

Unbundling of Legal Services and the Family Lawyer

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I want to file my divorce papers myself and work out a settlement directly with my spouse . . . but I need a lawyer to advise me about my legal rights and settlement strategy and to review my paper work.

—Pro se litigant

I am going to mediate my divorce . . . but I want to consult with a lawyer to back me up at the negotiation table and to make sure the deal is fair.

—Spouse selecting divorce mediation

Now that the settlement is completed, I want to improve my business, establish a better working relationship with my former spouse and start having a life again. How can my family lawyer help me?

—Divorce client ripe for a legal wellness checkup

The roles of client and attorney are undergoing major evolution.¹ Today, family law clients are more active, more educated in the art

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1. Client interest groups are active on both the national and local levels. One group, the National Legal Consumer Resource Center, directed by William Bolger and located at Post Office Box 340, Gloucester, Virginia, 23061, publishes a monthly newsletter, conducts studies, and lobbies on behalf of legal clients. Help Abolish Legal Tyranny (HALT), 1319 F Street, N.W., Washington, D.C. 20004, is a lobbying group

of clienthood, more questioning, and more demanding in their quest to control the purchase and supervision of legal services. Competent family lawyers understand that a client is more than the sum total of a case file. Economics, social relationships, emotional and psychological concerns, moral values, and pragmatic factors affect how a client can move on with life after divorce.² Client-centered lawyering beyond the giving of technical advice has become a major focus in legal education.³

Unbundling Legal Services (alternatively known as Discrete Task Representation or Alternatives to Full-Time Representation (AFTR) is a conceptual model of the lawyer-client relationship that may transform family law practice in the twenty-first century. Although much unbundling already occurs in many family law practices,⁴ for others, this article may preview a fresh approach toward clients and law practice generally.⁵

I. Definition of Unbundling

Family lawyers generally offer a full service package of discrete tasks that encompass traditional legal representation. More specifically,

supporting clients' rights. See Brae Canlen, *No More Mrs. Nice Guy*, 14 CAL. LAW. 50 (Apr. 1994) (describing the feelings, attitudes, and political actions of a group of ex-spouses [mostly wives] who consider themselves victims of the family law system).

2. MODEL CODE OF PROFESSIONAL CONDUCT Rule 2.1 (1994) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation").

3. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); Larry Teply, *Lou Brown's "Baby" Gone International to Spread the Message of Preventive Law*, 11 PREVENTIVE L. REP. 39 (June 1992), and Mary Holmes, *International Client Counseling Competition*, INT'L BAR NEWS 52 (Jan.-Feb. 1994); Forrest S. Mosten, *Introduction to Special Issues on Client Counseling and Legal Interviewing*, 18 CREIGHTON L. REV. 1329 (1984-85); Louis M. Brown, *From Preventive Law to Mock Law Office Competition*, 51 OR. L. REV. 343 (1972). The Client Counseling Competition administered by the ABA Law Student Division involves law schools in the U.S. and is affiliated with the International Bar Association's Louis M. Brown International Client Counseling Competition in which seven countries now participate. This law school activity promulgates standards for client counseling which underscore the importance of delving into nonlegal considerations.

4. The introductory consultation is perhaps the most common example of current unbundling. Other illustrations include: preparation and/or recording a deed or other documents (perhaps just typing at client's request); lawyer rendering a second opinion on another lawyer's work; and answering a narrow telephone question from a prospective client.

5. An early genesis of unbundling was based on a medical prescription analogy in Louis M. Brown, *Lawyer's Prescription*, 38 CAL. ST. B.J. 388 (1963). Throughout his sixty-year commitment to preventive law, Professor Brown has urged the legal profession to look inward, outward (mostly at the medical profession), but mostly toward ordinary citizens for models and inspiration. See Forrest S. Mosten, *The Case Against Lou Brown: He Loves People More Than Profession*, 10 PREVENTIVE L. REP. 2 (Dec. 1991).

the lawyer implicitly or explicitly undertakes the following services⁶ on behalf of a client: (1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court.

When a client hires a lawyer, generally both client and lawyer assume that the lawyer will perform these services in a full-service package. The lawyer believes (because of training and experience) that the full service approach is necessary to adequately represent the client's interests.

Unbundling these various services means that the client can be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly. Further, the client may, in some cases specify the depth or extent of each service.⁷ For example, a client may want representation at trial, but may want to handle court filings, discovery, and negotiations without the lawyer.⁷ Conversely, a client may seek the advice and support of a family lawyer in negotiating a settlement, but may choose to self-represent⁸ or retain another attorney for actual court representation.

With respect to service depth, a client may desire a lawyer to "re-search" the law by making a five minute check of the statutory index. Alternatively, the client might want the lawyer to write an exhaustive research memorandum that could take many hours. Variables determining the type and depth of services include: the extent and accuracy of information given to the client making a choice, personality of the client, complexity of the task, and costs and resources available to do the job.⁹

The concept of unbundling is far richer than merely a series of practical suggestions or practice tips. Because family lawyers have been

6. See generally GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); see BINDER ET AL., *supra* note 3.

7. This unbundling model operates both in traditional law practices and those such as Sunset Legal Centers in Miami, Florida, which rely heavily on nonlawyer personnel. See TERENCE PURCELL ET AL., *TOMORROW'S LEGAL SERVICES* 17-21 (Law Foundation of New South Wales 1994). For a comprehensive look at the proliferation of nonlawyer services, see ABA COMMISSION ON NON-LAWYER PRACTICE, *NON-LAWYER PRACTICE IN THE UNITED STATES* (forthcoming).

8. PURCELL ET AL., *supra* note 7, at 16 (citing Junda Woo, *Entrepreneurial Lawyers Coach Clients to Represent Themselves*, WALL ST. J., Oct. 15, 1993, at B1 [describing innovative Connecticut practice offering advice, simulated role playing, and limited assistance for *pro se* litigants]). See PAUL BERGMAN & SARA J. BERMAN-BARRETT, *REPRESENT YOURSELF IN COURT: HOW TO PREPARE AND TRY A WINNING CASE* (1994); Lowell K. Halverson, *How To Stay Out Of Divorce Court: A Negotiation Primer for the Divorcing Couple* (1991) (unpublished manuscript, on file with author).

9. See generally BINDER ET AL., *supra* note 3 (discussing a legal counselor's duties and skill requirements to fully ascertain a client's needs and concerns as well as to develop and execute a comprehensive plan of action).

schooled in practicing with the full package of services, breaking up the package may require major rethinking about the lawyer-client relationship.

II. Origins of Unbundling

Unbundling has its roots in several sources: (1) the consumer movement;¹⁰ (2) the use of alternative dispute resolution (ADR);¹¹ (3) the proliferation of legal malpractice suits which has resulted in lawyer defensiveness and a desire for protection against clients with the evolving ethical duty to disclose alternatives to litigation;¹² (4) the precarious economics of family law practice which underscores the importance of reducing unpaid accounts receivables; and (5) the emergence of preventive law as an acceptable and preferred method of law practice.¹³

Some of the sources of unbundling include deficiencies in the current system: high lawyer fees, excessive delays from congested courts,

10. The trend among U.S. Supreme Court cases is to support entrepreneurial and consumer-oriented marketing of professional services. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding blanket bans on lawyer advertising unconstitutional); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (permitting a Florida certified public accountant to personally solicit clients). See BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977); BARLOW F. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES* (1970).

11. See Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343 (1992); Lawrence J. Brennan, *Introduction: Alternative Dispute Resolution: Litigation Solutions for the 90's and Beyond*, in *HOW TO HANDLE ARBITRATION IN NEW YORK STATE AND FEDERAL COURTS*, 458 PRACTISING L. INST. 7 (Apr. 23, 1993).

12. For a discussion of alternatives to litigation, see COLORADO MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (effective January 1, 1993, requiring lawyer to advise clients of alternatives to litigation); Kansas Bar Association Ethics Advisory Services Comm., Op. 94-01 (1994) ("Lawyers are required to discuss alternative dispute resolution methods with clients when ADR is proposed by court or opposing counsel or when lawyer's professional judgment indicates ADR is viable option."). See also Edward A. Dauer & Cynthia McNeil, *New Rules on ADR: Professional Ethics, Shotguns and Fish*, 21 COLO. LAW. 1877 (Sept. 1992); Forrest S. Mosten, *The Duty to Explore Settlement: Beyond Garris v. Seversen*, 12 FAM. L. NEWS (Sept. 1989); Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990).

