Innovations in Family Law Practice

Edited by

Kelly Browe Olson

and

Nancy Ver Steegh

Association of Family and Conciliation Courts

www.afccnet.org

INNOVATIONS IN FAMILY LAW PRACTICE

INNOVATIONS IN FAMILY LAW PRACTICE

Edited by

Kelly Browe Olson

and

Nancy Ver Steegh

ASSOCIATION OF FAMILY
AND CONCILIATION COURTS

© 2008 Association of Family and Conciliation Courts
Madison, Wisconsin
www.afccnet.org

Series Editors: Linda B. Fieldstone and Wendy Bryans
Editors: Kelly Browe Olson and Nancy Ver Steegh
Design and production: Nola Risse-Connolly
2008 10

All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without permission in writing from the publisher.

CONTENTS

Preface 7

Introduction 9

Chapter 1: The Ineffective Family Lawyer 13
Andrea Kupfer Schneider & Nancy Mills

Chapter 2: Collaborative Practice 29
Susan A. Hansen & Gregory M. Hildebrand

Chapter 3: Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation 63
David A. Hoffman

Chapter 4: Family Law Self-Help Centers 87
Pamela Cardullo Ortiz

Chapter 5: Unbundling Legal Services to Help Divorcing Families 117
Forrest S. Mosten

Chapter 6: The Evolution of the Family Court Duty Counsel Program in Ontario 155
Carmelo Runco

Contributors 169

Appendices: Chapters 2, 3 and 5 have electronic appendices available online. To access the appendices, go to: http://www.afccnet.org/resources/resources_professionals.asp

PREFACE

Since 1963, the Association of Family and Conciliation Courts (AFCC) has convened a wide range of professionals dedicated to improving the lives of children and families through the resolution of family conflict. AFCC members are bound by their strong commitment to education, innovation and collaboration in order to benefit communities, empower families and promote a healthy future for children. Through educational programs, publications and the Internet, members discuss how best to help families resolve conflict, especially those experiencing separation and divorce.

AFCC's interdisciplinary approach has contributed to it being a leader in the development of initiatives in areas including mediation, custody evaluation, parenting coordination, and parent education. Above all, AFCC members are innovators who are accustomed to sharing their expertise with colleagues. The Innovations Series is designed to enable AFCC members to share practical information about programs, processes and ideas that are emerging in the practice of family law.

Each book in the Innovation Series has been edited, and each chapter written, by thoughtful and experienced practitioners who have given generously of their time in order to contribute. We are deeply honoured to have worked with all of them.

We hope that a chapter in this series will spark an idea for a new program in your community or help improve the functioning of an existing program. And, of

course, we hope that you will continue your connection with AFCC by finding ways to share your own innovative ideas with our community through future publications and educational programs. The better our work and the more we learn from one another, the greater our contribution will be to the communities, children and families we serve.

Wendy Bryans, LL.B and Linda Fieldstone, M.Ed.
AFCC Innovations Series Project

INTRODUCTION

The practice of family law and the role of the court system have changed dramatically during the last thirty years. In response to this new legal landscape, lawyers and family court professionals have begun to improvise and innovate. This book features a handful of programs and unconventional responses developed by creative and committed practitioners in the United States and Canada. Each chapter highlights a particular practice but when read together, the chapters form an inspiring guide to the development of new legal processes, implementation of new professional roles, promotion of family self-determination, and innovative responses to scarcity of resources.

The transformation of the family court system has been fueled, in part, by changing societal values and expectations. As divorce became more common, social scientists studied the impact of divorce on children and concluded that children fare better when parental conflict levels are low[1] and that, absent abuse or high conflict, children benefit from continuing contact with both parents.[2] At first blush, these twin goals seemed at odds: how could courts reduce conflict levels while simultaneously encouraging more contact? Although research shows that most parents are eventually able to cooperate for the sake of their children,[3] they are often helped by participation in programs such as parenting education and mediation that encourage parents to fashion their own future parenting arrangements while also teaching specific techniques for conflict resolution.

As a result of this research, courts moved away from designating a "winning" or "losing" parent and, when possible, promoted more cooperative parenting styles, sometimes including shared custody. At the time of divorce, parents were encouraged to restructure family relationships rather than making a "clean break." In fact, the goals of divorce were themselves redefined. As one commentator wrote, the new "successful" divorce requires parents "to work through their anger,

disappointment, and loss in a timely manner and terminate their spousal relationship with each other (legally and emotionally), while at the same time retaining or rebuilding their parental alliance with and commitment to their children."[4]

Goals such as these were incompatible with the traditional adversarial approach to divorce that was often more focused on assessing blame than on reducing conflict and fortifying relationships. In fact, in one study 71 percent of divorcing parents reported that use of the court process escalated distrust and conflict "to a further extreme."[5] In another study, 50 to 70 percent of litigants experienced the legal system as "impersonal, intimidating, and intrusive."[6]

As alternative divorce processes became available, families often preferred them. For example, in one study, 77 percent of mediating couples expressed satisfaction with the mediation process while only 40 percent of couples reported satisfaction with the adversarial divorce process.[7] Similarly in another study, 85 percent of mediating couples believed the process was fair while only 20 to 30 percent of couples using a traditional court process viewed it as fair.[8]

In this context lawyers began to question the place of zealous advocacy and the use of "courtroom combat" tactics in family cases. Some lawyers concluded that interest-based problem solving approaches to divorce held more promise for families.[9] In their chapter on "The Ineffective Family Lawyer," Andrea Schneider and Nancy Mills present empirical data concerning the effectiveness of such negotiation styles and the extent to which family lawyers have adopted (or not adopted) these techniques in practice.

Some family law attorneys embraced interest-based problem solving approaches so fully that they developed new models of practice based on them. In their chapter on "Collaborative Practice," Susan A. Hansen and Gregory M. Hildebrand explain the collaboration process and provide valuable tips for practice. While supporting the goals of the collaborative model, David A. Hoffman advocates instead for use of "Collaborative Negotiation Agreements."

As divorce became more expensive and some parents became disillusioned with the traditional adversarial process, courts reported a sharp increase in the number of unrepresented parties. In fact, an Oregon study found that at least one party was unrepresented in 80 percent of family cases.[10] At the same time, family courts experienced increasing caseloads in an environment of declining resources.[11] In light of these trends, Pamela Cardullo Ortiz presents a detailed look at Maryland's pioneering family law self help program aimed at assisting *pro se* par-

ties.

Some divorcing couples seek some, but not all, of the services traditionally provided by lawyers. In the chapter on "Unbundling Legal Services to Help Divorcing Families," Forrest Mosten explores the benefits of tailoring the lawyer-client relationship to meet the specific desires and needs of clients.

Finally, Carmelo Runco provides an insider's view of the Canadian Duty Counsel program that combines various attorney roles and legal services under one roof. He speculates about the future of delivery of legal services and the need for closer ties to social service providers.

Special thanks go to these generous authors for taking time away from their busy practices and professions to share their substantial creativity and expertise. We hope that this book will spark new ideas for your own "innovations" in the practice of family law.

Kelly Browe Olson
Nancy Ver Steegh

REFERENCES

1. See Joan B. Kelly and Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52(4) FAM. REL. 352 (2003); *Joan B. Kelly, Children's Adjustment in Conflicted Marriage and Divorce, A Decade Review of Research*, 39(8) J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 963 (2000).
2. See Joan B. Kelly & Michael Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 300 (2000).
3. Carla B. Garrity & Mitchell A. Baris, *Caught in the Middle* 27 (1994) (25 percent of parents ease into a co-parenting relationship and 50 percent become more cooperative after a period of disengagement).
4. Janet Johnston & Vivienne Roseby, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce* 3 (1997).
5. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L. Q. 283, 298 (1999).
6. Mary R. Cathcart & Robert E. Robles, *Parenting Our Children: In the Best Interest of the Nation* 39 (1996).

7. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in MEDIATION RESEARCH, at 9, 437 (Kenneth Kressel et al., eds., 1989).

8. Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy,* 9 OHIO ST. J. ON DISP. RESOL. 95, 99 (1993); Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J. L. & SOC. PROBS. 413, 424 (1985).

9. Andrew I. Schepard, *Children, Courts, and Custody*, 175 (2004).

10. Oregon Task Force on Family Law, *Creating a New Family Conflict Resolution System: Final Report to Gov. John A. Kitzhaber and the Oregon Legislative Assembly* 5 (1997).

11. ABA Commission on the 21st Century Judiciary, Justice in Jeopardy, 38-39 (2003) available at http://www.abanet.org/judind/jeopardy/pdf.report.pdf (between 1984 and 2000, domestic relations filings increased by 79 percent).

CHAPTER 1

THE INEFFECTIVE FAMILY LAWYER

Andrea Kupfer Schneider & Nancy Mills

How lawyers negotiate on behalf of their clients is a crucial part of being an effective family lawyer. The data found in the Family Law Education Reform Project Final Report ("FLER Report")[1] and accompanying survey ("FLER Survey")[2] demonstrate the importance of a set of skills necessary to negotiation of family law disputes. These skills include listening, setting realistic expectations for clients, problem-solving, and collaboration.[3] The collaborative and cooperative processes discussed elsewhere in this book point out that there are a variety of creative processes that clients and lawyers use effectively in family cases. As this chapter shows, however, what lawyers actually think should happen in family law cases is very different from what actually happens. This essay reviews data from and about the negotiation techniques of family lawyers based on a larger study of how lawyers negotiate.[4]

The first part of this essay explains briefly the general results of the study and findings for what makes an effective negotiator. The second part explains the data for family lawyers in particular, and points to some troubling differences between family law and other areas of practice. The concluding section explores these differences and suggests their implications for family lawyers, their clients and those who teach them.

I. NEGOTIATION STUDY

In 1976, Professor Gerald Williams studied lawyers' approaches to negotiation through a mail survey to about 1,000 attorneys in Phoenix.[5] His seminal study found two kinds of styles—cooperative and competitive.[6] Twenty-five years later, this research sought to revisit these two approaches and determine whether there may be more than just two negotiation styles. The methodology used was similar to Williams' study—sending surveys to attorneys and asking them to describe and evaluate the lawyer with whom they had most recently negotiated—whether or not that particular dispute was settled. The updated study added new adjectives based on negotiation literature, for a total of 89 adjectives and 60 bipolar pairs (descriptions of opposite negotiation behaviors). The study also included ratings on the general effectiveness of the opposing attorney on a scale of 1-9, and asked each attorney for the reasoning behind the ranking.[7]

The survey was sent to 1,000 attorneys in Milwaukee, Wisconsin, and 1,500 attorneys in the Chicago area. The surveys were completely anonymous with an overall response rate of 29%.[8] Although more than 30% of the respondents were women, less than 18% of the evaluated attorneys were female.[9] The study also identified the practice areas of the responding attorneys and the practice area of the attorney being evaluated.

Statisticians at the Institute for Survey and Policy Research at the University of Wisconsin-Milwaukee performed cluster analysis on the results. Cluster analysis is a type of statistical analysis that seeks identifiable patterns among the responses. Thus, this analysis did not rely on more subjective selection of certain characteristics and grouping them together. The study used cluster analysis to divide lawyers into 2, 3, and 4 clusters, or groupings. The division of lawyers into 2 clusters resulted in a problem-solving group and an adversarial group. In 3 clusters, the groupings were true problem-solving, cautious problem-solving and adversarial. Finally, the 4 cluster analysis resulted in groups labeled true problem-solving, cautious problem-solving, ethical adversarial and unethical adversarial.

