An Introduction to Divorce Mediation
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Course Introduction

The psychology of divorce is complicated. In this course, Drs. Sam Margulies and Anya Luchow present critical information regarding litigation and mediation and the psychology of each. This course is an excellent introduction to the emotional as well as legal aspects of divorce. As the authors’ indicate, the adversarial legal system is often criticized by mental health counselors and other professionals as poorly designed to meet the needs of families.

Learning Objectives

Upon completion of this course, you will
• differentiate between divorce mediation and litigation
• know the psychological aspects of the “initiator” and “noninitiator.”
• understand the nature of the adversarial legal system
• understand the benefits of divorce mediation

Course Content

Article:  Litigation, Mediation and the Psychology of Divorce, pages 3-12

The adversary legal system has frequently been criticized by the mental health professions as poorly designed to meet the psychological needs of families. This article explores why that criticism is true. Successful adjustment to divorce by couples and their children requires the completion of critical psychological and practical tasks early in the divorce. In particular, the noninitiating spouse must come to terms with the fact of divorce and control the intense emotions that accompany the decision to divorce. The norms and values of the legal system and the perceptions and behaviors of the lawyers interfere with completion of the psychological tasks and retard adaptation. Mediation is viewed as an appropriate model for supporting the completion of successful divorce. Divorce is simultaneously a legal process and a psychological process. Although much has been written about each of the two, how the two processes interact is not well understood. Lawyers commonly argue that the legal system is only neutral ground on which the divorcing parties fight their battle. Moreover, the intensity of the fight and the impact the fight has on the divorcing family are seen as the product of the pathology of the parties unrelated to the nature of the legal system. In other words, the legal system is regarded as benign. It is seen as having little influence on the parties’ behavior and therefore as not liable when we assess the damage done to families by protracted divorce-related struggle.

In this article we will show how the adversary legal system is by no means a neutral field. To the contrary, we will argue that the nature of the adversary system is the primary source of the pathology that flows from divorce. We will show how the norms and rules of the adversary system shape and augment conflict by interfering with the adaptive behavior necessary to successfully deal with the challenges divorce poses to both individual and family systems.

Divorce and individual psychology
For most people divorce is one of life’s most stressful experiences. For healthy personalities divorce is a severe challenge, and for personalities with significant pathology the stress of divorce can cause an emotional crisis. But not all people are equally stressed by divorce. To better understand the emotional crisis of divorce, it is useful to consider the distinction between the initiator and the noninitiator of the divorce, for it is the difference in the two roles that shapes the way the couple manages, or fails to manage, the divorce.

The decision to divorce is rarely mutual. That is, it is infrequent that both spouses awake the same morning and conclude that the marriage is over. More commonly, one spouse, after lengthy rumination and often after a long period of marital discord, concludes that he/she can no longer tolerate the painful marriage and should seek a divorce. The initiator has a psychological advantage over the noninitiator. Although the initiator may experience bouts of acute ambivalence and guilt, he/she has usually had the opportunity to mourn the relationship, develop alternatives, or at least the image of alternatives, and, generally, try on the role of the divorced person. It is not uncommon to find that the initiators, long before telling their spouses that they want to divorce, have begun to develop separate social lives, have begun revamping careers, and in some cases have found another person who provides intimacy and emotional support. For most initiators divorce represents a substantial improvement in their lives. This fact has an important bearing on the ability to adapt to the challenges of divorce, because it provides important motivation to make the myriad adjustments divorce requires.
The noninitiator is in an inferior psychological position. Some noninitiators have been aware of the problems of the marriage for a long time and have a realistic understanding of the situation. For these spouses the decision of the initiator is not particularly surprising and, though a cause of sadness, may also be a source of relief. But other noninitiators are completely surprised by the revelation that the other spouse wants to leave the marriage. Some are even surprised that the other spouse is unhappy in the marriage. These noninitiators often have the hardest time in divorce because events begin to move before they have ever begun to get ready.