13. See LOUIS M. BROWN, *PREVENTIVE LAW* (1950); LOUIS M. BROWN & EDWARD A. DAUER, *PLANNING BY LAWYERS: MATERIALS ON AN UNADVERSARIAL LEGAL PROCESS* (1978) [hereinafter *PLANNING BY LAWYERS*]; LOUIS M. BROWN, *LAWYERING THROUGH LIFE: THE ORIGIN OF PREVENTIVE LAW* (1986). Louis M. Brown, *Preventive Law and Public Relations: Improving the Legal Health of America*, 39 A.B.A. J. 556 (July 1953); Thomas Gonser & Forrest S. Mosten, *The Case for a National Legal Health Strategy*, 12 PREVENTIVE L. REP. 32 (Summer 1993); NATIONAL CENTER FOR PREVENTIVE LAW, *PREVENTIVE LAW BIBLIOGRAPHY* (1993).

defensive lawyering, and the acrimony caused by the jousting of the adversarial system. Unbundling, however, has also emerged from positive societal forces such as the consumer movement, the acceptance of ADR, and the development of preventive law.

With the establishment of private legal clinics in the early 1970s, the interests of law clients and a wider consumer movement merged. The public began demanding more control over accessibility of attorneys, the demystification of legal jargon and arcane court procedures, and alternatives to the high costs of legal services for those persons of lower and moderate incomes.¹⁴

Private legal clinics provided an elementary form of unbundling through legal consultations of a specified time and price without any further obligation on the part of the client or the lawyer.¹⁵ The middle-income client's access to a lawyer to consult and obtain significant legal advice for a known, set, and reasonable price was a revolutionary development in itself and one that received significant and positive consumer reaction.¹⁶

The same consumer motivations are evident with respect to family lawyers providing unbundled services. Instead of retaining a lawyer for full service representation for which total fees often cannot always be accurately predicted, family lawyers are available to perform only *part* of the job for *part* of the total fee. The lawyer's hourly rate may not differ in discrete task representation, but the cost to the client will be more controlled and generally far less.¹⁷ Unbundling need not be confused with a reduced hourly rate. The fee arrangement may be "win-win" for both client and lawyer. The client pays significantly lower overall fees. However, lawyers charge (and clients generally expect to pay) a customary hourly rate for the limited services provided. Actually, lawyers providing unbundled services may choose to offer

14. ABA SPECIAL COMM. ON THE DELIVERY OF LEGAL SERVICES, REPORT ON THE SURVEY OF LEGAL CLINICS & ADVERTISING LAW FIRMS (1990) [hereinafter SURVEY REPORT]; ABA SPECIAL COMM. ON THE DELIVERY OF LEGAL SERVICES, LEGAL CLINICS: MERELY ADVERTISING LAW FIRMS? (1982); Gerry Singen, *New Providers in the Marketplace: Mass Market Law Firms, Prepaid Legal Services and Legal Clinics* (Working Draft 1984, Program on the Legal Profession, Harvard Law School) (cited in SURVEY REPORT, at 121); Louis M. Brown, *Law Office for Middle Income Clients*, 40 CAL. ST. B.J. 720 (1965).

15. SURVEY REPORT, *supra* note 14.

16. *Id.*

17. See Kasey W. Kincaid & Kimberly J. Walker, *Managing Litigation Costs: The Client Cannot Start Too Soon*, 41 DRAKE L. REV. 67 (1992) (defining value billing as "an attempt to bill the client for the true value of the services rendered . . . based on the lawyer's responsibility and experience required and the value added to the client's experience with the law").

such services at a higher than normal hourly rate based on a value billing concept, due to the malpractice risks.¹⁸

The legal profession can certainly benefit from similarly increasing its customer-centered orientation. The profession is beginning to recognize its vulnerability in the marketplace as clients are increasingly self-representing, turning to nonlawyer providers, or just living with a recognized legal need.¹⁹ Marketing courses for lawyers are the current rage, primarily because legal consumers (clients) are learning from their experience as consumers of other products and services to expect disclosure of relevant "sales information" and friendly client-oriented service. Tools such as readable brochures, responsive customer hot lines, and employer marketing training help meet this growing consumer demand. Lawyers are learning from this consumer trend. Some innovative middle-income providers have developed thriving practices using client-oriented advertising,²⁰ office availability in shopping malls,²¹ information and service hot lines paid immediately by credit card or by phone bill,²² and other experiments in service delivery.

III. Three Models for Providing Unbundled Legal Services

To explore unbundling and its potential for the practice of family law in the future, I submit three working models²³ of unbundled lawyer-

18. *Id.*

19. ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, MAJOR FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 12 (1994) [hereinafter ABA LEGAL NEEDS STUDY]. Moderate income persons reported that 61% of identified legal needs were never brought to the legal justice system: 23% were handled on the person's own initiative; 12% by nonlegal helpers; and in 26% of the legal needs the person took no action at all. However, legal needs that found their way to the civil justice system were seen as resolved more satisfactorily than those that did not.

20. See ABA COMM'N ON ADVERTISING, YELLOW PAGE ADVERTISING: AN ANALYSIS OF EFFECTIVE ELEMENTS 9 (1992) ("With expenditures for television commercials approaching \$100 million in 1990, there is every indication lawyer advertising has become an effective method for clients to gain access to legal services").

21. Singsen, *supra* note 14.

22. A successful model of unbundled family law services is Divorce Help-line in Soquel, California. Utilizing an "1-800" telephone number, this firm of family law attorneys (some are Certified Family Law Specialists) is available for clients to consult by the minute (charged to major credit cards). The Help-Line lawyers offer legal coaching throughout the divorce process, and draft correspondence, agreements, and court documents. See ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT 32 (1994) [hereinafter ABA PRO SE REPORT].

23. A video simulation of the three models is available from Professor John Wade, Director of the Dispute Resolution Center, Bond University, Gold Coast, Queensland, Australia.

ing: (1) legal counselor advising for *pro se* litigants; (2) consulting lawyer for clients participating in mediation; (3) preventive lawyering to perform techniques such as nonlitigation calendar and legal wellness client checkup. In all three models, the family law attorney can offer discrete services which are broken out of the traditional package, and the client is empowered to specifically contract for the level of service desired by the client.

A. Legal Counselor for Pro Se Litigants

In January 1993, the American Bar Association Standing Committee on the Delivery of Legal Services released a study of *pro se* representation in Maricopa County (Phoenix), Arizona ("1993 Study").²⁴ In January 1994, the ABA released a report on other thriving models of *pro se* court-related progress.²⁵ The findings of these two reports are startling and should be required reading for family lawyers.

First, the rapid growth of *pro se* litigants replacing lawyers is remarkable. In 1980, 76 percent of the cases involved at least one lawyer, generally two, leaving both parties unrepresented in only 24 percent of the cases. In 1985, both parties were unrepresented in 47 percent of the cases. In less than six years, the number of families handling their entire divorce without any lawyers doubled!²⁶

The 1993 Study indicated that the trend toward self-representation in family law had continued its upward bent. In 1990, 52 percent of families obtained a divorce without any attorney, and in 88 percent of cases, at least one party was either self-represented or defaulted.²⁷

1. MESSAGE OF THE PRO SE MOVEMENT

Consumers in Arizona and other jurisdictions are sending an unequivocal message to the courts and to lawyers to make the entire legal system more user-friendly. This can be done in a number of major ways: (1) less complex procedures in the court system, including more no-fault jurisdictions;²⁸ (2) uniform support guidelines;²⁹ (3) simplified court procedures;³⁰ (4) model pleadings and

24. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, SELF REPRESENTATION IN DIVORCE CASES 34 (Jan. 1993) [hereinafter SELF REPRESENTATION REPORT]. See also Robert B. Yegge, 33 JUDGES' J. 8 (1994).

25. ABA PRO SE REPORT, *supra* note 22.

26. *Id.* at 6.

27. *Id.* at 7.

28. *Id.* at 14-17.

29. See SELF REPRESENTATION REPORT, *supra* note 24, at 108.

30. Generally ABA PRO SE REPORT, *supra* note 22.

standardized forms;³¹ and (5) greater procedural assistance both at the courthouse and in the private sector.³²

The 1993 Study indicates that court-provided written handbooks are too broad and general to give the *pro se* divorce litigant the necessary, detailed, and procedural information to properly protect substantive rights.³³ The private sector is responding by providing better written publications and instructional videotapes.³⁴ Even though many *pro se* litigants have substantial educations (more than half having some college education), the 1993 Study shows that *pro se* litigants frequently have difficulty completing the appropriate forms and filing them in court even with the use of these commercial aids.³⁵ The findings demonstrate that *pro se* litigants make less use of temporary orders,³⁶ obtain less spousal maintenance,³⁷ obtain tax advice less frequently,³⁸ and utilize alternative dispute resolution options less.³⁹ These deficiencies may be the tip of the iceberg. They demonstrate the need for unbundled services to be provided by family lawyers as indicated by the 1994 ABA *Pro Se* Report:

When examining *pro se* activity in a specific jurisdiction, consideration should be given to the effectiveness of the various mechanisms for alerting *pro se* litigants about their responsibilities and/or encouraging them to get legal advice—especially concerning central issues of allocation of pensions, insurance and other employment-related assets and the income tax consequences of property and support settlement.⁴⁰

2. THE FAMILY LAWYER'S ROLE

If a lawyer is willing to offer discrete services, clients are generally willing to pay for services such as legal counseling, help with forms, coaching for negotiations, ghost writing letters, preparing settlement documents, and reviewing proposals and drafts.⁴¹ Clients are afforded access to a family lawyer and the opportunities to contract for discrete necessary services.