Articles elsewhere have discussed the differences between lawyer negotiation behavior from the original study and today,[10] which we were able to assess using the two cluster analysis, comparing the cooperative/competitive lawyers from the past to the problem-solving/adversarial lawyers of today. There are a few notable

differences between the lawyers in the original study and those of today. First, the number of adversarial lawyers as a percentage of the bar has gone up from 27% to 36%. Second, the number of ineffective lawyers—as reported by their peers—has also gone up from 12% to 22%. Finally, the adversarial lawyers as a group have gotten more negative and nastier. A generation ago, the effective competitive lawyers still had plenty of positive adjectives describing them, including convincing and experienced.[11] Today, that situation is quite different—the top seven adjectives describing adversarial lawyers are stubborn, headstrong, arrogant, assertive, irritating, argumentative and egotistical–and not surprisingly, these lawyers are not at all effective. The original article on the new study also described the differences among three clusters at length.[12]

For the discussion of comparing family lawyers to lawyers of other practice areas, we will focus on the four cluster analysis.[13] The following tables present the top twenty adjectives for each of the four styles found (Table 1), the top twenty behaviors for each style (Table 2) and how each style was rated in effectiveness (Table 3). In four clusters, the two clusters of problem-solving and adversarial divided into two clusters within themselves, true problem-solving, cautious problem-solving, ethical adversarial and unethical adversarial. The adjectives in each column were gathered using the cluster analysis method described above. The titles at the top of each column, however, were created after seeing the list of adjectives below. In addition, we should note that the percentage of lawyers, in terms of effectiveness, is a steady drop from the highest number as true problem-solvers (71.8% effective) down to the smallest number in unethical adversarial (2.6% effective).

If we focus on the difference between the true problem-solving and cautious problem-solving, the cautious problem-solvers were engaged in completely positive behavior. All of the adjectives describing them are favorable and have good behavioral characteristics such as ethical, experienced, rational, confident, agreeable and dignified. Yet, the effectiveness rating of the cautious problem-solvers versus the true problem-solvers was dramatic—23.5% versus 71.8%. What was the difference?

Those lawyers in the cautious group *were* cautious—cautious about really engaging in problem-solving behavior. The true problem-solvers had far more skills in their repertoire and were effective in what we labeled a triangle of skills.

Table 1: Top 20 Adjectives for Four Cluster[14]

	True Problem-Solving	Cautious Problem-Solving	Ethical Adversarial	Unethical Adversarial
1	Ethical	Ethical	Confident	Irritating
2	Experienced	Experienced	Assertive	Stubborn
3	Personable	Personable	Arrogant	Headstrong
4	Trustworthy	Self-controlled	Headstrong	Argumentative
5	Rational	Confident	Experienced	Quarrelsome
6	Fair-minded	Rational	Demanding	Arrogant
7	Agreeable	Agreeable	Egotistical	Egotistical
8	Communicative	Dignified	Ambitious	Manipulative
9	Realistic		Stubborn	Assertive
10	Accommodating		Argumentative	Demanding
11	Perceptive		Tough	Complaining
12	Confident		Irritating	Hostile
13	Sociable		Forceful	Suspicious
14	Self-controlled		Firm	Conniving
15	Adaptable		Quarrelsome	Greedy
16	Dignified		Masculine	Rude
17	Helpful		Dominant	Angry
18	Astute		Ethical	Confident
19	Poised		Deliberate	Ambitious
20	Flexible		Hostile	Deceptive

The lawyers with these approaches share ethical behavior and a pleasant personality but the true problem-solver goes further in assertiveness, empathy and flexibility. The true problem-solver is better at asserting the case (rated highly in preparation, astuteness about the law, being realistic) and better at talking about the case as well (rated highly in being poised, forthright, communicative, reasonable, and sincere). The true problem-solver is better at understanding that negotiation can have mutual benefits (found in the bipolar descriptions) and is also better at working with the other side (rated highly in accommodating, agreeable, helpful, perceptive, and tactful). Finally, the true problem-solver is highly rated in adaptability, facilitating the agreement, and flexibility. These are all skills that, apparently, the cautious problem-solvers do not have.

Table 2: Top 20 Behaviors for Four Cluster[15]

	Problem-Solving	Cautious Problem-Solving	Ethical Adversarial	Unethical Adversarial
1	Did not use derogatory personal references	Did not use derogatory personal references	Interested in his client's needs	Not interested in my client's needs
2	Courteous	Interested in his client's needs	Unrealistic initial position	Rigid
3	Interested in his client's needs	Did not use offensive tactics	Extreme opening demand	Arrogant
4	Honest	Courteous	Not interested in my client's needs	Unreasonable
5	Pursued best interest of client	Zealous representation within bounds	Aggressive	Single solution
6	Friendly	Honest	Arrogant	Uncooperative
7	Zealous representation within bounds		Prepared	Narrow range of strategies
8	Intelligent			Narrow view of problem
9	Reasonable			Extreme opening demand
10	Tactful			Did not consider my needs
11	Cooperative			Negotiation = win/lose
12	Adhered to legal courtesies			Unrealistic initial position
13	Prepared			Unconcerned how I look
14	Forthright			Aggressive
15	Trustful			Inaccurately estimated case
16	Sincere			Insincere
17	Accurate representation of position			Fixed conception of problem
18	Facilitated			Distrustful
19	Viewed negotiation as possibly having mutual benefit			Obstructed
20	Did not use threats			Inflicted needless harm

However, these cautious problem-solvers were still rated far more highly in effectiveness than either group of adversarial lawyers. It is perhaps heartening to see the perceived effectiveness of lawyers drop rather dramatically as the level of adversarial behavior rises. While there are dramatic differences between ethical

Table 3: Four Cluster Breakdown by Effectiveness[16]

	Ineffective	Average	Effective	Total Percentage of the Bar by Cluster
True Problem-Solving	1.3%	26.9%	71.8%	38.5%
Cautious Problem-Solving	11.8%	64.7%	23.5%	27.5%
Ethical Adversarial	39.8%	44.4%	15.8%	21.5%
Unethical Adversarial	75.3%	22.1%	2.6%	12.5%
Totals	21.7%	40.5%	37.8%	N=618

and unethical adversarial behavior, we should still note that the ethical adversarial have several strong negative adjectives attributed to them (such as arrogant, egotistical, and irritating) and are significantly less effective than cautious problem-solvers.

The difference between the ethical and unethical adversarial lawyers (as shown in Table 1) can be found in four areas. First, the ethical adversarial lawyers still are considered trustworthy (that is, rated highly in ethical behavior) while the unethical lawyers are highly rated in being manipulative, conniving and deceptive—not at all trustworthy. Second, unethical adversarial lawyers are also not trustful, rated highly in being suspicious of the other side. Third, while the ethical adversarials are tough and firm, unethical adversarials are generally considered to be rude and angry. Finally, the only group of lawyers not viewed as experienced is the unethical adversarials who are also missing the adjective of deliberate, perhaps reflecting a lack of preparation or thoughtfulness about their case. The bipolar behavior ratings further differentiate between the ethical and unethical adversarial attorneys, describing the unethical group as untrustworthy, unpleasant, inflexible, and not understanding of or caring to understand the other side. It should be of little surprise that only 2.6% of these unethical adversarial lawyers were perceived as effective by their peers.

So, in comparing lawyer behaviors across the clusters, it is clear that there are

strong differences in style—and that these differences result in clear differences in effectiveness ratings as well. It might be useful to explain further the methodology of the study in terms of the effectiveness rating. Obviously, this study measures perceptions rather than some objective measure of effectiveness. Yet, perceptions of one lawyer by another lawyer are clearly more accurate than self-evaluations and considered valuable given the similar education and practice area.[17] We might also worry about the "punishment" effect—this person "beat" me in the negotiation so I will rate them lower in effectiveness to get back at them. In fact, as further explained in the first article on the new study, the lower ratings were often backed up with stories, including objective measures that would support the ineffectiveness ratings.[18] For example, "ineffective" lawyers included those who were reprimanded by the judge or refused a settlement offer for much more than they received at trial.

II. FAMILY LAW IS DIFFERENT

The foregoing four cluster analysis is particularly significant for family law. Consider the following:

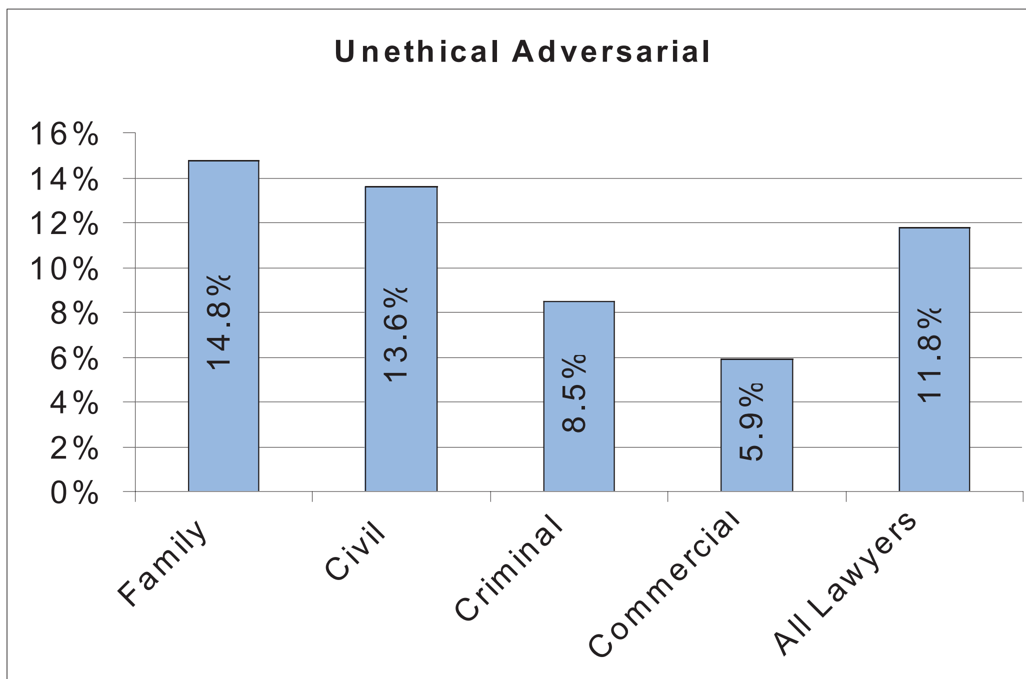
Table 4: Practice Area by Cluster[19]

	Family	Civil	Criminal	Commercial	Corporate	Property	Other	Total % by Cluster
True Problem Solving	37.7 %	36.4 %	49.2 %	38.2 %	42.0 %	44.7 %	37.4 %	39.3 %
Cautious Problem Solving	23.0 %	31.1 %	22.0 %	23.5 %	34.0 %	23.4 %	25.3 %	27.5 %
Ethical Adversarial	24.6 %	18.9 %	20.3 %	32.4 %	22.0 %	19.1 %	23.2 %	21.5 %
Unethical Adversarial	14.8 %	13.6 %	8.5 %	5.9 %	2.0 %	12.8 %	14.1 %	11.8 %
Total % by Practice Area	10.6 %	39.4 %	10.2 %	5.9 %	8.7 %	8.1 %	17.1 %	N=578

Family law had the highest percentage of unethical adversarial lawyers—14.8%—as compared to all other practice areas. Civil law attorneys were less

unethical adversarial at 13.6%, as were criminal lawyers at 8.5%, and commercial lawyers at 5.9%. The average of all other practice areas was seen as less unethical adversarial at 11.8%, as compared to 14.8% for family law attorneys. For those of us from outside the family law field, this seems shocking. Family law and ADR texts discuss how fitting ADR is for the field of family law with so many long term and emotional issues at stake. Collaborative law has its genesis among family lawyers. Both the FLER Report[20] and the FLER Survey[21] emphasize that family lawyers require skills in listening, handling emotional conflict, communicating with child clients, working with clients in emotional crisis, recognizing and resolving ethical dilemmas, and the use of ADR processes and problem-solving in general. More typically, it is the "Rambo-type" civil litigator assailed for a "scorch-and-burn" policy of litigation that would seem to be represented by the unethical adversarial approach. In fact, that is not the case.

