Each of the systems previously mentioned is one of a variety of methods by which a third party attempts to resolve a dispute. Conceptually, mediation and conciliation differ from arbitration in that the litigants (to use an adversarial term) present their own matter and resolve the dispute without the imposition of a binding decision. Arbitration and advocacy, on the other hand, terminate disputes without the consent of the litigants.

This article will deal with alternative dispute resolution in domestic relations, and specifically the conciliation program in Chester County, Pennsylvania. Domestic relations cases, whether they involve divorce, property division, support, custody or interfamily relationships and dynamics, have always been treated as the stepchild of the court system. Judges as a rule do not like these types of cases. Attorneys, except for those in a very limited number of firms, view domestic relations cases as a necessary evil in the practice of law. These cases are often regarded as being beneath most attorneys.⁹

Domestic relations cases rarely get to the judiciary in a majority of the counties in Pennsylvania, in comparison to all civil cases. Judges are insulated behind a series of masters, who have been appointed to handle these matters.¹⁰ This system typically translates into a protracted litigation process (involving many different people)

6. See generally Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966) (discussing traditional and modern dispute mediation in China).

7. Note, *Rabbinical Courts: Modern Day Solomons*, 6 COLUM. J.L. & SOC. PROBS. 49 (1970) (discussing rabbinical courts through history and suggesting possibilities of expansion today).

8. See generally Odiorne, *Arbitration and Mediation Among Early Quakers*, 9 ARB. J. 161 (1954) (discussing Quaker reluctance to submit disputes to courts of law).

9. See Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 646 (1980-81) (family lawyer lacks status accorded his peers in other branches of the law).

10. Rule 1920.51 of the Pennsylvania Rules of Civil Procedure provides for the appointment of a master by the court:

(a)(1) The court may hear the testimony or, upon its own motion on the motion of either party, may appoint a master with respect to all or any of the matters specified in subdivision (a)(2)(i) to hear the testimony and return the record and a transcript of the testimony to the court together with a report and recommendation. The order of appointment shall specify the matters which are referred to the master.

(2)(i) The court may appoint a master in an action of divorce under Sections 201(a)(b) and (d)(1)(i) of the Divorce Code, an action for annulment and the claims for alimony, alimony pendente lite, equitable distribution of

to resolve family controversies. This process normally fails to achieve early resolution of the matter, either by agreement or at trial.

The psychological well-being of the client, as well as the cost in time and money, are often disregarded in domestic relations cases. For example, let us examine a typical middle class couple with a family in the process of divorce. Each party will go to an attorney whose role it is to advise the client and to protect that client's interest. In most instances, the attorney is not going to give the client therapy or advice as to how to resolve the family conflict amicably. Instead, he is going to do what he has been trained to do: initiate the adversarial process. The client's spouse, meanwhile, is receiving counterstrategy from his or her attorney.

After a divorce complaint is filed, equitable distribution of property,¹¹ child support,¹² child custody,¹³ and alimony are sought, if appropriate.¹⁴ The parties will then appear at a support conference. Upon legal separation, the parties' lifestyles will radically change in most cases. Neither party will talk to the other, upon the instructions of their attorneys.¹⁵ Communications are now through the attorneys, or possibly through the domestic relations officer who tells them what they may expect if no agreement is reached at the conference. Neither gets to explain how he or she feels, or what his or her fears or needs are. If the parties do not agree at the conference, a hearing in front of a master is then scheduled and exceptions are taken to the

marital property, child support, or counsel fees, costs and expenses, or any aspect thereof.

(ii) No master may be appointed as to the claims for divorce in an action under Section 201(c) or 201(d)(1)(i) of the Divorce Code.

(iii) No master may be appointed in a claim for custody or paternity.

PA. R. CIV. P. 1920.51, 42 PA. CONS. STAT. ANN. (Purdon Supp. 1984). Rules 1920.53 through 1920.62 also relate to masters in a divorce proceeding. *See id.* 1920.53-62. *See also* The Pennsylvania Divorce Code of 1980, 23 PA. CONS. STAT. ANN. § 304 (Purdon Supp. 1984) (§ 304 of the divorce code provides for hearings by masters on divorce issues, except for custody and paternity, in accordance with the Pennsylvania Rules of Civil Procedure). Local court rules may also contain provisions relating to masters. *See, e.g.*, CHESTER COUNTY, PA. R. CIV. P. 1910.19-12.