For the noninitiator who really does not want the marriage to end, the divorce is experienced from the beginning as a general nightmare. These spouses feel betrayed and abandoned. They are alternately enraged and panicked and often feel a deep sense of humiliation and rejection. They frequently plead with the other to relent and reconcile. Even though they may have stonewalled emotionally for years, many of these noninitiating spouses will now offer to change, to go into long-rejected marital therapy, and generally to do anything that the other wants as a condition of reconciliation. Sometimes they are successful in inducing the other spouse to attempt a reconciliation. Most such attempts fail, because the relationship has been so badly damaged or because the other spouse, though trying to appease, really wants out.

For the noninitiator, the divorce means only that life is going to get worse. The divorce is felt to cause only loss – of status, economic security, identity, contact with children, and place in the community. Because the noninitiator does not see how divorce will improve his/her life, the motivation to adapt is generally lacking.

As we will discuss throughout this article, divorce causes and requires many changes for each individual and for the family. The essential difference between the initiator and noninitiator is that the former is motivated to accept change while the latter is not and, to the contrary, may be motivated to resist any change. For divorcing families, ability to change is almost completely predictive of ability to adapt well to the divorce. A legal system that retards change also inhibits healthy adaptation.

Successful divorce
For our purpose here, “successful divorce” refers to those divorces in which all family members are thriving five years after the divorce. This means that each spouse has reestablished a successful social life and has adapted well to the economic challenges of divorce. The family’s economic resources have been distributed fairly, no one has a continuing sense of injustice, and each individual has mobilized his/her personal resources to find a reasonably satisfying economic life. In such families children have survived the initial trauma intact and have moved through their own developmental stages without major disruption. Ideally, the children have reasonably amicable relationships with new mates or prospective mates of their parents. For such families the divorce solved the problems it was intended to solve – namely, it provided a second chance to the two spouses and left them with the wherewithal to achieve it well. Whether or not the individuals and families arrive at this point depends on how well they perform certain critical tasks of adjustment.

Tasks of the individuals
For both the initiator and noninitiator there are emotional tasks and practical tasks, and the two sets are closely interrelated. The initial task for both spouses is coping with and controlling the intense feelings that accompany divorce. Although it is necessary to acknowledge feelings, it is equally important that divorcing people avoid the paralysis that can come with the complex and turbid emotions of divorce. Guilt, anger, humiliation and fear are universal in divorce. Both spouses fear a loss of control as the divorce moves into the legal process. Both may feel socially isolated as friends distance themselves. One’s identity as wife, husband or parent may
feel threatened. Many divorcing people experience secondary anxiety as their preoccupation with the divorce undermines their ability to concentrate at work or attend to their children’s needs at home. Despondency, depression and sadness are all commonplace.

The primary psychological tasks are those associated with coping. Each individual needs to assume responsibility for him/herself and to marshal his/her personal resources. Isolation is addressed by reconnecting with others, seeking new friends and sources of support and reaffirming old relationships. Identity issues are addressed by learning new skills such as improved parenting by fathers and new career skills by mothers. None of these tasks can be performed if the person is still falling apart, hysterical, paralyzed, passive or immobilized.

Also critical is a transition from a focus on the past to a focus on the future. Most couples battle over whose version of history is correct. Blaming and finding fault for the demise of the marriage and bitterness over past offenses and infidelities are all understandable, predictable and normal. Nevertheless, all of these slow transition and ultimately waste time. The adjustments that need to be made are rarely informed or served by the continuing debate over who did what to whom. As each partner shifts his/her focus forward blame for the past becomes irrelevant.

It is in the future that problems will be solved. If each spouse concentrates his/her energy on defining the tasks that need to be done, such as solving and avoiding problems and mobilizing resources, then both spouses will quickly be engaged in adaptive behavior. Orientation to the future takes the attention off past hurts and puts it on oncoming tasks and goals. And because each spouse plays a much smaller role in the other’s future, the future is defined without constant reference to the other’s spouse deficiencies and defects. We find that emphasizing the future rather than the past reduces anger and recrimination and allows both spouses to move forward.