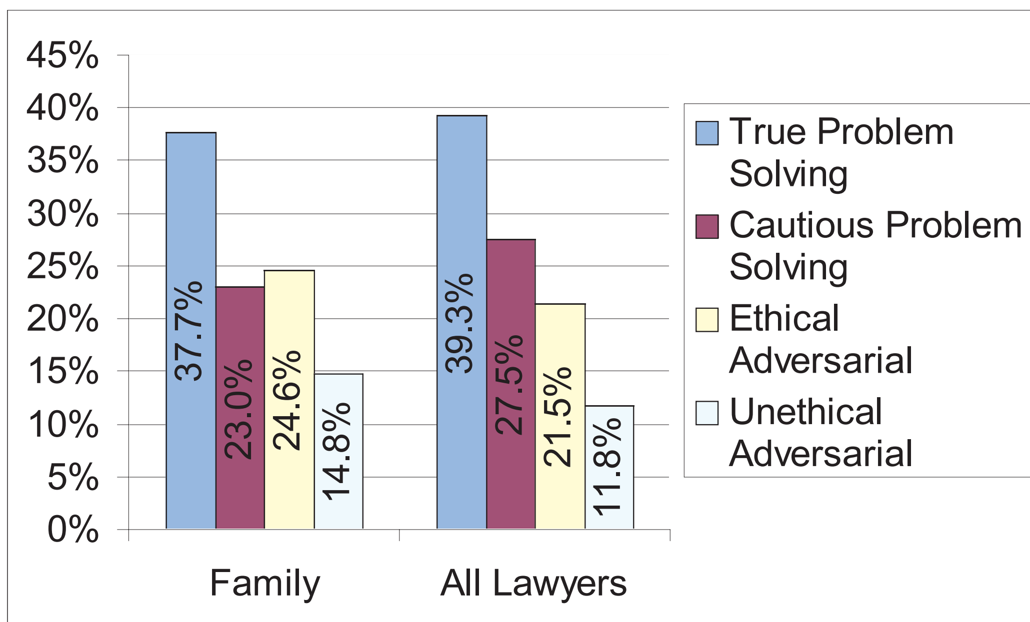
Table 5



The proportion of family lawyers rated as adversarial (including both ethical and unethical) is higher than that of any other practice group (this means that, cor-

respondingly, family law has the lowest percentage—just over 60%—of problem-solving attorneys). In comparing family law attorneys to civil attorneys, 39.4% of family law attorneys were adversarial as compared to 32.5% of the civil law attorneys. Commercial law attorneys were only 38.3% adversarial, and criminal law attorneys were 28.8% adversarial. Total comparison of adversarial family law attorneys to all other attorneys was a significant 39.4% to 33.3% (and problem-solving was 60.7% for family law attorneys compared to 66.8% for all lawyers). Despite the fact that the very nature of family law—at least when children are involved—virtually assures a long-term relationship between the parties, more attorneys in this practice area engage in the very behavior that destroys that relationship.

Table 6



III. SO WHERE DO WE GO FROM HERE?

A. So Why Are Family Lawyers More Adversarial?

There are multiple reasons why attorneys might be seen as adversarial by other attorneys.

1. What They Were Not Taught

As law students or new lawyers, the family law practitioners may have been taught that adversarial behavior was the best way to represent clients or that zealous representation requires it.[22] This may have been consciously or subconsciously enforced by popular culture, mentors or more experienced lawyers. If the attorneys are adversarial, they may be unaware of the alternatives or unwilling to engage in mediation, or collaboration.[23]

2. Clients Push Negative Behavior

Perhaps lawyers act like pit bulls because that's exactly *why* their clients hire them.[24] In the emotional cases revolving around divorce and custody, popular culture at least seems to send the signal that the adversarial approach is the best way to go.[25] It also could be perceived to be the most satisfying way to get back at the (lying, cheating) spouse. The client might be unaware of any other options besides litigation for resolving their family dispute and turn to the lawyer who has a reputation for being a hard litigator.

3. The Context

One could argue that family law is far more emotional than any other type of negotiation and that the emotion (often negative) requires, encourages or permits negative behavior that would have more serious ramifications in other practice areas.[26] For example, even though family law bars are relatively small in most jurisdictions, this "repeat play" does not seem to discourage adversarial behavior. In contrast, in criminal law with an equally small bar, the "repeat play" seems to result in an amazingly high percentage (almost 50%) of lawyers on both sides who are true problem-solvers, with another 22% as cautious problem-solvers.[27]

4. Easy Cases Go *Pro Se*

The increase in *pro se* divorce filings has been noted throughout the 1990's.[28] Perhaps this increase means that the parties in amicable divorces or divorces with few assets decide to proceed on their own, leaving the harder cases for the

lawyers. This is especially true of an increasing number of middle income *pro se* clients who could afford lawyers but choose not to hire them.[29] If potential clients are not hiring lawyers, this also means that lawyers are *themselves* competing over a fewer number of clients which, in turn, could lead to increased adversarial behavior by lawyers.[30]

5. Only Certain Types of Cases

Finally, if the easy cases have gone *pro se*, then perhaps only the hard cases remain in the system and that these hard cases encourage or require adversarial behavior.[31] For example, while divorce filings have remained flat in the last decade, custody filings are up 36%.[32] Custody battles are, by their nature, more contentious and lead to more adversarial behavior. Others have hypothesized that the courts are filled with repeat families—families that have multiple filings and ongoing battles so that a high percentage of repeat families increases the percentage of adversarial behavior.[33] A similar explanation, looking at the clients, is that high conflict families or troubled families are the ones who end up relying on attorneys.[34] Finally, some studies have noted that when there is more money at stake, the number of filings (and disputes) rises.[35]

6. Family Law Cases Handled by Non-Family Law Attorneys

A final argument may focus on *who* actually handles the case. In many family law cases, the clients hire a family lawyer, someone who specializes in family law cases. In other cases, however, clients end up with a generalist—someone who does not specialize in the area but, rather, handles all sorts of cases. Many generalists can handle these cases. In other instances, however, a generalist could get overwhelmed by the emotions, personality disorders, and issues of domestic abuse, violence or neglect that can arise.[36] In these instances, perhaps the lawyer resorts to adversarial behavior under the mistaken assumption that such an approach will best protect the client. The generalist may also be perceived as adversarial because he or she is not aware of the typical customs and practices in the domestic relations court.

B. How Does This Matter?

An important question to ask about this data and these differences is how this matters to family law attorneys and their clients. We would argue that this is important in three particular ways.

First, we have seen that effectiveness is clearly correlated to one's approach to negotiation and one would expect that correlation to be even higher in family law which is so well-suited to a problem-solving approach. This is an area of law where mediation, collaborative and cooperative law processes are currently used by numerous parties and their attorneys. While individual lawyers may prove to be exceptions to any generalizations about their style, it is clear that true problem-solving is perceived as most effective while unethical adversarial is perceived as least effective. For family lawyers, we should worry that the general level of effectiveness is low.

Second, lower effectiveness obviously does not serve the interests of the clients. The descriptions of irritating, hostile and egotistical behavior suggest that these adversarial lawyers might not be particularly responsive to, or supportive of, their clients. In family law cases clients are often in particular need of emotional support.[37] It is necessary for lawyers to be able to counsel their clients on the best decision making process for their case within the context of the clients ability to negotiate.

Finally, perceptions of behavior tie directly to the reputation of a specific lawyer as well as the overall bar. The specific lawyer will create his or her own bad reputation if he or she is not serving the client well. It will also harm the reputation of all lawyers as clients see this behavior.[38] Some clients may think this is true of all attorneys, or all family law attorneys. As we discussed above, this negative reputation of lawyers could explain the increasing number of clients who choose to opt out of using lawyers at all in their family law matters.[39]

C. What Does This Mean to Attorneys and Their Clients?

In part, a review of what is actually happening within the family law bar should trouble those who think that family law disputes should be resolved as quickly and as amicably as possible. This disconnect between what we think *should* be happen-

ing and what is *actually* happening leads to a number of reflections about lawyers and lawyer training.

If *clients*, rather than attorneys, are determining negotiation behavior, then lawyers need to focus on negotiating with their clients over the appropriate and effective method of representation.[40] Lawyers are hired for more than legal expertise—lawyers are also hired for their process expertise and their counseling. This should extend to advising clients about the ramifications of different negotiation behaviors including the costs and benefits to the client and their family from an adversarial approach. Clients also need to be advised about alternative dispute mechanisms that might provide more appropriate resolutions for family disputes.[41]

If we think that the emotions at stake are the driver of adversarial behavior, again, this falls on attorneys to learn how to better manage their clients' emotions rather than simply reflecting them. Managing emotions is not done by ignoring them,[42] but rather by recognizing the impact they may have and understanding how to work with them.[43]

If we think that the money at stake drives the adversarial behavior, we might worry about the ethics of our counterparts. Perhaps more training in ethics and increased judicial oversight of filings are the changes that are needed.

If, however, we think that the adversarial behavior is because all of the easy cases are now out of the system, maybe this is a situation in which we can blame the structural causes rather than the lawyers. We are not sure structural elements can excuse unethical or ineffective behavior but perhaps—like some dreadful drivers in Boston who contend with possibly the worst structural traffic patterns in the country—it can help us understand why the behavior ends up being so poor.

IV. CONCLUSION

The findings in this article strongly support the concerns and ideas raised by the FLER Report and the FLER Survey. The disparity between what students are learning in family law (or not learning) and what experienced practitioners and judges say they need to learn is dramatic. The number of adversarial family lawyers can be explained by any number of factors as discussed above. More importantly, legal educators and the bar need to focus on teaching the tools that are necessary to provide effective, ethical lawyering. Family law classes and con-

tinuing education training must emphasize the type of ethical dilemmas regularly faced by practicing attorneys. As suggested by the FLER Report, dispute resolution processes must also be taught. With recognition of the effectiveness of different models (other than "zealous advocacy"), lawyers will better understand their choices of negotiation approaches and the impact those choices have on the outcome of their dispute. The findings in this study also help put the collaborative movement in family law into context. Collaborative lawyers are *contracting* to behave in a true problem-solving mode. With the success of this movement in many jurisdictions, we can also hope that both lawyers and clients see the demonstrated advantages of problem-solving versus an adversarial approach.

NOTES

1. Mary E. O'Connell & J. Herbie DiFonzo, The Family Law Education Reform Project Final Report, 44 FAM. CT. REV.524 (2006).
2. Timothy Hedeen & Peter Salem, What Should Family Lawyers Know? Results of a Survey of Practitioners and Students, 44 FAM. CT. REV. 601 (2006).
3. Hedeen & Salem, *supra* note 2, at 9-10.
4. For the original larger study, see Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence On The Effectiveness Of Negotiation Style, 7 HARV. NEGOT. L. REV. 143 (2002). A version of this article was published as What Family Lawyers are Really Doing When They Negotiate 44 FAM. CT. REV. 612 (2006).
5. Gerald R. Williams, *Legal Negotiation and Settlement* (1983).
6. Id. at 18-19.
7. See Schneider, *supra* note 4, at 198 (Appendix A).
8. Id. at 157-58.
9. Id. at 158-59.
10. Id. at 184-90; see also Andrea Kupfer Schneider, Perception, Reputation and Reality: An Empirical Study of Negotiation Skills, 6 No. 4 DISP. RESOL. MAG. 24 (2000).
11. Williams, *supra* note 5, at 142-43.

12. See Schneider, *supra* note 4, at 171-76.

13. This is because the differences in practice areas versus clusters were statistically significant.

14. See Schneider, *supra* note 4, at 180.

15. Id. at 182.

16. Id. at 184.

17. See Kelly G. Shavier, *Introduction to Attribution Processes* 21-34 (1975), explaining that attributions are more likely to be correct when the observer has experience, intelligence and can empathize with others.

18. See Schneider, *supra* note 4, at 194-95, n.102.

19. Percentages in Table 4 for "total by cluster" differ from Tables 1 and 2 because the number of usable responses (N) vary for each table.