11. *See, e.g.*, The Pennsylvania Divorce Code of 1980, 23 PA. CONS. STAT. ANN. §§ 401-404 (Purdon Supp. 1983).

12. *See id.* §§ 501-507.

13. *See, e.g.*, The Pennsylvania Custody and Grandparents Visitation Act of 1981, 23 PA. CONS. STAT. ANN. §§ 1001-1015 (Purdon Supp. 1984).

14. *See, e.g.*, The Pennsylvania Divorce Code of 1980, 23 PA. CONS. STAT. ANN. §§ 501-507 (Purdon Supp. 1984).

15. For a discussion of the destructive effects of adversarial proceedings on communications between the parties, *see* Winks, *supra* note 9, at 621-22. *See also* Solomon, *Divorce Mediation: A New Solution to Old Problems*, 16 AKRON L. REV. 665, 669 (1983).

court, if necessary.¹⁶

A three-tiered process for support has thus evolved. Custody also involves a separate hearing. In Chester County the litigants and their attorneys are present at a conciliation conference. The local rules state that any child over the age of five must also attend, although the child is not in the room at the same time as the parents.¹⁷ If the parties do not reach an agreement, psychological evaluations are ordered, the costs of which are split between the litigants.¹⁸ The next step is trial, and more expense.

In 1982, the Pennsylvania Supreme Court Rules Committee Subcommittee on Arbitration, Mediation and Conciliation issued a questionnaire to the sixty-seven counties in Pennsylvania to ascertain whether there was an alternative program to litigation for custody in their county.¹⁹ Over half the counties in Pennsylvania, including Chester County, were found to have custody conciliators or masters.²⁰ This is a staggering number, considering that the Pennsylvania Supreme Court Rules are quite clear that masters are not to hear custody cases.²¹

Up to this point, only the preliminary areas of a domestic relations problem have been reached, and already there have been separate hearings for support and custody. The trial for divorce or property division is yet to occur. In a large number of counties, there is a master appointed by the court to hear arguments concerning both equitable distribution and divorce.²² There are good reasons to believe that it would make more sense if these matters could be resolved by a nonadversarial method. "Often, the outcome in court is far from certain, with any number of outcomes possible. Indeed, existing legal standards governing custody, alimony, child support, and marital property are all striking for their lack of precision and thus provide a

16. See PA. R. CIV. P. 1910.12, 42 PA. CONS. STAT. ANN. (Purdon Supp. 1984). See also CHESTER COUNTY, PA. R. CIV. P. 1910.10-12.

17. See CHESTER COUNTY, PA. R. CIV. P. 1915.5A(b).

18. See *id.* 1915.8.

19. Discussion of subcommittee members at the organizational meeting of the Pennsylvania Supreme Court Subcommittee on Conciliation/Mediation/Counseling, chaired by the Hon. Edward Rosenberg (Sept. 29, 1982).

20. Questionnaire and results compiled by the subcommittee. Of the 67 counties, 53 responded. Four counties were consolidated as two and the responses of four others were invalidated due to inconsistencies. Of the remaining 47, 27 (57.4%) had such a program.

21. PA. R. CIV. P. 1920.51(a)(2)(iii), 42 PA. CONS. STAT. ANN. (Purdon Supp. 1984). For the text of rule 1920.51(a)(2)(iii), see note 11 *supra*.

22. See PA. R. CIV. P. 1920.51-55, 42 PA. CONST. STAT. ANN. (Purdon Supp. 1984) (role of masters in divorce proceedings).

bargaining backdrop clouded by uncertainty.”²³

Atlanta attorney Anne E. Meroney explains what one experienced labor mediator believes to be the four fundamental principles for effective mediation:

First, an understanding and appreciation of the problems confronting the parties is required. . . . Second, the mediator must impart to the parties his knowledge and appreciation of their problems. . . . Third, the mediator must be able to create doubts in the minds of the parties as to the validity of their positions. . . . Fourth, the mediator, having created such doubts, must be able to suggest other options to the parties.²⁴

These principles certainly create the possibility for nonadvocacy.