The particular organization of tasks differs for initiators and noninitiators and for men and women. Adjustment to new circumstances is easier for the initiator than for the noninitiator, but timing may be a problem. Initiators want closure and may become impatient with a spouse who is not yet ready for closure. They want to work out the economic and child-related issues of the divorce so they can move on to new lives. When the initiator is able to wait patiently while the other spouse comes to terms with the divorce, the process can proceed relatively amicably. But when the initiator, impatient for resolution, threatens and cajoles the other spouse intense recrimination and litigation are almost inevitable. The initiator must also manage his/her guilt lest it make things worse. Because they feel guilty, initiators may try to cushion the blow by calling the divorce a “trial separation,” holding out the possibility of reconciliation when, in fact, reconciliation is impossible. But leading the rejected spouse to believe that if he/she tries hard enough the initiator will relent invariably leads to more intense feelings of betrayal later on and delays the process of adjustment by the noninitiator.

The noninitiator has more complex coping tasks than the initiator. The greatest danger for this spouse is sinking into a posture of victimization that focuses his/her energy on recriminations against the initiator, who is now defined as the villain. Victim/villain explanations give the noninitiator a nonproductive view of the past because they emphasize vindication of past injuries and punishment of the “guilty party” rather than adjustment to a new set of needs. It is at this point that the victimized spouse is primed to find a lawyer to “rescue” him/her from the deprecations of the other spouse. In addition to precipitating litigation, the vindictiveness of the noninitiating spouse will now enrage the initiator, cauterize one’s progress and lock the entire family in limbo for the duration of the litigation. Accordingly, we regard the avoidance of this syndrome as perhaps the most important task for the noninitiating spouse.
The noninitiator needs to accept the divorce as fact and take responsibility for an active role in reshaping his/her life. For many of these spouses, who regard the divorce as nothing but loss, the aftermath of the decision to divorce becomes an attempt at damage control by minimizing other losses. They try to hang on to the status quo even when this is impossible economically. For most families, divorce means a mandatory retrenchment of consumption level. Most families consume between 95% and 105% of net income living in one household. Creating a second household adds 30%-40% of the one-family expenses. This results in one of three options: massive deficit spending that soon consumes the family’s savings and creates economic disarray, the impoverishment of one of the two households, or the distribution of cutbacks across the entire family. This latter alternative is, ultimately, the only one consistent with a healthy adjustment to divorce. Anything that interferes with its prompt achievement is damaging to the family. Trying to maintain the status quo is almost always a losing battle.

What this means is that the choices made (or defaulted) by the noninitiating spouse generally set the tone for the divorce. When the noninitiator stays in control the divorce can be an orderly process in which family members grieve but move on. When the noninitiator loses control the divorce becomes a destructive war of attrition.

Tasks for men and for women
Gender-specific tasks of divorce are associated with traditional gender roles of families. For men, adjustment to divorce requires that they assume new emotional responsibilities for themselves and their children. In most families women are still in charge of the family’s emotional life in that they are the ones who maintain the emotional structure within which men relate to their children. They play the dominant role in maintaining intimacy with and emotional connection to friends and family. For men, the major risk of divorce is emotional disconnection from their children and friends, and hence the risk of isolation. In particular, men need to broaden their parental skills and their emotional repertoire. It is not unusual to find newly separated fathers who have never before been responsible for their children for an entire weekend by themselves. Fathers need to expand their parenting skills lest they find their children slowly slipping away.

In most cases it is still the father who moves from the home while the mother remains the primary residential caregiver for the children. The task of separating successfully is often a stumbling block for families. Men who are initiating the divorce tend to move out readily. But men who are noninitiators tend to cling to the house, arguing that if the wife wants the divorce, she can leave the husband behind with the children. Even men who have not played a major role in raising the children, and who are unlikely to play this primary role in the future, may cling to the house and the children as a way of holding on to the structure of their lives. There is reason to believe that it is this profile involving the noninitiating male that is most likely to develop into a custody battle.