A lawyer can offer several different types of discrete services:

31. *Id.* at 17.

32. *Id.* at 21.

33. SELF REPRESENTATION REPORT, *supra* note 24, at 37-39.

34. ABA PRO SE REPORT, *supra* note 22, at 11.

35. SELF REPRESENTATION REPORT, *supra* note 24, at 13-15.

36. *Id.* at 20.

37. *Id.* at 18.

38. *Id.* at 16.

39. *Id.*

40. ABA PRO SE REPORT, *supra* note 22, at 43.

41. Woo, *supra* note 8, at B1.

- a. A lawyer can educate the *pro se* litigant about options, inside or outside the courthouse, for resolving the case without adjudication.⁴²
 - b. A lawyer can advise the client and offer an experienced assessment of proposed settlements or other courses of action.
 - c. The lawyer can role-play strategies and techniques in a simulated negotiation, to prepare the client for actual negotiations.⁴³
 - d. A lawyer can offer a psychological or negotiating profile to help the client deal with the other spouse and/or opposing counsel.⁴⁴
- Under the surface of the process of negotiation is client education on the four distinct relationships between divorcing spouses: the spousal divorce, economic divorce, parental divorce, and legal divorce.⁴⁵

42. Forrest S. Mosten, *Avoiding Trial in Family Law*, L.A. LAW. 45 (Sept. 1993) (options may include helping the client accept the normalcy of divorce to facilitate a less disruptive transition from married life); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 148 (1984) [hereinafter *COMPREHENSIVE GUIDE*] ("Divorce is fast becoming a statistically average condition for even the normative distribution among the population; it is creating a new set of transactional systems and processes via shared parenting, single adulthood, remarriage, and blended family units"); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 7-8 (1989) ("Divorce is the only major family crisis in which social supports fall away. . . . When a man and a woman divorce, many people tend to act as if they believe it might be contagious. The divorced person is seen as a loose cannon. We have names for them: rogue elephant, black widow. Despite the widespread acceptance of divorce in modern society, there remains something frightening at its core.").

43. Woo, *supra* note 8. See also Robert S. Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98 (1969-70).

44. Client education concerning the process of negotiation must often be supplemented by educating lawyers on this subject. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* (1991); Carrie Menkel-Meadow, *Toward Another View of Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); JOEL EDLEMAN & MARY BETH CRAIN, *THE TAO OF NEGOTIATION* (1993). See also CALIFORNIA STATE BAR COMMITTEE ON DELIVERY OF LEGAL SERVICES FOR MIDDLE INCOME PERSONS, *LAWYER'S GUIDE TO BEING A CLIENT COACH* (Steven Elias ed. 1994).

45. See *Understanding the Process of Divorce*, in ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 19-57 (1992); see generally CONSTANCE R. AHRONS, *THE GOOD DIVORCE* (1994). Helping the client understand the emotional component of divorce may be the most valuable contribution of the unbundled attorney. See WALLERSTEIN & BLAKESLEE, *supra* note 42, at 29-30 ("Incredibly, one-half of the women and one-third of the men are still intensely angry at their former spouses, despite the passage of ten years. . . . An adult is more likely to succeed after divorce if he or she has some history of competence, some earlier reference point to serve as a reminder of earlier independence and previous successes. For all, recovery from crisis is an active process. It can be facilitated by the luck of the draw or by a chance meeting, but it involves active effort,

- e. The lawyer can assess legal strengths and weaknesses in the client's case, helping the client formulate positions for negotiations and/or court hearings.⁴⁶
- f. The lawyer can provide computer printouts on child and spousal support guidelines, develop budgets, analyze available income and perquisites, and help the client develop a realistic economic plan.⁴⁷
- g. The lawyer can refer the client to necessary ancillary professionals such as accountants, therapists, appraisers, or vocational counselors.⁴⁸

In addition to gaining increased legal knowledge, clients often feel empowered and relieved to handle their own case. They feel that they can control their own destiny with the comfort of knowing that the lawyer can be brought in for future full-service representation if the client so chooses.⁴⁹

3. BARRIERS TO SERVING AS LEGAL COUNSELORS TO *PRO SE* LITIGANTS

Two major barriers currently exist which limit lawyer availability for unbundled legal services to *pro se* litigants: malpractice exposure and pejorative attitudes of lawyers, court-staffs, and judges toward *pro se* litigants.

a. Malpractice Exposure

In most jurisdictions, a lawyer who is involved in only part of the case may still face malpractice liability from a disgruntled client who later claims that the lawyer should have advised about rights and obligations that are ancillary to the problem presented by the client. In a recent decision, *Nichols v. Keller*,⁵⁰ the California Court of Appeal found malpractice exposure for a worker's compensation attorney who

planning, and the ability to make constructive use of new options and to move ahead."); see also LOWELL HALVERSON & JOHN W. KYDD, *DIVORCE IN WASHINGTON: HUMANISTIC APPROACH* 1-18 (1990).

46. Planning negotiation strategy is often an under-emphasized area of lawyering. See generally Menkel-Meadow, *supra* note 44.

47. See George Norton, *The Future of Support and Family Law*, *FAM. L. NEWS* (1994).

48. See BINDER ET AL., *supra* note 3, at 356-359; *COMPREHENSIVE GUIDE*, *supra* note 42, at 305-17.

49. See generally Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW. & SOC'Y REV.* 93 (1986); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 *YALE L.J.* 1663 (1989).

50. 19 Cal. Rptr. 2d 601 (Ct. App. 1993). See also Peter Spero, *The Attorney's Duty to Advise Beyond Scope of Representation*, *L.A. DAILY J.* (Dec. 19, 1994), at 7.

did not advise a client of third-party claims. The scope of representation was defined by both lawyer and client as a worker's compensation claim and the court held the lawyer should have advised the client about the ancillary claim. The court stated:

In the context of [personal injury] consultations between lawyer and layperson, it is reasonably foreseeable the latter will offer a selective or incomplete recitation of the facts underlying the claim; . . . and rely upon the consulting lawyer to describe the array of legal remedies available, alert the layperson to any apparent legal problems, and, if appropriate, indicate limitations on the retention of counsel and the need for other counsel. In the event the lawyer fails to so advise the layperson, it is also reasonably foreseeable the layperson will fail to ask relevant questions regarding the existence of other remedies and be deprived of relief through a combination of ignorance and lack or failure of understanding. And, if counsel elects to limit or prescribe his representation of the client, . . . then counsel must make such limitations in representation very clear to his client.⁵¹

The court quoted Justice Louis Brandeis who in 1898 could have been describing the philosophical underpinnings for an unbundled consultation:

The duty of a lawyer today is not that of a solver of legal conundrums: he is indeed a counselor at law. Knowledge of the law is of course essential to his efficiency, but the law bears to his profession a relation very similar to that which medicine does to that of physicians. The apothecary can prepare the dose, the more intelligent one even knows the specific for most common diseases. It requires but a mediocre physician to administer the proper drug for the patient who correctly and fully describes his ailment. The great physicians are those who in addition to that knowledge of therapeutics which is open to all, know not merely the human body but the human mind and emotions, so as to make themselves the proper diagnosis—to know the truth which their patients fail to disclose. . . . [Citations omitted.]⁵²

The lawyer-client relationship (with or without compensation) is usually imputed from the most limited meeting.⁵³ Lawyers who offer discrete task unbundling to *pro se* litigants do not presently have a safe harbor for incorrect or incomplete advice rendered due to the limited

51. *Id.* at 610.

52. *Id.* at 610.