Not all cases can be nonadversarial. Some must be adjudicated because of the personality or the emotional hurt of the litigants, or because some attorneys are strictly adversarial with a “win” mentality, even though the client or the client’s children are ultimately hurt by the process.

With few exceptions, domestic relations attorneys will attempt to settle their cases, while attorneys who dabble in the field usually end up in litigation. The reason is that through experience, the domestic attorneys know each other and know how far they can go with their colleagues. Further, they realize the emotional devastation of the situation on the parties involved. The nondomestic lawyer is more of a wild card, does not appreciate the subtleties, and may push as though the matter is a piece of typical civil litigation.

Another reason, unfortunately, that domestic matters become litigated is that some lawyers are “actors.” This might infuriate the judge and lose the case, but the client is often happy with the “actor-lawyer.” I have discovered that clients are not angry at attorneys if they are “actor-lawyers.” They become angry at the judge for not understanding their case. There is one thing that must be kept in mind: namely, that while law is a profession, it is also a business. The adversarial system serves to provide a source of income to paid combatants. It is for this reason that the lawyer’s and the client’s interests

23. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 969 (1979).

24. See Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467, 471 (1979) (citing W. MAGGIOLO, *TECHNIQUES OF MEDIATION IN LABOR DISPUTES* 10 (1971)).

may diverge. Settling a case usually will not provide the kind of income that litigating a case will.

Professors Mnookin and Kornhauser state five reasons why some divorcing spouses require courtroom advocacy of their disputes: spite; a distaste for negotiation; calling the bluff — the breakdown of negotiations; uncertainty and risk preferences; and the absence of a middle ground.²⁵

I would like to add a sixth reason for cases not settling: the advocacy system and attorney economics. Daniel Brown quotes a prominent divorce lawyer explaining his philosophy:

I am in business to win. . . . Once I have been hired, my sole aim is to gain victory; and in doing so, I will do anything and everything I think necessary to serve the interest of my client, to achieve his purpose, to gain him a divorce in which he will come out financially, psychologically, in every way on top. That is what I have been hired to do and if in doing it, it appears cold and calculating, then that's the way it has to be. I am tough because I assume the lawyer who opposes me will also be tough [W]hen I take a case, I am not concerned with whether my client is always right. As far as I am concerned, a client is always right.²⁶

We can change this philosophy, especially in states allowing no-fault divorce. Pennsylvania has recently become a no-fault divorce state.²⁷ The basic concept of marriage law has changed: society no longer tries to preserve the family unit, and divorce is a matter of private concern. Concepts of advocacy can change since it is no longer necessary to prove fault.²⁸ What is needed is a forum to bring the parties together in a nonadversarial setting.

25. Mnookin & Kornhauser, *supra* note 23, at 974-75. Professors Mnookin and Kornhauser feel that there are five reasons why divorce cases end up in litigation notwithstanding the advantages of a negotiated settlement: (1) one or both of the parties may be acting out of spite for the other; (2) some persons may prefer a judicial solution to face-to-face negotiation; (3) sometimes parties would prefer a settlement but must carry out their threats of litigation when negotiations break down; (4) sometimes people overestimate their chances of winning and for that reason are willing to litigate; and (5) sometimes the parties' positions are such that there is simply no middle ground for compromise. *Id.*

26. Brown, *Divorce and Family Mediation: History, Review, Future Directions*, CONCILIATION COURTS REVIEW, Dec. 1982, at 1, 5 (quoting R.L. FELDER, *DIVORCE: THE WAY THINGS ARE, NOT THE WAY THINGS SHOULD BE* 1-2 (1971)).

27. Pennsylvania enacted its new divorce code in 1980. *See* The Pennsylvania Divorce Act of 1980, 23 PA. CONS. STAT. ANN. § 101 (Purdon Supp. 1983).