For women, the tasks of coping are generally more complex than for men. The noninitiating wife who has been unemployed but who now, because of the need for economic retrenchment, must seek employment has to overcome her own intense resistance to this dramatic change. Pressed economically, afraid for her children, often feeling humiliated and abandoned, she must manage even though she feels overwhelmed. For her, the practical task is reorganization, while the psychological task is avoiding despair, passivity, and a sense of victimization. She needs to comfort her children, manage a tight budget, obtain career counseling and prepare for a job hunt. All of these activities require that she mobilize her energy and maintain a sense of buoyancy she does not feel. But above all, she must embrace change not only as inevitable, but as something in which she takes a pro-active role.
Family tasks
Modern family-systems theory has redefined divorce. Rather than being the death of the family, divorce is now regarded as a reorganizing event for the family. Reorganization occurs in two stages. In the first stage the family separates into two households. The separation is initially disruptive, as children and adults alike must settle into new and strange patterns of living. Visitation schedules must be worked out. The many small annoyances of transporting children between two households must be mastered. But within six months to a year, new patterns of routine should emerge while everyone settles down.

During this early stage a critical task is helping the children make peace with the new situation. Ideally, the divorce is explained to the children as the mutual and irrevocable decision of both parents. Almost universally, children resist the divorce and want their parents to stay together. If the noninitiator tells the children that he/she doesn’t want the divorce and that this is all the idea of the other parent, it directs the anger of the children at the initiating parent. If the noninitiating parent assumes the role of victim, the children may be recruited to comfort and protect that parent at the very time they themselves most need to be comforted and protected. Managing the needs of the children during this early stage is important because it will determine how well they do throughout the adjustment process. When they do not thrive, the problems that result – acting out, poor school performance, and depression – will in turn make their parents’ lives more difficult. When this occurs, maladjustment to divorce becomes a downward spiral, with the damage lasting for years.

Reorganization into two households requires both emotional and economic readjustment. It is often necessary to cut spending on amenities such as recreation, domestic help, summer camp and restaurants. This can cause resentment and anger and needs to be handled diplomatically. It is vital that the children be kept out of the disputes and be told that their parents are in charge. Anything that detracts from the ability of the parents to maintain a united front is harmful to the children.

The long-range tasks of reorganizing the family are related to the extended family ties that result when either parent or both parents develop new relationships or remarry. Even under the best of conditions this is difficult, because step-family issues are complex even in divorces in which adjustment develops well. But when the children are engaged in the battles of their parents, their ability to develop respectful relationships with the new prospective mates of their parents is diminished. It is true that the foundation of divorce in the second marriage is often laid during the divorce of the first marriage. Paradoxically, it is in the interest of each divorcing spouse that the children like and get along with the new spouse of the other parent. It gives each parent the ability to take time off from the children knowing that they are content in the other household. When the children engage in turmoil in the other parent’s household, it makes life more difficult for both households.

For both individuals and families, the roots of successful adjustment are found in the ability to maintain control over intense emotions, focus on the future, and rapidly engage the necessity for change. It is precisely in the performance of these tasks that the adversary system has such an adverse impact.

The nature of the adversary system
The legal system in which divorces must be resolved is a unique culture unto itself. The norms, values and behaviors of that culture interact with the divorcing family system and individual personalities involved in the divorce. The product of that interaction is, generally, a heightened level of stress as well as a major collision between the myths believed by the divorcing couple and the realities that greet them when they arrive, after lengthy preparation, at the courtroom door.
From a psychological viewpoint, the most significant characteristic of the legal system is the almost complete contradiction between what the system is designed to produce and what it actually produces. The adversary system is premised on a belief that zealous advocacy of countervailing viewpoints and positions produces some semblance of justice and truth when a trier-of-fact – judge or jury – finds the facts after hearing both sides. In this system, litigants engage in thorough investigation and preparation and then participate in a trial in which testimony, evidence and cross-examination tease the truth out of otherwise conflicting and contradictory versions of history and interpretations of law. Thus the trial as drama, as denouement, has captured the imagination of literature, movies and soap opera as the modern version of a passion play. Modern media treatment of trials has raised the public perception and expectation of trials as the place where God, in a black robe, vindicates the virtuous and punishes the wicked. The job of the lawyer is to win at trial. Accordingly, the divorce process is organized around winning, and defeating the other side.