53. *Miller v. Metzinger*, 154 Cal. Rptr. 22, 27 (Ct. App. 1979) ("When a party is seeking legal advice consults an attorney at law and secures that advice, the relationship of attorney and client is established prima facie."). The California Supreme Court has accepted review of *Flatt v. Superior Court*, No. SO31687 (Cal. 1994), which affirmed *Metzinger* and applied it to a situation in which the attorney provided an initial consultation but declined representation due to a conflict of interest. The lawyer is now facing a malpractice action for failure to warn the client to obtain substitute counsel as soon as possible to avoid a statute of limitations. See L.A. DAILY J., April 22, 1994, at 1, 9.

scope of employment. The client may have chosen to only retain the lawyer for two to three hours. Yet when faced with a subsequent tax assessment, omitted asset, or prejudicial custody order, the lawyer may be the scapegoat. Currently, no special legislation or rule of professional responsibility exists to protect the lawyer in a limited engagement.⁵⁴ Furthermore, it remains an open question, absent immunity, as to the binding effect of a carefully drawn attorney-client engagement letter limiting the scope of legal services and limiting malpractice liability accordingly. The public policy of protecting clients and their rights to pursue malpractice claims may conflict with the public policy of providing legal access through limited scope lawyer representation.⁵⁵

The problem of lawyers helping *pro se* litigants is clearly articulated in the 1993 Study:⁵⁶

Finally, self-representation poses another dilemma for at least some attorneys. Some individuals who self-represent may be apt to seek limited attorney services to compensate for their deficiencies, or for specific issues. Such assistance can be obtained at a significantly reduced cost when compared to having the attorney conduct the entire case. The establishment of the attorney-client relationship, however, presents an ethical concern since the establishment of an attorney-client relationship is binding on the attorney and can result in malpractice claims, despite their restricted contact with these clients. Neither the *Model Code of Professional Responsibility* nor the *Model Rules of Professional Conduct* adequately address the conduct of an attorney providing information in public divorce clinics or classes, nor in situations where the attorney handles only specific parts of a case. [Citations omitted.]⁵⁷

Another minefield in a client's negotiation with the other spouse is an organized bar position that lawyers may not coach or script clients to directly negotiate with the opposing party if that party is represented by counsel.⁵⁸ Such a rule requires a *pro se* litigant to do without legal coaching and other specific legal assistance suggested and/or generated by an attorney if that spouse wishes to negotiate directly with the other represented spouse. If both spouses are represented, such rule impedes

54. See *Lawrence v. Walzer*, 256 Cal. Rptr. 2d 6 (Ct. App. 1989), in which a court voided an arbitration clause regarding malpractice claims contained in a family lawyer-client engagement letter.

55. *Id.*

56. SELF REPRESENTATION REPORT, *supra* note 24.

57. *Id.* at 4.

58. California State Bar Comm. on Professional Responsibility, Formal Op. 1993-131 (1993). This opinion is based on MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 prohibiting a lawyer from directly or indirectly communicating with a represented party. This opinion directly conflicts with the public policy of encouraging legal access through unbundling legal services and has a chilling effect on the willingness of lawyers to make themselves available to advise, coach, and script *pro se* clients.

both spouses from directly negotiating while receiving legal advice or coaching. The impact also may thwart represented spouses engaging in mediation without lawyers present if the parties' lawyers are consulted outside the sessions.⁵⁹

As an alternative to debilitating concern over malpractice exposure, another direction for the family law bar may be to promote research on the prevalence of lawyer unbundling and encourage lawyers to provide unbundled services.

Since providing legal advice in this situation has raised ethical concerns in the past, future research could address such things as the number of attorneys who have provided this advice, whether it is primarily to the spouses of their clients (e.g., perhaps spouses sometimes seek one attorney to handle their case, with the attorney officially representing the petitioner while the other spouse is officially listed as self-represented), the type of advice that they provided, and any concerns they had over ethical issues. Such information will help clarify the potential for ethical difficulties in this type of representation and suggest whether there is reason for concern. Indeed, rather than being an ethical problem for lawyers, perhaps they should be encouraged to advise people who self-represent. Although such counsel should be circumscribed when compared to traditional clients, it may nonetheless be essential for some of the self-represented litigants to be able to successfully make informed decisions and resolve their problems. [Citations omitted.]⁶⁰

b. Civil Immunity

I propose that the legislature grant civil immunity from liability to lawyers when they provide limited scope discrete task representation. In California, all third-party neutrals have immunity due to the public policy benefits of rendering mediation and arbitration services.⁶¹ If the need for ancillary legal services for *pro se* litigants is also in the public

59. This bar opinion may directly conflict with Section VI of the ABA Standards of Practice for Lawyer Mediators in Family Disputes (1984), which states:

The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching agreement. . . . Each of the mediation participants should have independent legal counsel before reaching final agreement. At the beginning of the mediation process, the mediator should inform the participants that each should employ independent legal counsel for *advice* at the beginning of the process and that the independent legal counsel *should be utilized* through the process and before the participants have reached any accord to which they have an emotional commitment. . . . [Emphasis added.]

60. SELF REPRESENTATION REPORT. *supra* note 24, at 42.

61. *Howard v. Drapkin*, 271 Cal. Rptr. 893 (Ct. App. 1990) (holding that a neutral third party could not be liable for damages on two distinct grounds: common law absolute quasi-judicial immunity and statutory absolute litigation privileges as set forth in CAL. CIV. CODE § 47, affirmed in *Silberg v. Anderson*, 786 P.2d 365 (Cal. 1990), and cited with approval in *Collins v. Tabet*, 806 P.2d 40 (N.M. 1991) (holding guardian ad litem immune from liability when acting in accordance with appointment)).

interest, civil immunity is necessary, provided there is proper lawyer-client contractual foundation limiting the scope of services rendered. Contracts would set forth the nature and scope of the services to be rendered, compensation, and adequate disclosures and waivers.⁶²

Regardless of one's view as to granting complete immunity for mediators (even in extreme cases of fraud, conflicts of interest, or self-dealing),⁶³ I do not suggest complete immunity for unbundled lawyering malfeasance. Rather, I propose that liability should attach according to the contracted scope of lawyer engagement. Just as many jurisdictions provide model attorney-client engagement contracts for traditional full-service lawyering, such "official models" should be developed for unbundled engagements.

Until immunity or limitations on malpractice exposure are enacted for discrete task representation, the best protection is the same that exists in all lawyer-client relationships, bundled or unbundled: clear communication and a positive personal relationship between lawyer and client.⁶⁴ The risk of malpractice should dwindle if there is clear client understanding as to the scope of legal work to be done and what is not being done. Further, clients who feel well-treated and held in high personal regard by their lawyers are far less likely to sue if problems develop down the line.⁶⁵

62. Proposed legislation linking specific limited scope of representation in mediation situations with malpractice protection outside the scope was offered by the Beverly Hills Bar Association (O. David Kagon, author) in 1990 but withdrawn before action by the California State Bar Conference of Delegates:

If the attorney is retained as counsel for a special or limited purpose by a client engaged in a mediation proceeding, the special or limited nature of such services shall be described with particularity in the contract and the attorney's responsibility to the client shall be limited to such services; provided, however, that nothing herein contained shall limit the attorney's liability for professional malpractice with respect to the special or limited services rendered by the attorney in accordance with the contract; and provided further that with respect to matters other than mediation, nothing herein contained shall impair or limit the ability of clients and attorneys to enter into contracts limiting the attorney's responsibility.

63. See *Howard v. Drapkin*, 271 Cal. Rptr. 893 (Ct. App. 1990).

64. See ABA STANDING COMM. ON PROFESSIONAL LIABILITY, THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE 38 (1992) [hereinafter DESK GUIDE].

65. *Id.* at 34-45. A close reading of many of the "malpractice traps" listed in this lawyers guide give little comfort to the unbundling lawyer (at least until the arrival of civil immunity). Some chilling "malpractice traps" include the basics of the unbundled relationship: clients concerned about fees; clients having little understanding of the legal system; clients having unrealistic expectations; and clients trying to tell the lawyer how to handle the case. See also SALLY J. SCHMIDT, *MARKETING THE LAW FIRM: BUSINESS DEVELOPMENT TECHNIQUES* 1-14 (1991). In a client poll, in second place of client preference, clients most valued a law firm for counsel, advice, and expertise in a specific area. In rating dissatisfaction with professional services respondents strongly identified with: "I feel I was treated like an object rather than an individual."

c. Lawyer Attitudes and Judicial Prejudice

Historically, courts have appeared to be the private preserve of the legal profession. The legal and procedural barriers to *pro se* representation have been compounded by attitudes of both bench and bar. *Pro se* litigants are the unwanted prodigal children of the court system. *Pro se* litigants often do not speak the language, dress in appropriate costume, or prepare adequately. They are not familiar faces. They are perceived as unprepared and taking too much court time. Family lawyers and judges (often former family lawyers) too often feel that a *pro se* litigant symbolizes one more lawyer being cut out of a fee. These prejudices toward *pro se* litigants may be difficult to alter, but the drumbeat of increasing *pro se* representation coupled with general lawyer bashing⁶⁶ makes it economically imperative for lawyers to understand the *pro se* movement and respond positively to it.