20. O'Connell & DiFonzo, *supra* note 1, at 33-40.

21. Hedeen & Salem, *supra* note 2, at 10-12.

22. O'Connell & DiFonzo, *supra* note 1, at 27 - 34.

23. See Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style, 7 HARV. NEGOT. L. REV. 143, 191 (2002).

24. Andrew I. Schepard, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* 128 (2004).

25. O'Connell & DiFonzo, *supra* note 1, at 35-36, n.127.

26. Lynn Mather, Craig A. McEwen, & Richard J. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* 16-17 (2001).

27. Andrea Kupfer Schneider, Cooperating or Caving in: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations? 91 MARQ. L. REV. 145 (2007). See also Jason S. Johnston & Joel Waldfogel, Does Repeat Play Elicit Cooperation? Evidence From Federal Civil Litigation, 31 J. LEGAL STUD. 39 (2002) (noting that repeat play led to an increase in the number of settlements).

28. Lynn Mather, Changing Patterns of Legal Representation in Divorce: From Lawyers to Pro Se, 30 J.L. & SOC'Y 137, 144 (2003). Please also see Chapters 4 & 5 on *pro se* services.

29. O'Connell & DiFonzo, *supra* note 1, at 21.

30. We are grateful to Judi McMullen for raising this point.

31. Mather et al., *supra* note 27, at 95.

32. National Center For State Courts, State Court Guide to Statistical Reporting, 2003, at 31 (2003), available at http://www.ncsconline.org/D_Research/CSP/2003_Files/2003_DomRel.pdf. The fact that custody filings are up can be explained through changes in society as well as changes in the law. Because of changes in the law, judges no longer default into awarding the mother custody. With more women working outside the home, there may also be more equal claims of custody. With a more mobile society, relocation cases are also more likely.

33. Mather et al., *supra* note 27, at 95-96.

34. Mather et al., *supra* note 27, at 91-96.

35. Mather et al., *supra* note 27, at 123-25.

36. O'Connell & DiFonzo, *supra* note 1, at 26-30. Thanks to Peter Salem for raising this point.

37. O'Connell & DiFonzo, *supra* note 1, at 38.

38. Id. at 35.

39. Id. at 21 (clients note that things would go smoother if attorneys were excluded). See also Chapters 4 and 5 on pro se cases.

40. For support of this concept, see also id. at 41; Hedeen & Salem, *supra* note 2, at 10.

41. See Donald G. Gifford, The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context, 34 UCLA L. REV. 811, 811-14 (1987).

42. See Daniel L. Shapiro, Emotions, in *The Negotiator's Fieldbook* (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006); Roger Fisher & Daniel Shapiro, *Beyond Reason: Using Emotions As You Negotiate* (2005).

43. See note 1, at 38-9; Hedeen & Salem.

CHAPTER 2

COLLABORATIVE PRACTICE

Susan A. Hansen and Gregory M. Hildebrand[1]

I. COLLABORATIVE PRACTICE

A. The Core Definition

Collaborative practice is an approach to resolving legal issues that is founded on four core elements:

1. A pledge not to go to court to resolve disputes;
2. An honest, voluntary and good-faith exchange of information without formal discovery;
3. A commitment to strive for solutions that take into account the interests of all parties; and
4. Withdrawal of professionals if the parties go to court.

In collaborative practice, each party retains a lawyer, and the lawyers and

clients sign a written collaborative agreement before engaging in the process. The indispensable defining element of the process is that the parties and lawyers stipulate in writing that the process will be terminated and the collaborative lawyers will be disqualified from continued representation of their respective clients if either party resorts to litigation.

Collaborative practice originated in the context of family law cases, although its application is expanding in other civil law areas. The International Academy of Collaborative Professionals (IACP) supports exploration and use of collaborative practice in civil law areas such as employment, trusts and estates, medical error, and business law. The core elements of collaborative practice remain the same in all areas of law and are particularly beneficial in cases involving a need for a continuing relationship between the clients. For purposes of clarity and brevity, this chapter will focus on the application of the collaborative process in divorce cases.

In addition to collaborative lawyers, family collaborative practice may involve mental health professionals as coaches or child specialists and financial specialists as members of the clients' divorce team. The clients have the option of starting their divorce with the professional with whom they have their initial contact or with whom they feel most comfortable. The clients and their initially retained professionals then choose the other professionals needed to help resolve the issues. The clients benefit throughout the collaborative process from the assistance and support of all of their professional team members.

Collaborative lawyers and other professional team members play an active role in all stages of settlement discussions. Each lawyer functions as an advisor, advocate and educator, and all of the professionals work together to assist the client in identifying interests and communicating in the negotiation process. The professionals work with the clients and one another to balance power, share knowledge and enhance communication.

Although the focus of this chapter is application of collaboration in divorce cases, the collaborative process is used to resolve many kinds of family law cases and issues. These cases include gay and lesbian couples and their families, opposite sex couples who have chosen not to marry, and paternity cases. The roles and process explanations that follow apply equally to these cases, as well as to divorce. In fact, the collaborative approach is particularly well suited for use in disputes where the parties have no legal recourse and consequently lack access to a structured legal process comparable to divorce.

B. A Brief History

The collaborative law process was first conceived in 1990 when a Minneapolis, Minnesota lawyer named Stuart Webb became disheartened over the toll taken on families and children in the course of traditional family law litigation. Stu Webb decided to "lay down arms" and determined that he would no longer litigate such cases. He envisioned a dispute resolution process in which lawyers could provide advice and advocacy without the threat or use of litigation. Webb developed the core collaborative commitment of a "disqualification agreement" so that clients could engage lawyers to assist them in resolving disputes without the fear that the lawyers would provoke disagreement or exacerbate conflict resulting in court battles.

While Stu Webb was developing the collaborative disqualification agreement in the Midwest, mental health professionals in California were also developing protocols for resolving the issues of divorce without the concomitant damage so often inherent in the litigation process. The work of these professionals led to the creation of interdisciplinary models of collaboration which rely on the skills of mental health professionals to assist clients in overcoming the emotional obstacles to interest-based issue resolution while maintaining a focus on healthy outcomes for all family members.

The emerging process, collaborative practice, expanded on the interest-based negotiation approach used in divorce mediation through the addition of individualized legal and mental health advice and advocacy. In both mediation and collaboration, the goal is to guide the parties to a personally tailored, negotiated resolution that minimizes conflict. Both collaboration and mediation are client-centered processes that emphasize: (1) educating and listening to clients; (2) open and respectful direct communication; and (3) the use of interest-based negotiations and creative problem-solving techniques.

Collaborative practice has spread exponentially throughout the United States, Canada, the United Kingdom, Australia and Europe. Some states in the United States have enacted collaborative law statutes.[2] The National Commission on Uniform Laws has appointed a panel to prepare a draft uniform collaborative law statute. In Canada, some provinces require lawyers to advise potential clients of the existence of the collaborative process as an additional alternative to litigation.[3]

Numerous state, provincial and regional groups have been established to sup-

port and advance collaborative practice, and more are being formed throughout the world as use of the collaborative process expands. The International Academy of Collaborative Professionals (IACP), www.collaborativepractice.com, is an international interdisciplinary organization. The IACP has promulgated a uniform definition of collaborative practice, standards for collaborative practitioners and trainers, a model code of ethics, and public and professional education programs. The IACP has launched an extensive research project to gain insight into various approaches used by collaborative practitioners to enhance the quality of the process. Led by the efforts of the IACP and its thousands of active members,[4] the collaborative issue resolution process continues to experience rapid growth in public awareness and the number of trained professionals.

C. Defining Elements

The numerous and evolving approaches to collaborative practice share core elements, which are articulated in writing and explicitly agreed to between the clients and lawyers at the outset of the case. These elements always include:

- Negotiating mutually acceptable settlement without using court to decide any issues;
- Withdrawal of the collaborative professionals if either client chooses to go to court;
- Open communication and voluntary information sharing;
- A goal of creating solutions that take into account the interests of all parties.

As clients retain collaborative professionals, they sign written agreements to engage in the collaborative process. The lawyers agree that they will not subsequently litigate any contested matter and the mental health professionals and financial specialists similarly agree that they will not participate as individual witnesses or adversarial consultants in litigation. The integrity of the collaborative process is premised on the clients' feeling of safety within the container created by the process. This container allows clients to honestly focus on interests and creative solutions without fear that open communication will be used against them in a

contested court process.

The process tools and hallmarks of the collaborative process endorsed by the clients and lawyers in the disqualification agreement typically include:

- A shared commitment to proceed honestly and respectfully without litigation or even threats of litigation;
- Active participation by the parties, including four-way settlement meetings to gather and share information, discuss options and reach agreement on resolutions;
- An interest-based approach to negotiation, with the overarching goal of meeting the needs of both parties and their children;
- The ability to work with mental health and financial professionals in an interdisciplinary collaborative team to utilize the skills of each discipline to maximize the potential of positive emotional, financial and legal outcomes for the family;
- Joint retention of any experts needed in the process;
- Disqualification of the collaborative lawyers and other team members from participation in any litigation between the parties.

The disqualification agreement allows the parties to proceed in a protected environment created by the endorsement of the foregoing elements. In jurisdictions in which mediation is an adopted and recognized tool for dispute resolution, the communications during mediation are similarly protected to facilitate the free flow of information and the ability to focus on interests. The disqualification agreement distinguishes the collaborative process from other litigation-based negotiation techniques or processes. In agreements to cooperate, for example, the parties and lawyers may agree to negotiation protocols, but the lawyers continue to represent the clients in court in the event that negotiation fails to result in full resolution. The significant positive impact of the disqualification agreement is that it encourages the parties to emphasize open communication instead of the gathering of evidence. It assists clients in looking to the future rather than the past and transforms the focus of negotiation for both clients and lawyers by removing court as a constant backdrop. The disqualification agreement can also alleviate fears that

hiring lawyers will foster disputes. Thus, potential *pro se* parties may consider the benefits of obtaining legal counsel and representation without the perceived risk of heightened conflict.

The disqualification agreement may be presented in the form of a single written agreement or in the form of a court order. Some jurisdictions supplement the basic agreement with a further statement of principles and guidelines similar to those set forth above.[5] In some jurisdictions, the parties and lawyers sign a Stipulation and Order, which is forwarded to the court for approval.[6]

D. Collaborative Practice Distinguished From Other Options–The Dispute Resolution Continuum

In order to gain a full understanding of the collaborative process, it is helpful to compare it to other family law dispute resolution options such as proceeding pro se, mediation and lawyer negotiation/litigation.

Pro Se

"*Pro se*" literally means "for oneself." The term *pro se* has thus come to mean an option in which the parties do not retain lawyers but instead represent themselves in the legal and settlement process. This process has also been called the "kitchen table" approach. The parties draft and file all necessary court documents to process their case, including the initial pleadings, motions and affidavits, required court forms, financial disclosure, written stipulations and settlement agreements, and any final judgment. If a final court hearing is required in their jurisdiction, they attend the hearing on their own. In some jurisdictions, *pro se* form kits are available at the courthouse. Parties may also turn to books, internet resources or a myriad of "information provider" type services which are available for a fee, to get through the legal process without the assistance of a professional. If the parties are not able to resolve issues, the parties must appear at any necessary hearings and present their own evidence and legal arguments to the court. Of primary concern in *pro se* cases is whether both parties have made all decisions and agreements knowingly and voluntarily. There are particular concerns in divorce cases when the issues involve children, retirement benefits, substantial assets or significant disparities in income. Additional concerns may exist with respect to educa-

tional, emotional and power imbalances.

Mediation

In mediation the parties hire a neutral third party to assist them in reaching agreements. The mediator may or may not be a lawyer. A mediator can provide information about the law and the legal process and guide discussion to help resolve issues, but the mediator does not represent either party and cannot provide legal advice. Mediation may occur with parties who have retained lawyers as well as parties who are not represented. Generally, parties exchange information, brainstorm and negotiate with one another in the presence of the mediator. The goal of mediation is to assist the parties in reaching agreements that meet the needs of both parties without the financial and emotional cost of contested or protracted legal proceedings. If agreement is reached the parties must prepare the pleadings and other required court forms, sometimes with the assistance of the mediator, unless one or both also retain a lawyer.