In reality, this image of trials is rarely played out in modern divorce. Here is the problem. Between 97% and 99% of all divorces are settled prior to trial. That is, prior to the case being submitted to a judge the lawyers negotiate a settlement. Generally, a settlement agreement — a contract — is drafted and signed. The terms of the contract govern the parties’ post-marital relationship to the children and marital assets. For the most part the role of the judge is reduced to rubber-stamping the negotiated agreement and dissolving the marriage. The settlement resolves all issues and all claims. Once negotiated, the settlement effectively ends the marriage and establishes the terms of the divorce.

Although negotiated settlements are the overwhelming norm how litigants reach settlement is most important. Settlement requires cooperation. But the win/lose premise of litigation makes cooperation difficult, if not impossible. In a small number of cases — no more than 5% — the parties, either directly or through their lawyers, negotiate a settlement before any action is begun in the courts. It is only after the settlement is resolved that either one files a suit for divorce. Because all issue of support, property distribution and custody have already been resolved, the only relief sought by the suit for divorce is the dissolution of the marriage. The court is not asked to award custody, alimony, child support or property to either party because the parties have already resolved the matter. This is the simple, uncontested divorce.

For the other 95% of divorces the process is not so simple. Here the divorce begins as a contested matter as one spouse sues the other for divorce. The other spouse answers the suit and may also file a counterclaim asserting his/her own claim for divorce. In such contested actions the court is asked to resolve the child-related and economic issues. Now the contest consists of convincing the court to rule favorably for one against the other, a contest that is waged by attempting to gather evidence buttressing one’s position and weakening the other’s. Here the future of the couple is determined by the decisions of the court rather than the decisions of the couple. Further, the event toward which this flurry of preparation is oriented is the trial, after which the court will decide the fate of all. It is for this litigation population, which is the bulk of all divorces, that a surprise is in store. For about 95% of this group will eventually settle, albeit many at the courtroom door with the trial about to begin. Part of the routine is the use of the impending trial to generate anxiety in the clients that causes them to make the concessions necessary to compromise and settle the case.

Thus for most divorcing couples the legal process of divorce involves the strange experience of preparing for trial as a prelude to settling the case. The client becomes part of a crusade for victory, only to be told late in the game that compromise is required. Lawyers expect most cases to settle. Everyone involved except the clients assumes settlement. Very few divorce lawyers actually go to trial in more than a few cases a year. In fact, many experienced lawyers have never tried a case (although few tell that to their clients). Litigation followed
by settlement is the norm. Indeed, it can be argued that trials are reserved for the “crazies” — those couples of which at least one member is so obsessed, unreasonable or vengeful that even coercive measures fail to settle the case. Of course, we also have to allow for trials caused by one or both lawyers being so obsessed, unreasonable or vengeful that the case cannot be settled.

Although the most common outcome of divorce litigation is a negotiated settlement, the adversary system imparts its own values to the process of adjusting or failing to adjust to divorce. There is ample reason to believe that much of the anger and disarray that accompany divorces are not so much a product of grief over the failed relationship as they are the result of what spouses perceive the other doing as part of the legal process. Four characteristics of the adversary process have important consequences for the feelings and behaviors of divorcing couples.