B. The Consulting Attorney in Mediation

As mediation becomes increasingly accepted, client participation in one or more forms of mediation inside and outside the courthouse is becoming commonplace.⁶⁷ In the early stages of alternative dispute resolution (ADR) development, mediation was viewed primarily as a consensual tool for two divorcing parties working alone with the mediator. In fact, a major client motivation to opt for mediation was to cut out lawyers and their resulting fees. As highly conflictual cases stayed in the adversarial court system, cases involving more amicable couples with generally modest estates were the primary early users of mediation. Most family lawyers generally ignored mediation as a viable option for their clients, rendered cautious warnings,⁶⁸ or tacitly remained on the sidelines while their clients attempted to mediate.

66. Ward Blacklock, *Lawyer Bashing: It's Time to Turn the Tide*, 24 ST. MARY'S L.J. 1219 (1993) (lawyer bashing is escalating as a result of unresponsiveness or greed).

67. See Mosten, *supra* note 42.

68. Some more recent critiques of mediation include: Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (citing Harriet N. Cohen, *Mediation in Divorce: Boon or Bane*, WOMEN'S ADVOC. 1 (Mar. 1984), and Richard E. Crouch, *The Dark Side of Mediation: Still Unexplored*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 39 (Howard Davidson et al. eds. 1982). Distinguished family law authorities have become more focused in their critiques of this option to litigation. See Diana Richmond, *Torture by ADR*, CAL. FAM. L. MONTHLY 66 (Apr. 1994).

However mediation does not cure all ills. For some families, it is a means to preserve a forum for disputative contact. For others it is a slow torture. If, no

As mediation has grown and increased in acceptance clients with large and complicated estates and/or those with highly adversarial interpersonal dynamics have also begun opting for mediation.⁶⁹ To meet this demand, more family law specialists are choosing to serve as mediators, either full time or as an ancillary part of their practices.⁷⁰ Since the law office remains the gateway to most legal decision making, many clients are increasingly seeking the services of lawyers who are knowledgeable in and supportive of ADR goals and practices and who are skilled to represent them throughout the mediation process.⁷¹ Mediation is often favored because it allows clients the opportunity to privately order their own lives by negotiating directly with each other, basing their settlement on their own goals, needs, and values, and utilizing creative possibilities for solutions that go well beyond the limitations of the law and court jurisdiction.⁷²

1. ROLE OF THE CONSULTING ATTORNEY

A major obstacle to the wider use of mediation has been client fear of losing the protection and advantage of attorney representation. Critics of mediation have dwelled on power imbalance as a critical flaw in

matter how long one mediates, one spouse hardly changes position, the dance that the mediator and the spouse must do around that spouse becomes an incredible empowerment for the obdurate spouse. If a mediator succumbs to thinking that any mediator result is better than a court order result, that mediator may have been too much to obtain an agreement. In general, I have found family mediators to be remarkably well trained, but they and some of our judges are seemingly slow to recognize that enough is enough. Sometimes we just need a decision, whatever it is.

See also Ira H. Lurvey, *Requiem for a Heavy Weight*, CAL. FAM. L. MONTHLY 121 (May 1994). Through the dialogue of his fictitious admiralty lawyer, C.L. ("Seal") Howell IV, Lurvey raises concerns about mediator competence, neutrality, the demise of professional trials as a source of justice, and the overselling of mediation.

69. In complex cases, mediation may be utilized as consensual case management as well as resolution of disputes. See Forrest S. Mosten, *Mediation in the Era of Direct Calendaring and Riefiler*, ASS'N FAM. L. SPECIALIST NEWSL. 5 (Apr. 1994).

70. The ABA Family Law Section has several committees on mediation, and the ABA has recently established a separate Alternative Dispute Resolution Section. Even the prestigious American Academy of Matrimonial Lawyers is offering mediation education and training to its members composed largely of skilled trial lawyers. The growth of private ADR firms and the proliferation of family mediation training are part of this trend.

71. See generally Forrest S. Mosten, *Representing Clients in Private Mediation*, 4 FAM. L. NEWS (Fall 1987); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986); JAY FOLBERG & ANN MILNE, *DIVORCE MEDIATION: THEORY AND PRACTICE* (1988) [hereinafter *THEORY AND PRACTICE*]; COMPREHENSIVE GUIDE, *supra* note 42, at 247-48 (arguing for the benefits of legal review).

72. See generally Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 50 (1979).

the process, and there is much evidence in support of this position.⁷³ By adding the consulting attorney into the mediation process, clients can benefit from a blend of private ordering and protection of legal rights. The role of a consulting lawyer may differ from client to client.⁷⁴

Some clients who utilize mediation will totally negotiate their own deal and only talk with their consulting lawyer after a written settlement agreement has been prepared.⁷⁵ Others want their lawyers to be intimately involved in a number of discrete tasks such as helping identify, interview, and select the mediator; review and/or negotiate the terms of the mediation contract; advise or arrange the agenda or procedures; review the progress of each session; coordinate outside experts; negotiate with and educate the mediator; draft, review, and approve any final marital settlement agreement; and generate documents such as deeds, corporation records, and loan applications.⁷⁶

The consulting lawyer must be prepared to be open to a new and creative job description and to negotiate the level of service with the client. As more and more mediators are now including lawyers in the actual mediation sessions,⁷⁷ the craft of low-key participation and tactful guidance and interventions supplement aggressive courtroom advocacy as the sole effective style of legal representation.

2. NEW PERSPECTIVES ON LAWYER CONTROL

Lawyers and clients both are concerned with keeping control.⁷⁸ It is not uncommon for both parties to be unhappy with a court imposed order,

73. Bryan, *supra* note 68. This carefully researched article cites leading treatises, empirical studies, and case authority on imbalance of power issues. For mediation techniques in balancing and power, see John Haynes, *Power Balance*, in *COMPREHENSIVE GUIDE*, *supra* note 42, at 277-296.

74. See Forrest S. Mosten, *The Consulting Lawyer in Private Divorce Mediation: Sample Client Retainer Letter and Discussion*, *FAM. L. NEWS* 6 (Summer 1989).

75. Mediators differ in their approaches to the involvement of independent counsel. Some actively discourage the use of independent counsel in contravention of ABA Standards, see *supra* note 56. Others recommend use of counsel to review mediated agreements. Still others actively encourage or require early use of counsel to consult outside mediation services or to sit at the table and actively negotiate. See also LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 244 (1987) ("virtually all divorce mediators, lawyers or not, now urge both husband and wife to consult their own lawyers before, during, or after the mediation. The role of such 'outside' lawyers was also unclear. [Citations omitted.] Just how deeply must they delve into the basis of the mediation agreement. One danger, of course, is that some reviewing attorney may undermine a mediation by inappropriately imposing an adversarial perspective. But sometimes a strong adversarial impetus is just what the client needs.").

76. See generally Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 *GOLDEN GATE U. L. REV.* 717 (1993); Mosten, *supra* note 71.

77. Forrest S. Mosten, *Role of the Consulting Attorney During Mediation Sessions*, L.A. CO. B. ASS'N, *FAMILY LAW SYMPOSIUM, TIPS OF THE EXPERTS* (1992).

78. See ABA LEGAL NEEDS STUDY, *supra* note 19.

or to find it impractical. Cost, emotions, and other barriers limit the viability of changing a litigated result by subsequent trial court modification or appellate review. It is small wonder why user satisfaction with the court system is significantly lower than with lawyers generally.⁷⁹ Submitting a decision to a judicial officer is the ultimate loss of control.⁸⁰ Lawyers who want to render unbundled services to mediation clients must be willing to give up some of their customary views of control over the negotiating process, and over case strategy as a whole. Clients seeking mediation often want more power over their own lives; they want to be full and active participants in their cases.⁸¹ In addition, the active presence of a neutral third-party (even nonbinding) requires increased accountability⁸² on the part of the lawyer to his or her client; the attorney needs to be responsive to the observations, interventions, and proposals of the mediator. A skilled mediator may often provide legal knowledge and options to the client that the lawyer may have missed.

What at first may seem to be loss of control may realistically result in more control for both lawyers and clients. In mediation, the result is wholly consensual.⁸³ Rather than submitting to a binding decision maker who is often unaccountable, who has little time, perhaps little family law experience, and certainly has relatively little interaction with the couple and lawyers, attorneys often find the mediation consultant role to be a better forum in which to negotiate, negotiate, and negotiate further until a settlement is satisfactory in all respects. No result is ever imposed.