Lawyer Negotiations/Litigation

Litigation is the traditional legal process. Both parties hire lawyers who provide legal advice and represent the positions of their clients in negotiations and court hearings. Negotiation occurs in the context of the legal adversarial system, and the parties and lawyers retain the option of turning to the court as a third-party decision maker if resolution is not reached on all issues. The parties generally communicate through their lawyers regarding their positions, proposals and counter-proposals. Most negotiations occur within the confines of statutory and case law precedent and legal formulas and against the backdrop potential of court intervention and decision-making.

The lawyer negotiation/litigation process may involve the use of formal legal procedures, known as "discovery," to obtain financial and other relevant information. Discovery may include the use of depositions (a formal taking of testimony before a court reporter), interrogatories (answering lists of questions in writing under oath) and the subpoenaing of documents or other materials believed to be relevant to the issues. Further, each party may hire experts to support their positions. In some jurisdictions in cases with child custody or placement issues, the

court will appoint a third party to advocate for the interests of the children. Ultimately, if agreements are not reached, parties and other witnesses testify before a judge, who makes a ruling on each disputed issue. The parties retain the right to ask the court to reconsider its decision and to take an appeal of the final ruling to a higher court. Most litigation cases are eventually settled. An estimated 98% of all divorces are resolved short of trial. Unfortunately, settlement often occurs after substantial time, money and emotion have been spent in legal conflict. Further, one or both parties may be dissatisfied with the court outcome, and they are then likely to appeal the judgment or return to court in the future to argue for modifications of specific orders. In cases involving placement of children or payment of child or spousal support, parties often return to court after the initial determination to seek modification of those terms in ongoing post-judgment litigation.

The adversarial system works effectively for some disputes. The rapidly expanding rate of *pro se* cases,[7] however, speaks to the dissatisfaction that many people have with the traditional negotiation/litigation process. Even people who can afford to hire lawyers are electing to proceed without representation, often out of fear that lawyers will drive up the costs and create conflict. If issues are not resolved to the satisfaction of all parties, the parents will continue their conflict in an ongoing cycle of post-judgment litigation. The litigation process itself tends to cause the parties to become polarized and increasingly unwilling or unable to consider the other party's interests or goals or even the needs of their children. This happens in spite of the fact that research has clearly identified parental conflict as the primary predictor of negative effects of divorce and separation on children. Most courts have insufficient resources to deal effectively with complex family dynamics and consequent protracted litigation results in heightened anxiety, increased polarity and additional financial cost. The lawyer negotiation/litigation process is necessary in some cases where the collaborative process is not appropriate or is not a mutually acceptable choice.

Collaborative Practice

In the collaborative process each party hires a trained collaborative lawyer and other collaborative professionals as needed to work together in an out-of-court, problem-solving, non-adversarial process. The binding collaborative commitment

made by both parties and their respective lawyers to voluntarily disclose all relevant information, proceed respectfully and in good faith in settlement negotiations, and refrain from the threat or actual resort to court does not waive either party's right to use the traditional litigation process but does require that if either party makes that choice, both collaborative lawyers must withdraw and each party must retain a litigation lawyer to proceed with the case. In collaborative practice, the parties and their professional team communicate and negotiate directly with one another in a structured settlement process. The collaborative process is designed to allow for innovative solutions and approaches to assist in reaching settlement.

Thus, the collaborative process can be narrowly defined as two clients and two lawyers who have made a formal written agreement to adopt a collaborative approach and to not submit contested issues to the court. Collaborative practice in family cases at its best is a flexible process in which professionals from other disciplines are incorporated as team members to maximize the benefit for families.

II. VARIATIONS OF COLLABORATIVE PRACTICE

A process can be collaborative with only two lawyers and two clients. As collaborative practice is growing, however, the use of professionals from disciplines other than law is increasing. Team roles in the collaborative process include collaborative lawyers, mental health professionals and financial experts. Additional professionals may be brought in as needed. The collaborative professionals who have been engaged and are active in the process can be referred to collectively as the collaborative team.

A. Overview of an Interdisciplinary Approach

The interdisciplinary collaborative approach to family issues includes roles for members of disciplines other than lawyers, including communication and parenting divorce coaches, child specialists and financial specialists. The interdisciplinary approach to collaborative family law recognizes the value of all members of the collaborative team in not only assisting clients in reaching agreement on issues, but also improving the quality of the process through enhanced communication and

education, and creation of resolutions that best meet the needs and interests of the clients and their children. Clients and collaborative professionals alike should be aware of options for involving professionals from a variety of disciplines so that informed and thoughtful choices can be made. Although roles will continue to change and new roles are likely to emerge in the quest to maximize the value of the collaborative process for clients, the key current roles will be discussed below.

The IACP has developed "Principles of Collaborative Practice" and "Minimum Standards for Collaborative Practitioners and Trainers" which establish basic credentials, training and experience standards for trainers and all collaborative practitioners. The IACP has also developed "Ethical Standards for Collaborative Practitioners" that apply to all disciplines.[8]

B. The Collaborative Lawyer

The role of a lawyer in the litigation process has been publicly compared to that of a gladiator, in which the lawyer's duty is to determine the client's desired outcome and then champion that desired outcome through a process of advocacy – whether in court or in negotiation prior to court. In contrast, the role of a lawyer in the collaborative process focuses on client education and facilitation of interest-based negotiation as the primary tools of advocacy.

One of the critical initial functions of a collaborative lawyer is to educate the client about the collaborative divorce process and explain how the client can effectively participate. The collaborative process requires active participation and informed decision-making from both clients. That active participation, in turn, requires an understanding of all information relevant to the family's situation and all issues presented, including applicable law, a thorough understanding of the process of collaboration and interest-based negotiation and the ability to fully participate in brainstorming and settlement discussions about financial and child-related concerns.

The intense emotions inherent in separation and divorce may impact the party's ability to focus and effectively participate in the process of collaboration. This may result in difficult or impaired negotiations or even derailment of the process. Therefore, the collaborative lawyer must understand the emotional dynamics of divorce in order to assist in effectively containing emotion and manag-

ing conflict within the process. A collaborative lawyer's role includes the ability to assist the parties in working through apparent impasse and facilitating difficult discussions to achieve a resolution.

The goal of creating a safe container and an effective collaborative process is met in a number of different ways. The first is to thoroughly define and affirm the collaborative principles and guidelines and to set them as ground rules for the process. Throughout the process, the collaborative lawyers must function as guides to keep the clients focused and the process moving forward. Lawyers use reframing and other skills similar to those used by mediators to assist clients in moving through the education and interest-based process.

The key steps in interest-based collaborative negotiation are:

- Anchoring in the process;
- Defining the issues;
- Identifying and communicating interests;
- Obtaining, organizing, understanding and analyzing information needed to consider issues;
- Generating a range of resolution options;
- Evaluating the resolution options in light of interest; and
- Reaching agreement.

Once an agreement has been reached it is the collaborative lawyer's responsibility to assist the parties in implementing the agreement. This includes not only preparing a written document confirming the terms of the final agreement, but also providing whatever legal assistance might be needed to carry out the terms. This may include the formal transfer and registration of titled property, such as real estate or business interests, division of retirement assets via specialized Orders (Qualified Domestic Relations Order – QDRO), providing instructions on changing beneficiaries, eligibility for spousal social security benefits and steps necessary to implement name changes and assisting or referring for updating estate plans.

Thus, the role of the collaborative lawyer is a fusion of educator, advocate, process guide, creative problem solver, settlement specialist, and team member.

C. Roles of Mental Health Professionals

One of the great strengths of the collaborative process is the direct inclusion of mental health professionals. The options for team roles for mental health professionals are dynamic and growing as new ways to assist clients in the process are explored. An overview of roles that are commonly used in various practice regions is provided below.

Collaborative Coach

The collaborative coach (also referred to as a "divorce coach") is a mental health professional whose role is to prepare the client to participate effectively within the collaborative process. Although the collaborative coach is not functioning in the role of therapist, the coach uses therapeutic training and experience to assist the client in managing emotional and psychological issues that might otherwise impair the client's effective functioning and participation in the settlement process. The coach also communicates with other collaborative team members to provide insight and assistance to help facilitate the most effective and efficient process.

During individual meetings with the client, the collaborative coach helps the client understand and work through emotions and understand relationship and family patterns. The coach assists the clients in identifying and resolving emotionally charged issues, managing anger, fear or other overwhelming emotions, seeing the client's own role in communication and negotiation dynamics, and developing the coping and communication skills which will enable the client to participate productively in the collaborative process. The coach helps the client identify and prioritize concerns, interests and long-term goals for themselves and their family. The coach may also teach positive co-parenting skills, educate the client about ways to create a healthy divorce outcome for children, assist in developing a parenting plan, and help the client communicate in a positive and productive way with his or her spouse. Finally, the collaborative coach serves as an ongoing resource as the client addresses emotional crises and parenting issues arising both during the case and after the legal component of the divorce has concluded.

A principal area of focus in the collaborative process for a coach is emotional containment and management. Emotional containment throughout the divorce process is often the key for clients in progressing toward resolution. How the

emotional process is handled has a profound impact on the legal settlement process as well. It is common to see sadness and anger from both parties in a divorce. There may be some "revisionist" history where the former partner is viewed in a disproportionately negative light. Parties may construct a retrospective "moral bank account" that focuses on the past and compares what they gave to the relationship with what they got out of it. Too often, each concludes that the balance sheet favors his or her individual efforts and reveals the unfairness or inadequate contributions of the partner.[9] Accordingly, parties may attempt to use their emotional bank accounts as the basis for decision-making about their children, assets, cash flow and other divorce issues. Thus, the coach promotes a more insightful and healthy decision-making process by directly addressing emotional issues with clients and guiding other team members concerning the emotional containment process. Additionally, the coach may identify deeper personality disorders or mental health issues. The coach is uniquely qualified to recommend referrals for further evaluation or treatment to address any significant mental health concerns.

Experienced coaches can provide clients with invaluable tools. A coach can help generate a positive vision of the future with clients who feel focused on the past, overwhelmed, or hopeless. For clients struggling with shame or anger, a coach can help work through issues, facilitate forgiveness, and help the client avoid the often toxic effects of holding onto blame or bitterness. Coaches may assist clients in reframing the relationship in a constructive way by remembering positive shared experiences. The coach assists the client in constructing a more balanced "story" of themselves and their relationship; hopefully one that provides more dignity and hope for the family and focuses on the future, rather than the past.[10] Coaches also help identify the emotional components of legal and financial issues as they are addressed in the collaborative process.

In addition to individual coaching strategies, four-way meetings present an opportunity for coaches to reframe issues and model new and healthy ways of communicating. Coaches and clients can identify emotional triggers and help the parties develop effective coping strategies more consistent with their long-term goals. When parties experience success in respectfully reaching decisions in four-way meetings, they are encouraged to utilize new behaviors in resolving future issues. Coaches also provide professional insight and advice to other team members, particularly the lawyers, to assist in understanding the emotional layers and needs of the clients and their interests in order to assist in communication and effective negotiation.

Child Specialist

The child specialist is a mental health professional with specific training and expertise in child psychology, child development, and family system. The child specialist assists parents in understanding and addressing their children's unique needs and provides tools for use by parents and other team members seeking to promote on-going healthy family relationships. The child specialist serves as a neutral advocate for the interest of the child and helps discern and share the child's feelings, needs and preferences. This professional provides a "voice" for the children throughout the process and helps the parents examine plans and actions through the eyes of their children, rather than just their individual perspectives.

The child specialist assists the parents in their collaborative negotiations as they develop a parenting plan that addresses interests and concerns related to their children. That assistance may include: informing the parents about common reactions children have to divorce; discussing age related, developmental stages and pragmatic considerations bearing on parenting decisions and placement of the children; actively assisting the parents in their efforts to create realistic and thoughtful parenting plans that keep the interests of the children primary; and helping the parents anticipate and plan for future challenges they may face as they continue to co-parent after conclusion of the legal proceedings. The child specialist may also be a resource for the family after the legal process ends, when issues arise or life changes occur that necessitate a review of the original plan.