**Winning**

A lawsuit is a fight in which the objective is to win and avoid defeat. Most areas of civil law, such as contract disputes and personal injury litigation, lend themselves well to a win/lose dichotomy. But in matrimonial law the lawyer’s credo of doing the best for the client no matter what has complicated consequences. The husband’s lawyer seeks a lower child-support order; the wife’s lawyer seeks more support – who wins? If the husband’s lawyer succeeds in having his client pay minimal support, has he won? When the children start shaking down their father for more money whenever they see him, has the father won? If the wife’s lawyer succeeds in getting an unreasonably high child support order so that the husband defaults and runs away, has the wife won? Because all the outcomes have complex interactive results, conventional measures of winning do not apply in divorce. But the culture of advocacy has not adjusted to different consequences of divorce and the pyrrhic nature of such victories. Lawyers are oriented to winning struggles and their zeal for the victory engages the client’s fantasy of winning as well. This has important consequences for the adaptation of the divorcing couple.

**Organizing for trial**

Notwithstanding a settlement rate of about 98%, about 95% of divorces are organized around a preparation for trial. Discovery and pretrial motions are conducted with an eye toward maximizing one’s tactical advantage at trial. The objectives here include getting as much information from the other side while giving as little as possible. Where assets have to be valued, appraisers for each side get caught up in the cynical manipulation of facts in order to present the best possible case at trial. The intense advocacy of this process is consistent with the lawyer’s definition of good lawyering. But the consequences for the clients are important.

The lessons learned by the clients during this process feed the pessimism with which each views the other’s motives as well as the other’s willingness to cooperate. Withheld information and exaggerated appraisals convince each that the other is dishonorable, likely to cheat, and not to be trusted. Anger intensifies, the sense of powerlessness becomes more acute, and any inclination to cooperate diminishes.

The result is that the intense advocacy appropriate, perhaps, to the 2% of cases that are going to trial contaminates the other 98% that will eventually settle. Settlement becomes harder and is delayed. When settlements are finally hammered out, they are often the product of grudging concessions rather than affirmative agreements. This is why so many settlements — about half — break down within two years of the divorce and the clients return to court for further litigation.
Central roles of lawyers
A consequence of organizing the divorce to obtain a victory at trial is the centrality of the lawyers in the process. Clients become ever more dependent on the judgments made by their lawyers and less able to take initiative on their own. This introduces several problems. First, the psychological posture of clients in this relationship is one of passivity because they are so dependent on the lawyers. For many clients the daily phone call to their harried lawyer becomes a source of constant irritation and frustration. Because each client is so dependent on the attorney, whatever communication was left between husband and wife soon withers, leaving each more frustrated with the other and with the entire system. The problems for clients are often exacerbated by the happenstance of bad “chemistry” between the lawyers. If the lawyers dislike each other, cooperation becomes even more unlikely, and the limbo for the clients becomes a nightmare as day-to-day problems cannot be solved because neither the lawyers nor the clients can agree to anything. For clients, communication through lawyers is frustrating and inefficient, but the clients are afraid of negotiating directly for fear of prejudicing their positions in court.

Status quo pending trial
Another characteristic of the adversary system is a tendency of the lawyers to freeze the status quo for fear that their position at trial will be weakened by what they regard as unilateral concessions. This means that during the time the family is awaiting trial, a period that can extend to years, none of the adaptive changes needed can occur. Two of the most common transitions that are delayed by this are the wife’s return to work and the husband’s move out of the marital home.

Most lawyers advise men not to move from the marital home even when it is clear that the wife will be the primary residential parent for the children. Many lawyers feel that by keeping the husband in the house they maintain the pressure on the wife to make economic concessions. When women are the initiators, the reluctance of the husbands to move is invariably strong, and the encouragement of lawyers to stay makes the husband immovable. By fusing possession of the house with the possession of the children, this tactic often promotes custody fights that otherwise could have been avoided. The husband’s refusal to move often gives the wife an unacceptable choice between leaving without the children or staying in an impossibly hostile environment. She cannot leave with the children in many cases because the husband controls the money.