3. ECONOMIC AND PERSONAL BENEFITS TO THE LAWYER

Another advantage of the consulting role for a lawyer is that mediation clients pay their bills.⁸⁴ If settlement is reached through consensual

79. *Id.* at 20-21.

80. Research demonstrates that clients prefer procedures that provide a sense of control over the process and the final decision and a sense of respect and status. Catherine M. Kitzman & Robert E. Emory, *Procedural Justice and Parent Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW HUM. BEHAV. 553, 554 (1993).

81. RISKIN & WESTBROOK, *supra* note 75, at 207 (citing COMPREHENSIVE GUIDE, *supra* note 42, at 7-9, and MOORE, *supra* note 68, at 6).

82. *Id.* at 209-10 (discussing legal and moral accountability of mediators [focusing on environmental mediators]).

83. MOORE, *supra* note 71, at 33 (discussing final bargaining as "[r]eaching agreement through either incremental conversions of positions, final leaps to package settlements, development of consensual formula, or establishment of a procedural means to reach a substantive agreement"). Recent research confirms that joint problem solving makes agreement more likely in that such process enhances the likelihood of discovering alternatives that mesh the two parties' interests. See Josephine M. Zubek et al., *Disputant and Mediator Behaviors Affecting Short-Term Successes in Mediation*, 36 J. CONFLICT RESOL. 546, 567 (1992).

84. Forrest S. Mosten, *Mediation and Prevention of Business Disputes*, 27 BEVERLY HILLS B.J. 105 (Summer 1993).

mediation, clients tend to have greater satisfaction.⁸⁵ Satisfied clients generally pay faster so that fewer fees are written off. Also, because bills do not skyrocket as fast and lawyer work is better understood and appreciated (the client is actually with the lawyer for much of the time billed),⁸⁶ accounts receivables do not become so out of control.

Attorneys who sign on for the discrete task of legal consultant in mediation may also find greater personal satisfaction and congruence with their personal values than in the bloodletting of a courtroom. A lawyer's belief in the creative opportunities, efficiency, and cost benefits of mediation can often inspire and steady a client to persevere through the often bumpy and painful process. That inspiration and belief alone may help clients achieve satisfactory resolution.

C. Preventive Lawyering Techniques

In cancer treatment, chemotherapy may be preferable to radical surgery, but it doesn't do much for the patient's happiness, muscle tone, or pursuit of other opportunities and pleasures in life. In the same way, very few lawyers hold the belief that a settlement, even an amicable nonlitigated settlement, is the height of human experience. Research has demonstrated that mediation does not bring about long-term behavioral change in clients. Client contact with a professional is short-term and rather superficial in psycho-dynamic terms.⁸⁷ The express purpose of mediation is to settle a case, not to promise happier, more satisfying lives for the participants.⁸⁸

85. See Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation* 17 FAM. L.Q. 497, 507 (1984), and Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication* 7 JUST. SYS. J. 420, 439-441 (1982) (cited in RISKIN & WESTBROOK, *supra* note 75, at 431: "Mediation clients also experience more user satisfaction than their adversarial counterparts. Disputants who successfully mediate, generate compromise agreements that are perceived to be fair, equitable and better complied with over time.").

86. This may be compared to medical care for office visits, and work performed at that time accounts for most of the billing. See ABA SPECIAL COMM. ON SPECIALIZATION, WORKING PAPERS FOR NATIONAL CONFERENCE OF LEGAL SPECIALIZATION, AN INQUIRY INTO WHETHER PREVENTIVE LAW SHOULD BE RANKED AS A SPECIALTY 67 (1975).

87. Joan B. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, MEDIATION Q. 33-34 (Sept. 1983) (cited in RISKIN & WESTBROOK, *supra* note 75, at 200-01. See also Joan Kelley et al., *Mediator and Adversarial Divorce: Initial Findings From a Longitude Study*, in THEORY AND PRACTICE, *supra* note 71, at 465-66 ("The findings of this study did not support the hypothesis that mediation is significantly more effective in reducing psychological distress and dysfunction. The mediator intervention was not powerful enough to selectively reduce major psychological distress beyond the passage of time.").

88. While expectations concerning long-term behavioral change after mediation are muted, resolution achieved through mediation can significantly impact a participant's future life. The benefits of saved money, expeditious finality, privacy, salvaging

Preventive lawyering is an approach which strives to prevent the causes of conflict in the first instance so that disputes can be avoided and dispute resolution may never be necessary. Similarly, preventive lawyering is based on the premise that the lawyer's role is to help a client recognize symptoms of legal trouble and utilize lawyers to maximize life's opportunities not "win" a case or merely resolve a problem that has ripened into conflict.⁸⁹

The underlying assumption of proactive, preventive planning is that clients derive positive benefit from ongoing relationships with their attorney. By receiving updates on a client's life events⁹⁰ (not limited to disputes), the lawyer can then assist the client to improve decision-making and planning to prevent problems, reduce conflict, and increase life opportunities.

The theory of preventive lawyering is supported by a substantial body of writing and practice materials inspired by Louis M. Brown,⁹¹ the Father of Preventive Law, and the founder and chair of the National Center for Preventive Law in Denver, Colorado.⁹² Preventive law is the conceptual forerunner of unbundling. Preventive lawyers investigate potential legal soft spots and counsel a client as to whether the soft spot needs immediate attention. If solutions are required, the preventive lawyer helps the client decide if a professional is needed, what professional is best suited to treat the problem, and how to locate, engage,

relationships, and feeling satisfied (rather than victimized) can facilitate an improved personal life and/or limit the damage caused by the dispute compounded by the costs of resolution.

89. Louis M. Brown, *The Practice of Preventive Law*, 35 J. AM. JUDICATURE Soc'y 45 (1951).

90. Louis M. Brown, *Providing Preventive Legal Care in Prepaid Legal Service Plans: The Periodical Checkup*, 2 PREVENTIVE L. REP. 102 (Feb. 1984) ("A checkup may be done when certain client events take place. For example, client moves from one state to another, client changes legal status from single to married person, changes from military to civilian life, or a client is about to retire, or any time the client is considering 'signing on the dotted line' with respect to any significant matter.").

91. On February 6, 1994, the ABA underscored its policy of promoting innovative delivery of legal services and preventive law by establishing a perpetual Louis M. Brown Legal Access Award to be given annually to a person or entity that originates, implements, or advocates improvements in the delivery of legal services and information to moderate-income people.

92. The mission of the National Center for Preventive Law states:

The objectives of Preventive Law are twofold: First, to assist individuals and organizations in the pursuit of their goals by enhancing legal knowledge and competence in all aspects of human endeavor. Second, to provide the skill and means by which those goals can be accomplished without incurring the costly and disruptive effects of unnecessary legal conflict.

Preventive Law is largely a focus and practice of the legal profession. But [it] is not limited to what lawyers do. It includes as well the principles of business management, the management of personal matters, public education, and the organization and delivery of legal opportunities and government services.

and work with that professional. Therefore, the preventive lawyer is not necessarily the same lawyer who performs the needed services. The lawyer rendering preventive advice might limit work to problem diagnosis and legal counseling. The preventive counseling function may be unbundled from the role of the service provider.⁹³

Similar to mediation, preventive lawyering is more than a service of techniques and practice tips. Preventive law is an attitude that can permeate a lawyer's entire outlook toward clients.

But preventive law presents a different atmosphere. Preventive law seeks, among other things, to forecast future legal trouble. The legal difficulty, if any, has not yet occurred. Future legal trouble does not present as bold a picture as does present legal trouble. Incipient difficulty is not as "obvious" as is actual difficulty. The practice of preventive law requires that methods be found and used to bring inchoate legal trouble to the attention of the lawyer. Preventive law requires that techniques be available to discover legal trouble early so that incipient legal trouble can be prevented from becoming actual legal trouble.⁹⁴

This preventive approach is particularly applicable in the family law context at all stages of representation. Two overriding maxims of preventive law are that the attorney-client relationship should not end when the file closes, and that the client should never leave the lawyer's office without knowing when the next client-lawyer contact shall occur.⁹⁵ Some preventive lawyers merely contact the client and offer them an opportunity to come in. Others routinely schedule an appointment several months in advance when no symptoms of legal trouble are yet present. As clients are accustomed to seeing lawyers only at the later stages of legal disease, client education is imperative to develop this preventive relationship. Some preventive lawyers, including this writer, have installed client libraries in their offices to help with the client education process and to encourage the client to be a collaborative partner in the attorney-client relationship.⁹⁶ As the National Center for Preventive Law and other providers are publishing legal checkup questionnaires,⁹⁷ the family lawyer now has a ready supply of tools to perform this unbundled service.