Process Facilitator/Family Specialist/Communications Coach

Another approach to mental health coaching in the collaborative process is to have one mental health professional participate in the process as a neutral facilitator. Professionals in this role have varying titles as well as variance in specific process involvement. In this approach, the mental health professional typically attends all meetings, and functions as a process facilitator whose goal is to help everyone communicate as effectively as possible. In addition to helping the clients develop effective communication skills in and out of the meetings, the professional also gives suggestions to other team members to improve overall communication and process effectiveness.

This professional will generally have individual contact with the clients to dis-

cern individual goals, understand family dynamics and promote effective participation. The professional may meet with people in various configurations, including with the parties together, with a party and the party's lawyer, or with the entire team. The goal is to coach the couple to understand and step away from their husband and wife issues and emotions in order to move into effective co-parenting communication. This relationship transformation is critical to the effectiveness of the collaborative process as well as to the interests of the family.

D. Financial Specialist

The financial specialist is a neutral financial professional who is retained by both clients. Financial specialists are typically certified financial planners or accountants. The financial specialist helps clients gather, organize, understand and analyze financial data relevant to the case. They help the clients identify financial concerns, interests and goals. They also assist the other professionals in the case to assure that a range of financial options are generated and agreements are negotiated with a full understanding of the financial and tax ramifications. The financial specialist's involvement in a collaborative family law case will vary depending upon the needs of the individual case. Specific functions may include providing financial education, income and cash flow compilations, tax analysis, and preparation of short and long-term financial projections. The financial specialist may provide assistance in compiling and presenting financial information, generating options and insuring that both clients have sufficient financial understanding to participate in negotiations and make fully informed decisions.

Specific ways in which the financial specialist can assist the clients' understanding and effective use of financial information include: meeting jointly with the clients to explain financial concepts and help ensure that they have a common understanding; meeting individually with a client who needs additional explanation or education; and encouraging the formulation of realistic future plans for income and expenses. The financial specialist provides insight into the effect of specific options, such as: (1) how keeping a house might affect monthly cash flow; (2) the impact of property division on long-term financial or retirement planning; (3) decisions about complex valuation issues; or (4) tax implications related to property division and support issues.

Financial specialists are particularly beneficial in cases where there is a significant disparity in the level of financial knowledge or sophistication of the parties. The financial specialist offers an assurance of competent and neutral analysis regarding issues such as the long-term financial ramifications of settlements, business valuations, property classification or tracing issues, retirement planning, and tax impact. The expertise and experience of a skilled financial specialist can assist the parties and their lawyers in exploring a wide range of options and assuring that both parties fully understand the impact of decisions on their respective financial futures. Engaging a financial specialist as a team member early in the process assists the parties in taking an educated and proactive role in creating their own settlement.

E. Other Experts and Consultants

Although not formally part of the collaborative team, other third-party consultants and experts may also be jointly engaged by the parties and their lawyers in a collaborative case to provide assistance in educating the parties and resolving issues. Typically such other experts would be retained to help with specific identified issues. For example, a business valuation expert might be engaged solely to provide a neutral and objective opinion of the value of a closely held business, an actuary might be hired to provide a calculation of the net present value of a pension, and a vocational expert may not only evaluate a party's earning capacity but also assist a party who has been out of the workforce for years in developing a strategy for obtaining meaningful employment. Other potential consultants may include real and personal property appraisers, realtors and lenders.

F. Interrelationship with Mediation

There are many ways in which mediators and collaborative practitioners share common skills and roles. There is a significant overlap in training with respect to interest-based negotiation skills, and many collaborative practice groups require mediation training as a component of their collaborative training standards.

Collaborative practice and mediation are complementary dispute resolution processes. In some areas, mediators play a direct role in the collaborative process

as neutral case managers or neutral facilitators who communicate directly with members of the collaborative team.

Resistance or impasse can occur in collaborative process as in any other process. Mediators may be brought into the process to assist in problem solving and moving forward to resolution, facilitating productive communication or pre-empting or working through impasse. Five-way mediation sessions or other creative approaches may be an effective way to address such difficult issues.

Similarly, mediators may utilize the skills of collaborative lawyers and other professionals as consultation and referral sources. This assures that clients have effective professional resources throughout the mediation process. Further, collaborative legal, mental health and financial practitioners with training and experience in teamwork as well as mediation can be effective co-mediators where appropriate. Thus, the mediation and collaborative processes can work effectively together to support the parties and provide the necessary education and empowerment to assist them in creating their own solutions and settlement.

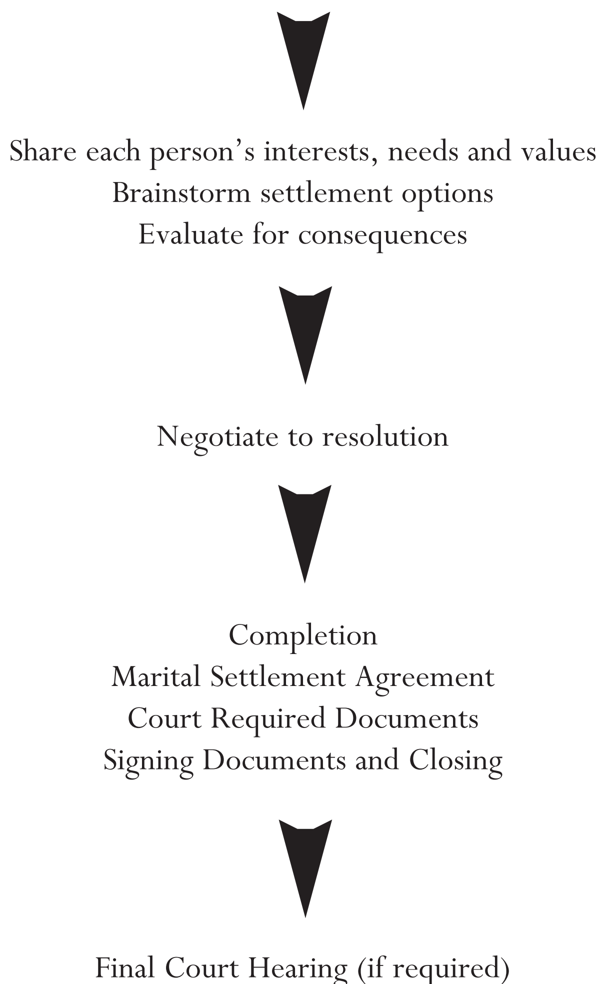
III. OVERVIEW OF THE COLLABORATIVE PROCESS

SUMMARY OF COLLABORATIVE PROCESS

(Time & number of meetings at each stage varies for each case)
(Individual meetings and calls between four-ways to assure understanding and efficiency)

Establishing the framework
Review legal and collaborative process
Commitment to process and sign agreements
Determine team composition
(coaches, child specialist, financial specialist)

Gather information
Determine information and documents to gather
Assign responsibility for gathering
Decide if other joint experts/consultants needed
Assure full understanding of all financial and other information gathered



The foregoing flow chart summarizes the collaborative process and is likely to be familiar to professionals familiar with mediation and interest-based negotiation. It has been proven to be a useful educational tool for explaining the flow of the process to clients. Helping clients move through the foregoing steps in an efficient, effective and timely progression requires significant client education, guidance, choreography and teamwork.

Traditional litigation is well-defined and well-known. While the steps may vary from one jurisdiction to another, litigation has a clear beginning (filing of the legal action). Statutory and case law and court rules govern timelines and procedures (e.g. motions, formal discovery, rules of evidence). The ultimate mecha-

nism for reaching an imposed outcome (a trial) is rigidly proscribed by the rules of evidence, and the legal stages of post trial appeal are also clear and rule bound.

By contrast, the collaborative process is less constrictively defined and more adaptable to the individualized needs of the clients. The clients and collaborative professionals, rather than the court or legal mandates, dictate the timeline and agenda. In order for collaboration to be effective, all participants must be able to work together. Therefore, the essential components and procedures of the collaborative process should be generally outlined and specifically understood by everyone at the outset of the case to assure the mutual understanding and vision necessary for the process to be helpful and effective for clients. The following sections expand upon the foregoing flowchart to assist in understanding the progression of the collaborative process.

A. Case Screening

Collaborative practice is only one of a range of dispute resolution options available to a person contemplating a divorce or other family law issue. The collaborative process is not the only or even the best option for every client. Collaborative professionals should understand which circumstances and characteristics are predictive of success and which are associated with impasse or misuse of the process. Such information concerning process options should be communicated to new clients in order to assure that the choice of process is informed and client-centered. Likewise, the professional must use individual judgment about willingness to take on the case within the collaborative process. Both the client and professional must weigh the pros and cons of process options, and it is imperative that professionals assure that the client has conducted this consideration in a fully informed way.

There are numerous areas of concern, including lack of honesty, strong articulated mistrust, untreated mental health issues, addiction, and domestic violence that need to be factored into any decision about use of the collaborative process. In cases involving domestic violence, safety must be the primary concern. Case assessment in all of the foregoing areas is key in assuring informed decision-making and in helping clients determine what process and professionals are best suited for their individual case. Some issues may be more effectively addressed in the collaborative process than in other contexts, given the opportunity to involve mental

health professionals and other joint experts as members of the collaborative team. The collaborative process is a good option for people who want to maintain privacy and control over their own case as in mediation, but who also want the individualized help of lawyers. Individuals must also have a commitment to making an honest effort to reach a settlement that meets the needs of all family members. Screening tools to assist in making appropriate process choices and for specific areas of concern such as domestic violence have been developed and will continue to be created and refined by practitioners and disseminated by the IACP.[11]

B. Client Intake

Providing the Client with Process Options

Although public education, media coverage and internet information about collaborative practice is spreading, prospective clients may not have heard about the process at the point of initial contact with their lawyers, mental health professionals or other advisers. In that event, the professional should present collaborative practice as one option in the continuum described above so the client can consider all options and make an informed personal choice. A collaborative professional should explain the process options to the client in a consultation and answer specific questions about the pros and cons of the process for that individual. This is an important supplement to the informative websites and brochures that are available. Informed decision-making by clients is a critically important aspect of all professionals' goals and client-centered obligations. The IACP and other collaborative professional associations also include both information about the process as well as membership rosters and contact information for trained collaborative professionals on their websites.[12]

Helping the Client Select An Option

Any client should be made aware of the potential advantages and disadvantages of the collaborative process in comparison with other process options so that the individual can make an informed decision. For collaborative practice to be effective, the client must fully understand the process and find its goals and objectives acceptable in order to make a genuine commitment to the process.

Potential areas of concern should be explored and discussed before the binding collaborative commitments are made. Professionals should develop evaluation and interview procedures to assist in dealing with potential issues, such as screening procedures for domestic violence or methods to help evaluate the presence of significant psychological or emotional problems that might be an impediment to the client's ability to participate productively in the process. In some cases, it is appropriate to involve mental health professionals *before* the collaborative agreement is signed. Such professionals can assist the clients and lawyers in the initial decision-making about whether the collaborative process is appropriate or likely to be productive in their case.

Forming the Collaborative Relationship

Serving a client as a collaborative professional, whether as a lawyer, coach, child specialist or financial specialist is a unique form of limited service. If a client has engaged a professional to provide such services, the nature and scope of those services should be clearly communicated to the client in writing, preferably in a specific collaborative representation agreement. Each team member should clearly discuss the parameters of their role in the collaborative process with the client and confirm their mutual understanding.

