BOOK REVIEW OF
***Common Sense, Legal Sense and Nonsense about Divorce* by Lenard Marlow**
by Franklin R. Garfield

Common Sense, Legal Sense and Nonsense about Divorce by Lenard Marlow is written for divorcing spouses. The essential message of the book is simple and straightforward: Divorcing spouses must solve certain personal and practical problems that may or may not have legal implications. If they go off to separate lawyers in order to do that, they are starting a process that will result in financial ruin and emotional devastation.

Common sense refers to the parties' good judgment and the personal considerations that are important to them. According to Marlow, that's all they need to solve their problems. In contrast, he characterizes the idea that the parties have legal rights, that their legal rights trump all other considerations, and that only a lawyer can protect those rights as nonsense. To Marlow, the legal rights so venerated by lawyers are nothing more than arbitrary legal rules that vary from state to state. If and only if it will help them solve their problems, the parties may sensibly resort to the laws of the state in which they reside.

Marlow's argument in a nutshell is that the law does not necessarily provide the parties with answers to their questions or solutions to their problems. This is primarily because the law as it applies to the facts of any given case is subject to interpretation. When the parties get answers to their questions from separate lawyers, the answers they get are different because each lawyer interprets the law in a manner that is most favorable to the party he or she represents. The idea that the parties should get answers to their questions from separate lawyers – indeed, that they should be represented by separate lawyers – is the premise on which the adversarial system is based, and it is the efficacy of that system that Marlow questions in this book.

What Marlow means by common sense (the personal considerations that are important to

the parties) and nonsense (a never-ending debate between the parties' lawyers as to how the law should be interpreted and applied) is tolerably clear. The meaning of "legal sense" and its role in the process deserve further explanation. By legal sense, Marlow means those principles of law that are helpful to the parties in resolving their situation. When those principles are definitive (*i.e.,* not subject to interpretation), they control the outcome.

To be sure, their application may not satisfy both parties. After all, one party or the other usually believes that the law is unfair in various respects. However, if the law is definitive, the parties are stuck with it. They may agree to a resolution that satisfies their own notions of fairness, but if they do not agree, the law is the default.

In California, for example, the law mandates an equal division of the parties' community property. The parties may disagree about the value of a community asset, whether one party is entitled to reimbursement for the contribution of separate property to its acquisition or improvement, how the asset will be divided or awarded to one party or the other, and so forth. But the law requires an equal division in every case regardless of the parties' notions of fairness.

On the one hand, the parties may agree to divide their community property unequally; they are not required to follow the law. On the other hand, unless there is consideration for an unequal division – for example, a waiver of the right to receive spousal support – an unequal division of the parties' community property is rare. In this respect, laws that are not subject to interpretation help the parties avoid their own version of the endless debate that lawyers engage in routinely.

The ultimate absurdity of the adversarial system is illustrated by two points: First, virtually no one wants to go to Court. Second, only a very small percentage of all divorce cases are resolved by a judge. In the vast majority of cases, lawyers engage in a prolonged and

expensive debate on behalf of their clients without ever providing the parties with answers to their questions or solutions to their problems.

The reason for this is simple. As Marlow puts it: "Since your attorney is an advocate, not a law professor, he will not view his function to be to take [the facts of your case] and organize them so as to give you an objective picture of the law. He will view it, instead, to be to take those facts and organize them so as to make the best possible case that he can for you." If the parties knew from the outset that an adversarial procedure would leave them only with a range of possible answers instead of the right answer, no one would choose it. The case does not end when the parties are finally given the right answer. The case ends when the parties are financially and emotionally exhausted.

Marlow conceptualizes the problems that confront divorcing couples in the form of three questions: How will we dispose of our property? How will we raise our children? How will we manage financially? Marlow disputes the notion that these problems become easier to solve when they are translated into the legalese that lawyers routinely employ.

Most divorcing couples understand that the legal system will not tell them the right way to co-parent their children. After all, raising children has nothing to do with legal rights and duties. It would never even occur to parties who are married and living together to ask whether they had legal rights and duties when it came to raising their children. It is only when the parties are no longer married and living together that they are encouraged to think in these terms. Although less obvious, this is equally true when it comes to dividing the parties' property and providing for themselves financially.

Common Sense is replete with illustrations of the author's points that are accessible to the lay reader. For example, confronted with a problem, a couple must choose the procedure they

will employ to solve that problem. Marlow posits five requirements for any procedure, and notes that the flip of a coin meets four of them: It is quick. It is cheap. It avoids emotional wear and tear. It provides a definitive answer, although not necessarily the right one. While many people will bristle at the thought of deciding important issues with the flip of a coin, Marlow's point is that any alternative procedure should be at least as good. Admitting that the flip of a coin meets only four of the author's five procedural requirements, he reminds the reader that negotiating through attorneys meets none of them.

Lawyers whose livelihoods depend upon the adversarial system are unlikely to read this book, let alone promote it. The necessity of separate representation to vouchsafe the parties' legal rights is a hallowed principle of the Anglo-American legal tradition. Lawyers will defend that principle to the death.

Individuals on the verge of divorce are anxious about what the future holds and predisposed to consult attorneys; not to go it alone. The belief that an attorney will protect them and that they need to be protected is embedded in the popular consciousness.

Along these lines, Marlow does not answer (or even address) several questions that occurred to me as I read this book: First, what accounts for the power of the myth that a divorce case is about the parties' legal rights, that they need to be protected from each other, and that only separate attorneys can provide that protection? Why is it so much easier for divorcing spouses to believe these lies than to accept the truth? In my opinion, it is because attorneys offer the parties hope for a better future than the one they envision. That hope invariably turns out to be false, but it is hope nonetheless.

Second, as mediators, we already know the truth of what Marlow is saying – that divorcing spouses need to solve personal and practical problems with legal implications, that a

mediator can provide them with all of the legal information they might need, and that the adversarial system does not deliver on its promises. So why do so many of us recommend (and some of us require) that our mediation clients consult independent counsel?

Common Sense is clear, concise and convincing. It deserves to find an audience. At a minimum, it should be required reading for every couple contemplating divorce.