93. See generally PLANNING BY LAWYERS, *supra* note 13.

94. LOUIS M. BROWN & ANNE O. KANDEL, THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION 1-5 (1990).

95. See generally PLANNING BY LAWYERS, *supra* note 13.

96. Barbara Kate Repa, *Client Library: A Novel Approach for Law Firms*, Nolo News (Summer 1992); NAT'L RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, LEGAL PLAN LETTER. CLIENT LIBRARY AN INSTANT SUCCESS (Apr. 13, 1990).

97. LOUIS M. BROWN, MANUAL FOR PERIODIC LEGAL CHECKUP (1983). The American Association of Retired Persons (AARP), the largest membership organization in the United States (approximately 30 million people), has developed an updated legal checkup questionnaire in collaboration with the National Center of Preventive Law that is currently being used in a Pennsylvania pilot project. See NAT'L RESOURCE

1. PREVENTIVE LAWYERING IN FAMILY PRACTICE

Settlement is completed. Judgment of martial dissolution is entered in court. Deeds are prepared. A cash equalization payment has been tendered. Lawyer's fees have been paid in full. Should the law office close the file? In addition to a yearly holiday card, the next time the client and lawyer might typically be in touch is when a crisis erupts in the client's life.

The preventive family lawyer, however, may undertake two additional client-oriented procedures to ensure client legal health: the non-litigation calendar and legal wellness client checkup.

a. Nonlitigation Calendar

Almost every settlement agreement or court decision will have executory provisions⁹⁸ that require ongoing client action or prescribe future events that affect the client's life. Examples are: (1) deferred sale of residence (e.g., for a period of three years); (2) yearly computation and/or modification of support and/or maintenance payments, or failure to comply with court orders including support; (3) distribution of retirement benefits upon eligibility of employee spouse; and (4) choice of school decision when a child is ready for the next school.

Virtually all family lawyers record future court dates and filing dates (including statutes of limitation) in an office calendar. In addition to office appointments, the preventive lawyer also records nonlitigation client events in a separate nonlitigation calendar. Like the litigation calendar, the nonlitigation calendar usually has a reminder (or tickler) system to alert both client and lawyer for preventive planning. The following illustrate entries for one client:

- October 1, 1994** Settlement completed which provides that the client reside in the family house until the oldest child, Mary, is eighteen (on September 15, 1997). The youngest child (Johnny) is at local elementary school and will matriculate to middle school in February 1998.
- October 2, 1994** The preventive lawyer makes all of the following entries into the office's non-litigation calendar.
- January 15, 1995** Write client concerning upkeep and expense of house.

CENTER FOR CONSUMERS OF LEGAL SERVICES, LEGAL PLAN LETTER (Apr. 23, 1993). The checkup operates in conjunction with seminars, legal services hot lines, and AARP's overall program of client education and group legal services plan. See also *Legal Checkup: Knowing When Your Solicitor Can Help*, in PURCELL ET AL., *supra* note 7.

98. See Louis M. Brown & Edward Dauer, *A Synopsis of the Theory and Practice of Preventive Law*, in THE LAWYERS HANDBOOK (2d ed. 1982) [hereinafter SYNOPSIS OF THEORY].

- October 1, 1995** Write client inquiring about house and general status. Remind client about buyout-date and monitor efforts to save money for possible buyout. The mortgage interest is 9 percent on date of the Judgment (October 1, 1993). Check current interest rates for refinancing possibilities. Remind client of wellness checkup options.
- October 1, 1996** Remind client about buyout (September 15, 1997). Invite client to come to office for consultation to explore buyout options and negotiation strategies. Alternatively, discuss repair and improvement needs preparing for sale and begin research and hunt for new home—possibly an interim rental. Discuss new possible geographical location for Johnny's middle school choice in February 1998. Remind client of wellness checkup.
- January 15, 1997** Monitor buyout or sale progress. Discuss initiating negotiations with other spouse (either directly between the clients or through counsel).
- May 1, 1997** Monitor buyout or sale progress. Remind client to bring in listing agreement or any sales documents before execution and financing. Discuss seeking extension of September 15th deadline.
- August 1, 1997** Monitor house sale listing or buyout. Final check to ascertain if court action to extend deadline is required.
- September 1, 1997** Final monitoring of house sale listing or buyout.
- October 1, 1997** Write client to schedule wellness review re: residence, insurance, estate planning, and status of possible career change.

This unbundled service of monitoring legal health is in its infancy. Yet, follow-up inquiries for the need of future professional services is commonplace in the dental and medical professions as well as in service industries such as insect fumigation, chimney sweeping, computer servicing, stock portfolio management, and the insurance industry.

The follow-up itself is a candidate for an unbundling decision by the client. Who has the responsibility (client or lawyer) to remind the client of upcoming events?⁹⁹ Does the lawyer or the client initiate contact to plan for the house sale? In fact, can the client choose to ignore planning altogether? The preventive lawyer would concede that the client can cut corners, disregard safeguards and lawyer advice, and even make uninformed and/or crisis-driven choices which

⁹⁹ *Id.*

may seem stupid and/or self-destructive.¹⁰⁰ The client is ultimately in charge of the information and decision-making options provided by the lawyer.

Lawyers often fear that clients might view proactive client contact as a financially motivated effort to drum up additional lawyer fees.¹⁰¹ It is true that lawyers may increase their incomes due to ongoing client contact through preventive planning. Also, clients are too often accustomed to thinking of lawyers as crisis surgeons for disputes and deal breakers in regard to transactions.¹⁰²

Clients and lawyers need education as to the value of preventive intervention. Proactive preventive lawyering costs money in the short-run. In the medical field, patients now decide whether the cost of a routine yearly physical wellness medical exam is worth the price.¹⁰³ Patients use a cost/benefit analysis to determine whether to undertake non-emergency medical procedures. The same is true of a client managing preventive legal health. Unlike the crisis panic caused by disputes and attempts at resolution, preventive legal management can better control the timing and costs of legal procedures to be undertaken. The client is in total control as to whether to utilize the lawyer in such a preventive role—and whether to take steps to solve a problem once highlighted by the lawyer.

100. See BINDER ET AL., *supra* note 3, at 356-359; see COMPREHENSIVE GUIDE, *supra* note 42, at 305-317.

101. Any possible vestige of ethical concern should be allayed by the 1993 Supreme Court decision, *Edenfield v. Fane*, *supra* note 10. The underlying premise of both the nonlitigation calendar and legal wellness checkup is that society benefits from the expanded use of lawyers in situations in which clients themselves may not perceive that a problem exists (let alone believe it requires a visit to a lawyer). This premise appears undermined by client fear that in addition to the cost, the experience of hiring a lawyer might be unpleasant, would not help, and may even make matters worse. See ABA LEGAL NEEDS STUDY, *supra* note 19. In examining this client fear, it might be argued that the public has been demonstrating its demand for less lawyering, not more. Cynics might even suggest that preventive lawyering is really another lawyer scheme to replace client dollars that are being lost through the *pro se* movement, nonlawyer alternatives, and other developments described in this article.

102. Louis M. Brown, *Open One Night a Week*, 35 J. AM. JUDICATURE SOC'Y 25 (1951) ("Lawyers want clients to know that Oliver Goldsmith was wrong when he said, 'Lawyers are always more ready to get a man into troubles than to keep him out of them.'").

103. Premarital and cohabitation agreements are illustrations of preventive legal services. The costs of these agreements are often high in terms of lawyers fees and stirring up latent emotional problems between a couple. However, given a recent palimony jury award of \$84 million, the preventive legal costs may be accepted similarly to the necessity of paying insurance premiums. See Lee Rommey et al., *Palimony Jury Awards \$84 Million*, L.A. TIMES, May 14, 1994, at 1, 21. See also JACQUELINE RICKARD, *SAVE YOUR MARRIAGE AHEAD OF TIME* (1991).

b. Legal Wellness Client Checkup

The nonlitigation calendar is an example of *symptomatic* preventive lawyering. Most preventive practice currently focuses on such symptomatic needs flowing from past client problems, disputes or even litigation.