Few lawyers are inclined to measure the psychological damage that results from this tactic against the hypothetical tactical gain they pursue by keeping the spouses together. Living together while the divorce battle is waged provides a perfect culture for the development of hate and despair. It produces such a corrosive atmosphere that both adults and children may become depressed because they are all unable to escape the daily bouts of rage.

In states that have backlogs in court, this process can last one to four years. Tremendous opportunities for rebuilding lives are squandered as couples forgo the possibility of peaceful respite from the hostility and a beginning of the process of rebuilding. Little learning can occur. Very little cooperation around parenting tasks can be achieved; and neither spouse is able to get on with the construction of a new social life.

Another lost opportunity involves advice by the wife’s lawyer that she wait until trial before seeking employment. For many middle-class women who have been homemakers, a return to work is a minimum requirement for economic survival. But it can take a year or more for a woman to get back into the economic system. It requires hard work to explore possibilities, develop a résumé, get job counseling, seek retraining
and find a job. Many women are already at a disadvantage by having been out of the workforce for years, and they are only injured by further delay. But lawyers, afraid of losing an advantage when seeking support at trial, routinely tell their clients to refrain from seeking a job.

Unhappily, this limbo is reinforced by the legal doctrine that applies to temporary court orders concerning money and children. The standard applied by most courts is the maintenance of the status quo. Legal culture abhors results in which a litigating party is prejudiced without a hearing. So the safest thing is to freeze the status quo until the judge can hear the case. Unfortunately, this often prejudices one side, because by maintaining the status quo the court inadvertently places tremendous pressure on whichever party can least tolerate the current situation. Support orders that maintain current expenditure levels in the face of a need for retrenchment can throw a family into complete economic disarray. The myth of being able to maintain the status quo often feeds the noninitiator’s fantasy that by doing nothing, he/she will be able to avoid any significant change. This only ensures greater disillusionment later on.

**Adaptation to divorce**

Successful adaptation to divorce by individuals and families is based on an assertive embrace of the need to change spending patterns and family roles. The faster the changes begin, the better the chances that the family will adjust. The adversary system of divorce interferes with and thwarts this transition at almost every point. Viewed as a learning system, litigation teaches and reinforces maladaptive behavior. It teaches passivity when action is needed. It teaches silence when communication is needed. It teaches stasis where change is required, and it promotes conservatism at a time when people must take risks.

If we look once again at the psychological tasks of divorce, the relationship between the legal system and the psychological system becomes apparent. First, divorcing people need to control their anger and rage. The legal process does not mitigate anger; on the contrary, it introduces new sources of anger as it undermines whatever residue of goodwill the couple has left. Second, divorcing people need to take responsibility for the divorce as a means of assuming control of difficult decisions. Again, the adversary system thwarts this adaptive behavior by focusing the parties on fault and fostering an atmosphere of recrimination and blame.

The orientation toward winning at trial induces fear of risk-taking precisely at the very time the parties need to take risks. Successful adaptation to divorce requires contra-instinctual acts by both spouses. The wife needs to encourage the father’s parenting in order to provide the children with security and herself with much-needed free time. She needs to venture into the workplace in search of increased income. The husband needs to separate quickly to provide everyone with peace as a way to create calm for both parents and children. All these things require risk. The adversary system sends the opposite message: do not concede anything even if it hurts you to hold on to the status quo.

The adjustment of the noninitiator is the linchpin of the divorce. The faster this spouse accepts the divorce, the easier will be the settlement process. The more this spouse drags the greater will be the battle and resulting destruction. Lawyers, unfortunately, are not trained, or for the most part, inclined to understand the emotional process of divorce. Although few lawyers knowingly fan the flames, the posture of the advocate frequently has that effect. Clients who feel victimized expect sympathy and reinforcement from their lawyers and lawyers are programmed to see the world through the eyes of the client. Thus the client who believes he/she needs protection from the other spouse seeks and finds a lawyer to aggressively prosecute his/her case. This in turn leads to the portrayal of the other spouse as the villain and a demand that, as the villain, the other spouse bear
the consequences of the divorce. The result is that the noninitiator’s fantasy that he/she can maintain the status quo is fed at least for a time. And during this period, this spouse, secure in the myth that the initiator will be made to pay, does not change or adapt but hunkers down in a state of paralysis.