28. *See id.* § 201(c)-(d) (a divorce may be granted when the marriage is "irretrievably broken").

The Pennsylvania General Assembly has finally realized that the domestic law system, with its origins tracing back centuries into the common law, is no longer adequate for today's society.²⁹ Attorneys should also see fit to change the nature of domestic practice, shifting from advocacy concepts which leave families devastated, angry and vengeful.

Attorneys, judges, and clients must move away from a fault concept and work on achieving practical solutions. Human behavior courses should be taught in law schools.³⁰ Attorneys react very uncomfortably when trying to deal with emotions. I often see attorneys reacting very uncomfortably in trying to deal with their client's hurt. They prevent the clients from venting their feelings at trials, hearings, or conferences. The current system does not let the client express hurt, anger, or fear. Instead, the system allows feelings to fester and grow, causing more pain, and consuming more time in the courts, while not moving any closer to the resolution of the problem.

II. CONCILIATION: AN ACTIVE ALTERNATIVE

The conciliation program I have established in Chester County, Pennsylvania, with the full cooperation of the court and the county government, helps to diffuse emotions and tries to have the parties deal with reality. Unlike advocacy, the program allows one spouse to hear from another that the marriage is over, that the spouse does not want to hurt the other side, and that the problems can be solved. Parents, grandparents (in appropriate cases), and parties in interest are required by local court rule³¹ to come together, sit down, and

29. Prior to the new divorce code, enacted in 1980, the divorce law in Pennsylvania has not changed much since 1785. See Gold-Bikin & Rounick, *The New Pennsylvania Divorce Code*, 25 VILL. L. REV. 617, 617 n.2 (1980). For a discussion of divorce law in Pennsylvania before the new code, see *id.* See also Comment, *Divorce Reform: Pennsylvania Attempts to Break with the Past*, 18 DUQ. L. REV. 877, 879-91 (1980).

30. See Bok, *supra* note 2. President Bok of Harvard has complained that "law schools train their students more for conflict than for the gentler arts of reconciliation and accommodation." *Id.* at 50. He has suggested the following curriculum changes: Happily, the great issues confronting the [legal] profession provide opportunities to address this problem by introducing new forms of teaching and learning for second and third-year students — classes to study the methods of mediation and negotiation, supervised work in new institutions for delivering legal services, courses on the organization and deficiencies of the legal system and its institutions, seminars on new ways of resolving disputes and avoiding litigation.

Id. at 51. I would add courses in human behavior to those listed above, and also give emphasis to human behavior issues in other courses. This is necessary because of the paramount importance these skills play in resolving disputes outside the traditional adversarial process.

31. See CHESTER COUNTY, PA. R. CIV. P. 1915.5A.

discuss their feelings and what they believe to be the benefits and detriments of the present situation. They also discuss what they believe to be in the best interest of the child. When an independent party can focus on the best interest of the child, without the anger that the adults feel, and the adults are told that their anger, while important, will not be considered by the court, the stridencies can be diffused.

This is far different than the adversarial system prevailing throughout much of the country. In the adversarial system the parties must litigate. There is neither a forum for the parties to discuss intelligently their feelings or those of their children and family members, nor an opportunity for them to make decisions relating to their futures. However, in a conciliation or mediation process, the attention of the parties can be refocused on what is best for their children. The parties can be told by an impartial, independent party that their plan is impractical and that the court will not uphold their position.

Clients do not always hear that from their attorneys. They view the attorney as their savior. Since attorneys need to eat, they often foster their client's dependence on themselves and the system. Once the client gets caught in the litigation spiral, it becomes difficult to get out. In conciliation, clients cannot hide emotions or animosities behind their attorneys.