A growing area of preventive activity in family law is in the area of *asymptomatic*¹⁰⁴ wellness legal checkups. No dispute or problem may be known to the client at the start of the client consultation.¹⁰⁵ Using this approach, a checkup between client and lawyer may be scheduled without any legal trouble necessarily bothering the client or even suspected by the lawyer.¹⁰⁶

A waste of time and money? What could the lawyer and client possibly talk about if the client is unaware of legal difficulty? Lawyers will need to take a proactive role to educate the client and often initiate these planning discussions.¹⁰⁷

Legal wellness checkups are well-suited for family law matters. Divorce is a result of organic changes in the family. The process of separation and creation of two different family units can cause both

104. In personalizing the applicability of the working medical model of an annual checkup, Louis Brown discusses how his routine annual physical examination revealed an asymptomatic heart condition requiring bypass surgery. *Preventive Medicine and Preventive Law: An Essay That Belongs To My Heart*, LAW, MEDICINE & HEALTH CARE 220 (Oct. 1983) ("I had no objective symptoms. Nothing signaled to me the existence of disease. I was also beginning to learn that medicine reached the point where a remedy from my sort of heart disease was available. The remedy was not preventive in a primary sense, that is the remedy (open heart surgery) would not prevent the disease. Rather it would be a sort of second prevention, a treatment to prevent the further development of the disease. . . . How marvelous our physicians' abilities to detect a patient's symptomless disease. We in law are years behind in our ability to provide a comparable service to clients.").

105. SYNOPSIS OF THEORY, *supra* note 98, at 15 ("A hypothetical client addresses a lawyer as follows: 'I have no legal problems as far as I know. No one is suing me and I have no intention of suing anyone else. So far as I know, I have taken good care of myself. But I am not a lawyer. You are. I want you to tell me whether I am in good legal condition. Is there anything I should be doing that I am not. Are there any indications of potential legal trouble or of legal benefits of which I am not aware.' To this client, it seems uneconomical to wait until legal trouble is upon him before he attends to it, especially where the problem is predictable and some anticipatory remedy can be applied or where some opportunity of which he is unaware may be available. Law practice is not as unfamiliar with this form of representation as it may seem to be. . . .").

106. Louis M. Brown, *Checkups for Clients*, 40 CAL. ST. B.J. 388 (1965).

107. SYNOPSIS OF THEORY, *supra* note 98, at 18 ("More to the point is the emphasis within preventive law on the need for the lawyer to become active in the definition of his engagement. Legal audits and periodic checkups, for example, are techniques of great potential value yet they are substantially unknown to the public. Clients will not demand them from lawyers who continue the passive stance that too many too often assume.").

positive and negative changes. These affect client coping and emotional adjustment, child development, inter-parental communication, joys and problems with new partners (from casual dates to remarriage), changing career choices, geographic relocation, health and fitness modifications, and changes in social relationships with extended family, friends, and in the client's wider community.

A regular wellness checkup gives the client a chance to update the lawyer on developments in his or her life that might have legal ramifications.¹⁰⁸ Some developments may be totally nonpredicted from the previous review; others may represent an evolving pattern. After listening to a client update, eliciting concerns, and probing for hidden agenda items, the preventive lawyer works collaboratively with the client to identify legal soft spots,¹⁰⁹ establish priority items, ascertain whether any action is needed, determine which professional may be needed, and develop an action plan. Some legal soft spots may be "pure" legal issues—most are not. Some examples of identified soft spots and client action surfaced in a post-divorce wellness checkup are:

SOFT SPOT	CLIENT ACTION CONSIDERED
1. Monthly expenses are exceeding income by \$200 each month.	Review client's budget; explore cutting expenses. Explore additional income possibilities. Review credit card use. Discuss referral to a financial advisor.

108. The legal profession should expand its public education in order for clients to know how to buy legal checkups. Average citizens are more likely to read newspapers or airline magazines than this journal. See Louis M. Brown, *Are You In Need of a Legal Checkup*, PSA FLIGHT MAG. 27 (Apr. 1980); *For Legal Health, Be an Early Bird*, PSA FLIGHT MAG. 58 (May 1992); Jeffrey S. Klein & Louis M. Brown, *Hire Your Lawyer Before You Need One*, L.A. TIMES, Sept. 26, 1991, at 4; Jeffrey S. Klein & Louis M. Brown, *Checklists: Aid in the Major Affairs of Life*, L.A. TIMES, May 28, 1992, at 4.

109. The term "soft spot" purposely replaces "hot spot." Trained in responding to client crises (hot spots), lawyers generally wait for the client to seek legal help. Preventive lawyering requires the proactive legal counselor to initiate inquiry to identify latent (soft) trouble. The ABA LEGAL NEEDS STUDY, *supra* note 19, focuses on legal needs identified by the survey respondents. The study understates society's total legal needs by ignoring the vast array of subjectively unidentified needs requiring newly developed legal service products. See Louis M. Brown, *Legal Needs: Appropriate Use of Lawyers' Services*, 4 U. TOL. L. REV. 353 (1973) (arguing that research inquiry should be the objective test of appropriate use of legal services rather than the subjective concept of a client's reported identifiable legal needs).

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| 2. Monthly expenses are exceeding income by \$2,000 each month. | Same as above.

Explore legal possibilities of initiating modification of support.
Discuss how client can negotiate directly with former spouse.
Explain role and costs of retaining a family lawyer to resolve problem. |
| 3. Depression over loneliness—especially when children are with other parent. | Discuss for client-generated solutions.

Make appropriate mental health referrals for client and perhaps for the child. |
| 4. Cohabitation with new partner and his or her three children. | Need for written agreement.

Support implications.
Relationship with former spouse.
Stress between client's children and new "step siblings."
Adequacy of space in home—relocation.
Financial, emotional and legal relationship with new partners. |
| 5. Stress at work spilling over to tension at home. | Discuss solution including new career choices.
Discuss career transition issues.
Refer to vocational counselor. |

IV. Family Lawyer as Primary "Legal-Health Care" Provider

Unbundling today is a growing practice method of providing legal access. Clients are beginning to understand and more carefully utilize limited scope representation in crisis driven situations: with successful *pro se* unbundling experience, clients are gaining confidence in taking responsibility to determine the scope of legal work to meet identified legal needs. Clients are learning when, how often, and how extensively to consult a lawyer. Clients are better recognizing that *pro se* legal access can be augmented by legal advice provided by lawyers who supplement not dominate the management of their case.

This revolution in client behavior is affecting the lawyer's role. Lawyers are better learning to share control over the structure and decision making of the client-lawyer relationship. Lawyers are beginning to see malpractice traps¹¹⁰ as opportunities in marketing and new service products. Uneducated clients concerned with fees and wanting to direct the overall case plan are being welcomed into the lawyers' offices rather than being "qualified" (rejected).¹¹¹ Lawyers are also experiencing the personal and economic benefits that sharing limited scope decision making can bring to them.¹¹²

Becoming accustomed to receiving symptomatic preventive advice for recognized needs during their divorce, clients are more open to being reminded by their family lawyer to follow-up on executory provisions or to fill lawyer prescriptions to obtain necessary ancillary services. These include drafting a new will, obtaining insurance protection, drafting a cohabitation agreement, looking at excessive alcohol consumption, or trying to budget more effectively.

Lawyers are overcoming their own reluctance to suggest such preventive advice particularly as their role evolves to that of a primary legal care provider. As the client's part in insuring legal health,¹¹³ the lawyer is expected to advise and diagnose incipient legal trouble—not necessarily to do all the routine work. Lawyers are becoming more accustomed to probe for legal soft spots. Once diagnosed, it is becoming accepted practice for the client to decide whether to act, whether a professional is required, and if so, what type of professional should be retained. If a lawyer is needed, the client has a choice whether the diagnosing lawyer or another lawyer will do the required legal work.

The result of this role evolution is that clients are beginning to view their family lawyer as a primary family legal health-care provider: a helper and a family resource to be consulted to insure legal health both when problems arise and preventively at regular intervals (e.g., each year) or upon important life events.

110. See DESK GUIDE, *supra* note 64.

111. *Id.*

112. "I love these initial interviews because they give me a chance to strategize and engage in a lot of brain storming without a concomitant major responsibility to see the transaction to its conclusion. I also enjoy watching how these one-shoters become empowered. The transformations sometimes occur in a matter of half an hour or so, particularly when they have also had a chance to review their [Meyer-Briggs] temperament profiles." Letter from Lowell Halverson, former Washington State Bar President, to the author (Jan. 21, 1993) (submitted to ABA Standing Comm. on the Delivery of Legal Services).

113. See generally Gonser & Mosten, *supra* note 13. See Louis M. Brown & Edward Dauer, Rx for 'Legal Health,' 5 EXPERIENCE No. 2, 32 (WINTER 1995).

V. Conclusion

Unbundling is an emerging trend in America's legal environment which developed in response to consumer demand and has taken hold with surprising tenacity. Unbundling meets the public's demand for increased availability of legal services in a user-friendly environment at lower cost. By modifying its emphasis from court room advocacy to adaptable dispute avoidance, management, and resolution, family lawyers are responding to actual legal needs as they have evolved societally. The exploration, development, and commitment to unbundling offers the family law bar the opportunity to redefine and develop new legal service products well into the twenty-first century.