**Mediation as alternative model**

One antidote to the toxicity of the adversary system is the use of mediation to help the couple negotiate the settlement. Mediation has emerged in the past decade as a fast-growing alternative expressly designed for the 98% of couples who will resolve their divorce through negotiated settlement. In the conventional divorce settlement is the by-product of preparation for trial notwithstanding that almost all cases settle. If we assume that the case will settle it makes little sense to prepare for trial. In mediation settlement is the explicit rather than the incidental objective.

Mediation involves the use of a professional neutral who facilitates the negotiation of the agreement directly by the couple rather than by their lawyers. The role of lawyer is changed from that of surrogate to that of advisor or consultant. The mediator helps the parties define the issues, develop the relevant information, understand their choices, and negotiate the agreement. Along the way the parties consult their lawyers for information and advice that informs their deliberations. When experts such as accountants, appraisers, or mental health professionals are needed, the couple chooses one neutral expert rather than two adversary experts. It is a process of informed decision-making that leads to genuine agreement rather than concession.

Although vigorously resisted by the organized bar, mediation has been enthusiastically embraced and promoted by the mental health community. It is attractive to mental health practitioners because, unlike the conventional adversary system, mediation provides an explicit model for adaptive behavior.

First, mediation requires both divorcing parties to stay in control — of their emotions and of the process of divorce. Face-to-face negotiation in the presence of a mediator instills a discipline that adversary proceedings do not. The mediator makes sure that each spouse has an opportunity to express his/her feelings and to be heard. But the dialogue is directed away from nonproductive arguments about the past, and blaming is actively discouraged. By providing a setting in which communication is safe, the mediator helps the parties avoid the despair that many divorcing couples feel when they cannot get even small problems solved with the other spouse.

The communication process in mediation is entirely different from that in litigation. Lawyers discourage direct communication between clients; mediators require it. Mediation provides clients with a communication model and extensive practice in problem-solving that can establish a working relationship between the post-divorce parents. Because mediation is designed to achieve settlement, the emphasis is on reconciling the interests and needs of the parties rather than on vindicating their legal rights. Mediation is therefore pragmatic rather than abstract, a distinction that in practice helps to reduce anger.

Mediation is generally much faster than lawyer-litigated and negotiated divorce because communication is so much more efficient. Using neutral experts not only speeds things up but also prevents the cynicism that results when adversary experts produce two distorted versions of the facts. On average, a garden-variety middle-class divorce is resolved in two to three months rather than two to three years. The cost of mediation can be as low as 10% of the cost of conventional divorce so families are spared the added stress of burdensome legal fees.
Mediation is also more protective of the family. The mediator, as neutral, is much better positioned to intervene on behalf of the children than is either adversary lawyer and tends to have credibility with both parents. Hearing both sides of the story, the mediator is better able than two lawyers to sort out problems and promote cooperation.

In short, mediation works because it is designed to promote adaptive behavior rather than maladaptive struggle. It calms where litigation excites; it emphasizes convergence of interests where litigation emphasizes divergence of rights. Divorcing spouses in mediation have no alternative but to face the need for change and to negotiate those changes without retreating into recrimination and blame. Mediation provides no place to hide from responsibility and strips away the myths that retard change. By keeping the parties active rather than passive mediation promotes responsibility and proactive change.

Divorce has changed substantially in the past 20 years. No-fault divorce is almost universal now, with practically every state having adopted some version. But the way people divorce has not yet changed sufficiently to provide a vehicle for no-fault psychological divorce. It is clear that conventional legal approaches to divorce are not well suited to the psychological tasks of divorce. That is why mediation is emerging as the appropriate vehicle for modern divorce.