Parties in a domestic dispute, as well as some attorneys, do not realize that once a statement has been verbalized and registered by the opposing side, damage has been done. Clients are emotionally vulnerable at this time, and their feelings are like open wounds. The parties normally have children, and they must be made to realize that the existence of children will necessitate contact with one another for years after the divorce process has taken place. As a result, they need to be able to communicate with one another. A 1983 study by Maryjane Wenk, a third-year Villanova law student, encompassing the southeastern Pennsylvania counties of Bucks, Delaware and Chester, shows that custody mediation or conciliation programs in custody constitute, on the average, seventy-one percent of all cases which settle without the necessity of trial.³² Multiply this figure by the lack of courtroom hours, the savings in court staff,³³ plus the emo-

32. Interview with Maryjane Wenk, Chester County Courthouse, West Chester, Pa. (Oct., 1983).

33. See Pearson & Theonnes, *Mediation & Divorce: The Benefits Outweigh the Costs*, FAM. ADVOC., Winter 1982, at 26 (results of Denver study show that the public saves between \$5,610 and \$27,510 per 100 cases processed with mediation service).

tional turmoil which these cases would have presented, and it is obvious that these alternative programs are working.

There are other benefits to conciliation and mediation. I referred above to public cost savings from the conciliation program. There is also a considerable savings to the parties themselves.³⁴ The parties usually do not have to hire experts. They do not have to pay an attorney to prepare a case for trial; for the conciliation conference, attorneys do not have to be prepared to present their client's cases in a formal setting. Rather, it is the parties who present the matter to the conciliator. For the most part, the attorneys stay in the background in this process. The concept of the program is to have the issues discussed by the parties, not their attorneys. It is meant to be nonadversarial. When the attorney attempts to advocate, the conciliator interrupts and explains that those present are there to hear the parties, not the attorneys. There is also a preservation of the litigants' dignity because there is a determination by the parties, rather than by a judge who is an outside party and does not know the parties or their children. Anne Meroney reflects these considerations in listing four reasons to mediate a domestic relations dispute:

First, some parties to a divorce or custody case justifiably fear that judges do not have time to examine their case thoroughly because of crowded dockets and the resulting pressure to move cases. Second, some parties fear the power of a judge, who they have not met and over whose selection they had little or no control, to decide the course of their lives based on a few minutes' contact and subjective observation. Third, a judge also may be unable to relate to litigants who have life styles different from the middle class American norm. Finally, some parties wish to avoid the escalation of hostilities which accompanies negotiations between attorneys.³⁵

There is also a time savings to mediation and conciliation. When our program was instituted in Chester County, if one filed a custody action, there was usually a six month to one year delay from the time of filing until the time of the hearing. Even then, there was no guar-

34. See Note, *Attorney Mediation of Marital Disputes and Conflict of Interest Consideration*, 60 N.C.L. REV. 171, 172 (1981) (mediation reduces financial burden of contested divorce). See also Winks, *supra* note 9, at 650 (mediation can lower transactional costs for the poor). But see Pearson & Thoennes, *supra* note 33, at 28 (evidence of attorney's fee savings in Denver custody mediation study not found in all cases, nor were savings as great as anticipated when found).

35. Meroney, *supra* note 24, at 469.

antee that the entire case would be heard when it was scheduled. One might have a day or two of hearings, if it was possible, then wait two or three months before the next hearing to finish the matter. This is emotionally draining to both the parties and their children.

At present, the program of conciliation in Chester County takes approximately three to four weeks from the time of filing to the time of conference. In an emergency situation, a conference can be set up immediately. The program also opens up communications between the parties and attempts to improve these contacts. For example, parents are told that, of necessity, they will have contact with each other in order to make decisions regarding their children until the youngest reaches eighteen years of age.

There are certain areas the court takes very seriously, in which both parents will have to be involved. These areas include health, education, and the religious upbringing of the children. The court expects both parents to have input into all decisionmaking in these areas. For example, if one parent is a custodial parent, the court expects that parent to send the child's report cards to the visitation parent. The court expects sharing of parent/teacher conference notices, notices of recitals, or sporting events, well in advance of the events, so that the other parent may participate if he or she so desires. This does not compel both parents to sit together, or to be friendly, but both parents will have to cooperate.³⁶

If the child should need an operation, the court expects both parents to discuss the operation. If they feel a second opinion is important, the parents should work together and develop a dialogue. That is where litigation is a real detriment. Once trial commences, things are said which damage later communications. Wounds are created which, once opened, cannot be healed.