Lawyer

In traditional representation, the lawyer represents the client from the beginning to the end of the action or until the representation is terminated. Collaborative representation of a client, in which the lawyer is disqualified from appearing in contested matters in court for a client represents a significant departure from the lawyer's traditional litigation role. Service as a collaborative lawyer thus requires that the client be fully informed of the lawyer's obligation to withdraw from representation in the event that the collaborative process does not succeed in resolving the matter. The distinctions from the traditional lawyer role must be made clear to and be accepted by the client in a fully informed decision before the collaborative process commences. Unbundled legal services and limited representation have become more common, but an informed decision by the client is an imperative prerequisite. The professional should discuss all aspects of the collabo-

rative commitments to be included in the written agreement. As set forth in the IACP Ethical Standards, either the collaborative participation agreement or the collaborative representation agreement, preferably both, will contain an express discussion of confidentiality practices and the express limitation of representation to the collaborative process.[13]

Mental Health Professional

Collaborative coaches and child specialists are also functioning in distinct roles unique to the collaborative process. Although therapeutic skills and experience are applied, the mental health professional is not providing traditional therapy services in the collaborative process. The traditional definition of therapist-patient privilege is substantially altered in the collaborative team model. Clients should have a clear understanding of the role of the coach, communication coach, or child specialist, including the parameters of confidentiality. In conformity with the IACP Ethical Standards, mental health professionals should also confirm the nature and scope of services that will be provided to the client in writing.[14]

Financial Specialist

A neutral financial professional becomes involved in the collaborative process on a fee for service basis to provide objective input based upon professional training and expertise. The financial specialist's compensation for collaborative services should not be tied to future individual services or commissions. As with other members of the collaborative team, financial specialists should confirm their relationship with the parties by means of a written retainer agreement that conforms with IACP Ethical Standards.[15]

C. Initial Process Preparation

The collaborative lawyer must have a clear understanding of the client's factual circumstances, values, concerns, interests and goals. This involves effective listening skills as well as providing information, explanation and advice to assure that the client understands his or her role in the interest-based collaborative process as well as all issues that must be addressed and resolved. The lawyer functions as a

guide in moving the process forward in both a structured and individualized process. Part of the lawyer's pre-meeting communication with the client should include discussions which will help the lawyer identify the major topics of most concern to the client, any hot-button issues which might require special handling or discussion with the other collaborative counsel or prospective team members and formulation of a specific agenda for the initial and subsequent four-way meetings. The lawyer should also begin to explain and explore the concept of interests, with an emphasis on helping the client understand the distinction between positional and interest-based negotiations.

D. Establishing the Collaborative Commitment – First Four-Way Meeting

Entry into a written collaborative agreement, or a Stipulation and Order, that includes the essential elements of the process is required in order to assure common understanding and anchoring in the process. In some jurisdictions, the written signed collaborative agreement is submitted to the court as a Stipulation and Order at the outset of the process. At the initial four-way meeting, the collaborative process is discussed in detail, and the parties are directly involved in the discussion of process pros and cons to be certain they make a knowing decision about their commitments as well as understand the roles of the professionals. The primary purpose of the meeting is for the parties to jointly raise and discuss any questions or concerns with one another and their respective lawyers before the agreement is signed. The agenda for the first four-way is generally as follows:

a. Ensure a common understanding and willingness to commit to the collaborative process. The collaborative lawyers review the personal roles and responsibilities of the parties in the process. Risks and benefits as well as the parties' personal motivation and goals are discussed. The collaborative contract, or Stipulation and Order, along with any ground rules, are reviewed and potentially signed.

b. Provide clients with a road map through the process. An overview of the process, such as the previously referenced flow chart, is reviewed and discussed. Depending upon the jurisdiction, initial pleadings such as a joint

petition for divorce, may also be discussed and signed.

c. Begin discussion of interests. Each party has the opportunity to express their interests generally regarding the process. Overarching goals and visions for the future may also be addressed. The clients' ability to formulate and articulate their interests is a critical element of a successful collaborative process, and the groundwork should begin at the initial meeting.

d. Attention to temporary issues. Generally, substantive issues are not addressed at the initial meeting. Immediate short-term concerns, however, might need to be addressed. Such issues should be known in advance and specifically put on the agenda to build trust in the process.

E. Caucusing

Four-way settlement meetings are the principle means of sharing information, conducting negotiation and reaching resolution of issues. Between meetings, contact with clients and other team members occurs to address questions or concerns and help identify issues, challenges and opportunities to keep the process moving forward efficiently. These caucuses and contacts are essential to set clear agendas and assure productive meetings.

F. Ongoing Four-Way Meetings

The frequency and duration of four-way meetings with clients and lawyers, as well as meetings with other collaborative professionals, varies depending on the needs of the individual case. Some cases resolve quickly in a couple of meetings, whereas others need substantially more time and professional attention.

a. Practical details. As much as possible, collaborative conferences should be held at times and locations which are convenient for the parties. This can be challenging in view of the multiple professional and client calendars, but scheduling a series of meetings into the future is usually effective. Physical arrangements vary, though collaborative practitioners give significant consideration to surroundings that will be comfortable for the parties. For

example, many collaborative lawyers use round conference tables to avoid the sense of "sides" or reinforcing positional negotiations. The degree of formality and surroundings and conduct at the meetings is generally a function of the professionals' approach. As with mediation, reasonable time limits can be helpful to maximize the benefits for the parties. Marathon negotiation sessions are rarely productive.

Collaborative conferences should involve a process of active participation by all parties. It is a fluid communication and negotiation process in which all participants directly address all other participants and any one of the attendees may take the lead at any given time. Each participant in such a conference should be mindful of not dominating the communication. Open-ended questions and brainstorming are encouraged.

b. Agenda. A specific, itemized shared agenda of topics to be addressed at a meeting helps assure a common and focused understanding of the purpose of the meeting. Jointly developing and then following the agenda helps everyone in the process stay on track. In addition, clearly understood agendas help alleviate anxiety and help clients feel secure, manage conflict, guide negotiations and assure progress in the process. Generally agendas are set at the preceding meeting, though changes may be made based on communication between collaborative conferences.

c. Conducting conferences. In addition to education and advocacy, the collaborative lawyers' role is to facilitate interest-based negotiation. They help the clients define their interests, identify issues, generate and understand a wide range of options and develop resolutions that address the interests of both clients and their children. The goal of the collaborative process is to maximize the clients' ability to directly and effectively communicate and engage in the negotiation process. The skill and training of the individual collaborative lawyers, as well as the trust and experience collaborative lawyers have with one another, is an integral part of ensuring the success of the process. There are many resources for practitioners to improve their collaborative skills, including increasing numbers of books and other publications.[16] A directory of trainers and available collaborative trainings are listed on the IACP website. Mediation training, in addition to specific collaborative training, is an invaluable asset in providing quality

professional services in the process.

Additionally, collaborative practitioners should continuously consider their role in the process, examining what works and does not for the benefit of the clients. Self-awareness, reflection, openness to change and remaining client-centered are imperative for the potential of collaborative practice to be achieved. Collaborative professionals should strive to model respectful collaborative behavior throughout the process. Many professionals practice in groups that routinely meet to facilitate the ongoing discussion of how to give and receive constructive input throughout the collaborative process. The example set by professionals and their approach to communication and negotiation is a powerful influence on the clients. Open and non-defensive communication is a critical element in assuring a final resolution that addresses the personal interests and needs of the clients.[17] The role of the collaborative lawyer is to guide the negotiation process, not control it. Lawyers with significant experience in traditional negotiation/litigation may have become accustomed to directing a client to a preferred legal alternative. In collaborative practice, the ultimate goal is to help the parties themselves creatively explore and define their own resolution. Instead of a choice, or splitting the difference between two alternatives, or simply applying a legal formula, a wide range of possibilities may be generated, limited only by the parties' needs and preferences as well as the collective creativity of the collaborative team.

d. Meeting minutes. Minutes of each collaborative conference serve as an essential reference and reminder of what has been discussed and decided and provide a common understanding in moving forward to keep all participants on track and increase the efficiency of the process. Minutes may be kept on a contemporaneous basis on forms that various professionals have created. The meeting minutes should include any tentative agreements, future assignments of tasks, and additional meeting dates and locations.[18] Meeting minutes are an important tool in keeping the process structured, focused and forward-moving.

e. Team communication. In addition to being a tremendous asset, multiple team members can also create communication challenges. Various approaches exist and new alternatives are constantly evolving to assure

effective team communication. Some professionals use group e-mail or scheduled conference calls to share information. Meeting minutes should also be disseminated to all other professionals engaged in the process. Some professionals designate a case manager, who is a team member with a specific function of productive information sharing and communication amongst team members. In some locales, a conference call is organized early in the process between the professional team members. In other areas, a process is being developed which incorporates an initial and a final full team meetings at reduced cost into the process in an effort to ensure full communication and shared professional expertise.[19]

f. Conclusion of the collaborative process. The collaborative process concludes with a complete negotiated agreement, the parties' reconciliation, or termination of the process based upon a resort to litigation. Either party has the option of electing to terminate the collaborative process. Lawyers may also have the option to terminate a process if provided for in a representation agreement and/or the signed collaborative commitment. The vast majority of collaborative cases are resolved pursuant to a mutually agreed-upon settlement. The IACP has research in progress to provide data regarding collaborative case conclusions. Informal polling to date has indicated that more couples reconcile in the course of the collaborative process than in traditional negotiation/litigation. Preliminary data suggests that fewer than 5% of collaborative cases terminate and shift to litigation.

Collaborative lawyers often draft documents jointly with their collaborative counterparts to assure common understanding, efficiency and cost-effectiveness. Potential terms for final agreements are generally discussed with clients to help them establish a mutually agreed-upon approach to address any post-judgment issues or concerns that may arise.[20] The goal is to give clients tools and a road map to address issues in a productive out-of-court approach.

IV. CAUTIONS IN COLLABORATIVE PRACTICE

Collaborative practice is one choice in a continuum of process options for clients. Consequently, the core definitional distinctions and boundaries of the collaborative

process must be clearly understood and delineated to assure the integrity of the process options and to avoid client confusion. Collaborative practice is not for every client and is not for every professional. The process requires the ability to work through difficult emotional and financial issues with honesty, integrity and mutual respect. Parties have to be willing to explore and understand the interests and needs of the other party as well as their own. Parties and professionals must be open to creative problem-solving rather than positional ultimatums or battling for self-interest outcomes. The willingness and skills necessary to engage in direct communication and to work within a team process are essential.

Finally, the decision to engage and productively participate in a collaborative process requires a complete understanding of and informed commitment to abide by the principals and guidelines of the process. As noted previously, there are issues and circumstances that may make the collaborative process more challenging or even inappropriate in certain cases. Certainly, caution, thoughtful consideration and involvement of appropriate team members are necessary in cases where issues of domestic violence, mental health impairment or significant mistrust or dishonesty are evident. For professionals, the collaborative process also means stepping out of traditional roles and learning and applying specific training, skills and ongoing education and self-reflection to practice the process with personal integrity, professional ethics and the goal of providing a quality process option for clients.

V. ETHICS IN COLLABORATIVE PRACTICE

Collaborative Practice significantly alters the nature of the services members of the professional team provide to their clients. To assure the highest levels of competency, the IACP has developed qualifications guidelines for collaborative practitioners and for trainings and trainers in the collaborative model, as well as a model set of Ethical Standards for Collaborative Practitioners. Each professional discipline is governed by its own code of ethics which must be followed in all work performed by the professional, regardless of the process in which the professional works. The governing principle of the IACP Ethical Standards is that each professional is first governed by the ethics standards pertinent to his or her own profession, and must honor those separate professional rules if there is a conflict

between the professional's standards and the IACP standards.

Mental health professionals and financial specialists are able, with clear explanations of waivers of confidentiality, to comply readily with their respective codes of ethics. The requirement of open communication in the collaborative process needs to be fully discussed with clients to avoid any misunderstanding about professional boundaries or client expectations of confidentiality. Mutual understandings should be incorporated into the individual retainers and collaborative agreements. Likewise, the role of a neutral team member, such as a financial specialist, needs to be clearly discussed and understood by the clients in advance for purposes of ethical compliance as well as the effectiveness of the process.

Lawyer codes of ethics were drafted in the context of a traditional adversarial litigation process. Despite the proliferation of limited representation agreements and unbundled legal services, some ethical debate has occurred about the lawyer's role in alternative processes, including collaborative practice. The American Bar Association Standing Committee of Ethics and Professional Responsibility recently issued a formal ethics opinion clearly upholding the collaborative practice process.[21] The key ethical obligation for the lawyer is assuring knowing and voluntary consent by a client to limited legal representation pursuant to a collaborative disqualification agreement. The agreement not to litigate is clearly a form of limited representation that requires a full discussion of options and ramifications with clients prior to any consent in an individual retainer or team collaborative agreement.