While there is confrontation in the conciliation process, it is not within a formal setting and it is without a court reporter or court staff. Also, there is the avoidance of the courtroom altogether. Many attorneys have clients they do not wish to bring into a courtroom, and many clients do not wish to go to court. Participation in litigation is a well recognized source of anxiety.³⁷ For these reasons, our concilia-

36. See Mills & Belzer, *Joint Custody As A Parenting Alternative*, 9 PEPPERDINE L. REV. 853, 871-74 (1982) (effective decision making regarding child will be serious problem unless there is complete cooperation).

37. One of the more famous expressions of this sentiment was made by Learned Hand in an address to the Association of the Bar of the City of New York in 1921: About trials hang a suspicion of trickery and a sense of a result depending upon cajolery or worse. I wish I could say that it was all unmerited. After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.

tion program has been very effective.

III. THE NEED FOR EDUCATIONAL CHANGES

Law schools and continuing legal education programs neglect to educate their students, the bar and the bench in the area of family law, perhaps to a greater extent than any other area of law. The last thing a law student needs to learn is the "case book method" of family law. By the time a student studies family law, she knows how to research and find the issues.

However, students do need to be taught practicalities:³⁸ how to deal with emotional clients; when to be suspicious of a client that has had two or three attorneys; how to be paid; and, probably most importantly, how to control a client. There is nothing worse than the feeling that either attorney cannot control the client. If counsel fails to control the client, then the parties are on an eternal road of litigation.

How does an attorney determine if the matter can be resolved without litigation? A starting point is asking the opposing attorney about the possibility of settlement. It amazes me how many attorneys never contact their opponents, but continue to plod along in preparation for litigation. There is no need to appear to be "giving up the ranch" by contacting the opposing counsel. However, some attorneys are born litigators and they love the courtroom. If your opponent is a litigator, prepare your case for trial, because that is where you are headed.

Some law schools are just beginning to teach techniques of negotiation, although most courses are geared for labor negotiation, not domestic relations law. Lawyers need the skills to determine what their client's bottom line is and how much can be negotiated away. They also need to realize that their opponent must gain something in return for his client. I recently watched an agreement fall apart because an attorney kept taking and taking for her client. When the other side finally asked for an insignificant item, which would not have altered the agreement at all, the first attorney refused. Perhaps this refusal grew from a feeling of power, perhaps from inexperience, or perhaps even from being trained solely as an advocate. The net

D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 1295 (3d ed. 1973) (quoting Address by Learned Hand, Association of the Bar of the City of New York (Nov. 17, 1921), *reprinted in* 3 ASS'N. B. CITY N.Y. LECTURES LEG. TOPICS 87 (1926)).

38. For a discussion of a more practical emphasis in law school curricula, see note 30 *supra*.

result was that the attorney who had made all of the concessions placed his papers into his file, placed his file into his briefcase, closed his briefcase and scheduled the matter for trial. This result could have been avoided had the attorney who had been taking all along realized she had reached the limits of compromise.

IV. CONCLUSION

It is common knowledge that court dockets are backlogged. Domestic cases take a back seat to the rest of the civil cases and all criminal cases. Yet domestic cases, in almost all instances, require a resolution of the issues, for the well-being of the litigants and their children.

Pennsylvania now has an important opportunity, because it has recently changed over to a no-fault statute in divorce matters. Attorneys and the court can change the direction of domestic relations cases in Pennsylvania from an advocacy approach to non-adversarial approach.

Law schools and continuing legal education programs have an obligation to teach alternative methods of dispute resolution. With the growing number of attorneys being prepared for domestic relations law (and with changing lifestyles), the courts have more litigation of this type than they can handle. There is a drastic need for proven alternatives. Justice Sandra Day O'Connor stressed the need for such a reform when she stated in January of 1983: "The Courts of this country should not be the places where dispute resolutions begin. They should be the places where disputes end. Perhaps we should begin thinking about all courts as courts of last resort."³⁹

39. Address by Justice O'Connor, National Conference on Alternative Consumer Dispute Resolution (Jan. 17, 1983) (unpublished paper available at Villanova Law School Library).