Mental health professionals and financial specialists can ethically secure prospective binding waivers of confidentiality from their clients. For lawyers, the lawyer-client privilege prevents the disclosure of client confidences without consent and prospective waivers are not enforceable. The client commits to full disclosure in the collaborative agreement and likewise directs the lawyer to participate in open communication. If the client later decides to alter this directive and withhold or conceal information, the lawyer remains bound by the attorney-client privilege and may not reveal the information. The lawyer and client will discuss ramifications of withholding information on the parties, the process and the potential for future litigation. Ultimately, if client permission to divulge the confidence is not given, the lawyer must withdraw from representation or, if permitted by the collaborative agreement or individual retainer agreements, terminate the process.

All preliminary discussions of the collaborative process with the client should include a reference to the vital importance that the process be conducted with transparency. The potential collaborative client needs to understand that one of the consequences of the agreement to voluntarily disclose all pertinent information may be that his attorney will withdraw from representation and the process may terminate if there is a failure to disclose. Great care is taken, pursuant to the IACP Standards, to ensure that the collaborative client understands the differences between traditional representation and collaborative representation and makes an informed choice of process and process rules.

Another issue unique to lawyers is the question of the ethical propriety of limiting the lawyer's representation to the negotiation process, and providing that the lawyer is prohibited from representing the client in contested court proceedings. If a client presents a contested issue to a court, the collaborative process terminates, and the collaborative lawyer must withdraw. Limiting representation is expressly allowed by the ABA Model Rules, which have been adopted in most States in the United States. The IACP Standards prescribes that the requirement that the collaborative lawyer withdraw in the event of litigation be included in the representation agreement and in the collaborative stipulation. The pros and cons of the agreement not to litigate with the collaborative lawyers should be discussed at length in initial client interviews and at the initial four way meeting.

The IACP Standards also address the boundaries and roles for the neutrals, both financial and child specialists, involved in collaborative practice. The Standards prohibit any dual roles for neutrals. Working with either client separately after the collaborative process has ended is inconsistent with serving in a neutral capacity in the collaborative model. Thus, the financial specialist may not sell either client products or services after the conclusion of the process and a mental health professional may not become a therapist for a collaborative client or their children.

In its leadership role within the global collaborative community, IACP provides an ongoing focus and review of practice and ethical standards addressing competence, confidentiality, conflicts of interest, professional roles and training. These steps help ensure the integrity of the process and clear client education about collaborative practice.

VI. THE FUTURE OF COLLABORATIVE PRACTICE

Collaborative practice has grown exponentially in the past six years. As an illustration, approximately one hundred practitioners attended the IACP Forum in 2001, primarily from the United States. At the 2007 IACP Forum, approximately six hundred practitioners from many countries around the world attended. IACP co-sponsored a European Collaborative Conference in Vienna, Austria in 2007 and Cork, Ireland in 2008; a conference in Sydney, Australia is planned for March 2009. IACP also has a pilot project, initiated in 2007, to share a basic training curriculum with practice groups worldwide. This ongoing project will assist in making collaborative practice training accessible to all interested professionals and in assuring public access to the collaborative process. The explosive growth in the numbers of trained professionals and expanding coverage by international media indicates the growth of collaborative practice as a process option.

The challenge for collaborative practice is to remain client-centered in assessing approaches to improve the quality of the services provided in the process. This includes being open to creativity and change while still preserving the core tenets and integrity of the process. For IACP, this includes sharing professional skills and tools with individual practitioners and regional practice groups worldwide, conducting ongoing research, reviewing and promulgating standards and ethical guidelines for practitioners and trainers, and continuing to foster global dialogue about collaborative practice. The growing evolution of interdisciplinary teamwork, international collaboration and expansion into new areas of civil practice provides both great potential and challenges to the collaborative community as it strives to provide an effective and efficient resolution process. Working together with individuals and practice groups, IACP will continue to promote excellence in the process to enhance the potential for the highest quality of outcomes for clients. This evolution provides clients with another meaningful choice in the dispute resolution continuum. Such positive change is the wave of the future as more and more parties to disputes seek creative ways to “wage peace.”

APPENDICES

To access this chapter's appendices, go to:
http://www.afccnet.org/resources/resources_professionals.asp

Appendix A: Principles and Guidelines for the Practice of Collaborative Law

Appendix B: Stipulation and Order for Collaborative Law

Appendix C: Domestic Violence Screening in Collaborative Law

Appendix D: Collaborative Representation Agreement

Appendix E: Divorce Coach/Child Specialist Retainer

Appendix F: Financial Specialist Retainer

Appendix G: Meeting Minutes

Appendix H: Parenting Issue Resolution Language

NOTES

1. Special thanks to Diane Diel for her invaluable assistance and to Robert Bordett, Linda Solomon, Zena Zumeta and Talia Katz for their contributions.
2. See, for example, Texas Family Code Ann. §6.603, North Carolina Gen. Stat. §50-70.
3. See, for example, Alberta Family Law Act 5(1)(b) (informs parties of collaborative processes, mediation facilities and family justice services known to the lawyer that might assist the parties in resolving those matters).
4. The membership of the IACP tripled in three years, increasing from 1,000 in 2004 to over 3,000 in 2008. The number of trained collaborative professionals continues to grow rapidly and is estimated at over 20,000.
5. See, for example, Principles and Guidelines, Appendix A.
6. See, for example, Collaborative Stipulation and Order, Appendix B.
7. In Wisconsin, an estimated 70% of all family law cases involve *pro se* parties. An informal survey indicates that most other states have similar statistics.
8. See www.collaborativepractice.com for IACP Ethics and Standards.
9. See, for example, Collaborative Family Law Council of Wisconsin Training Manual.

10. See John Winslade & Gerald Monk, *Narrative Mediation* (2000).
11. See, for example, Domestic Violence Screening Tool, Appendix C.
12. See, for example, www.collaborativepractice.com, www.collabdivorce.com, www.collab-familylaw.org.uk.
13. See Collaborative Representation Agreement, Appendix D.
14. See sample Coach Retainer Agreement, Appendix E.
15. See Financial Specialist Retainer Agreement, Appendix F.
16. See, for example, Pauline H. Tesler & Peggy Thompson, *Collaborative Divorce* (2006); Stuart G. Webb & Ronald D. Ousky, *The Collaborative Way To Divorce* (2006); Nancy Cameron, *Collaborative Practice: Deepening the Dialogue* (2004); International Academy of Collaborative Professionals (IACP) Collaborative Review, available to members by mail and via the website.
17. See Sharon Ellison, *Taking the War Out of Our Words* (2002).
18. See Collaborative Meeting Minute Form, Appendix G.
19. See Peter Roussos, Anxieties' Impact on Collaboration: Maximizing Impact for Client Change, IACP COLLAB. REV. Spring 2006, at 1.
20. See Issue Resolution Sample Language, Appendix H.
21. ABA Eth. Op. 07-447 (August 9, 2007).

CHAPTER 3

COOPERATIVE NEGOTIATION AGREEMENTS: USING CONTRACTS TO MAKE A SAFE PLACE FOR A DIFFICULT CONVERSATION

By David A. Hoffman[1]

In the 1980s the world of family law in the United States, recently transformed by the advent of no-fault divorce, began another dramatic transformation. Instead of relying solely on the courts and family law attorneys to structure the terms of their divorces, divorcing couples began using mediation in greater numbers. The promise of mediation was obvious: in addition to creating a safe place for a difficult conversation, mediation fostered an interest-based, problem-solving approach to their negotiations, helped parents develop cooperative strategies for co-parenting, and gave the parties a direct role in shaping their future. It also provided parties with the help of a neutral professional who was committed to helping both parties.

Mediation did not eliminate the need for lawyers but often left them on the sidelines of these negotiations. For many divorcing couples, diminishing the role of counsel was advantageous because it reduced the risk that their lawyers would ratchet up the level of antagonism between the parties. The parties in divorce mediations were usually encouraged to get the advice of counsel before signing

their divorce agreement,[2] but the cost associated with relegating lawyers to the sidelines was substantial: the parties were deprived of real-time legal advice, which the mediators – because of their role as impartial facilitators of negotiation – were not supposed to provide even if they themselves were lawyers.

In 1989, the founder of the Collaborative Law ("CL") movement, Stuart Webb, was serving as a divorce mediator in Minneapolis and found the process unsatisfactory for many couples because he believed they needed legal advice while they were negotiating. Webb sensed that the mediation playing-field was not level for these couples (often because of differences in their sophistication about financial matters), and he felt that he was not permitted – as a mediator – to level it, even though he was also an experienced family law attorney. CL provided a solution because it brought collaboratively trained lawyers directly into the process of negotiation, thus giving the parties not only real-time legal advice but also direct involvement in the process and opportunities for face-to-face communication about difficult issues.

A. COLLABORATION WITHOUT FIRING THE LAWYER

Like mediation, CL offers parties and attorneys the opportunity to create a safe place for a difficult conversation, but at a cost. The cost is that if negotiations fail, and litigation ensues, the parties must engage new counsel – this requirement is set forth in the CL participation agreement that the parties and counsel sign at the outset of the process. However, some clients are not willing to take the risk of losing their chosen counsel, for a variety of reasons. For example, some clients have such negative feelings about the legal profession that, once they have found a lawyer they want to work with, they are reluctant to take the risk that they will have to find yet another such lawyer. For other clients, the concern is that their soon-to-be-ex-spouse will exploit or sabotage the CL process, or may simply be unable or unwilling to collaborate, and therefore both parties will be put to the expense of hiring and educating new counsel, with that cost coming out of scarce marital resources.

It is hardly surprising that many clients have posed the following question to their collaboratively trained lawyers: "Why is it that we cannot agree to collaborate without agreeing to fire our lawyers?"

For some lawyers, the answer to that question is "you can." These lawyers might suggest using an agreement that is virtually identical to a CL participation agreement, but without the provision requiring the withdrawal/disqualification of counsel.[3] An example of such an agreement can be found in the forms created by the Mid-Missouri Collaborative and Cooperative Law Association ("MMCCLA")[4] or Boston Law Collaborative, LLC.[5]

For purposes of this chapter, I have chosen the term "Cooperative Negotiation Agreement" ("CNA") to describe such agreements. Some describe the use of such agreements as the practice of "cooperative law." Not all CNAs are alike but they ordinarily have some or all of the following components:

(a) voluntary information sharing;

(b) respectful communications;

(c) the use of an interest-based, problem-solving style of negotiation;

(d) direct involvement of the clients in the negotiation, through four-way meetings or by other means;

(e) maintaining the confidentiality of the negotiation process;

(f) disincentives (not including the disqualification of counsel) to the use of litigation; and

(g) in a divorce case, a freeze of marital assets during the negotiation process and, if there are children, consideration of the children's best interest as an essential ingredient in the negotiations.[6]

The purpose of this chapter is to discuss the origins of this concept, the advantages and disadvantages of CNAs, the ethical issues associated with the use of CNAs, and cases in which CNAs have been used.

B. BACKGROUND

Several overlapping developments in the world of dispute resolution – in both family and non-family cases – have led to the use of CNAs.

First, litigation has become more costly, complex, and time-consuming, creat-

ing opportunities for a broad range of private dispute resolution methods. The leading text in this area – particularly in the area of family law – was the 1979 article "Bargaining in the Shadow of the Law: The Case of Divorce," by Robert Mnookin and Lewis Kornhauser, which appeared in the *Yale Law Journal*.[7] The article described and legitimized a system of negotiation in which courts provide an essential role, even though very few cases are resolved there, by providing guideposts and benchmarks that enable the parties to make informed choices about settlement terms. Mediation has become the most widely used form of private dispute resolution, in both family and non-family cases, in the years since "Bargaining in the Shadow of the Law" was published. However, other forms of ADR (alternative dispute resolution) – such as arbitration, case evaluation, and CL – have also greatly expanded the range of options for the private resolution of conflict. In the United States, ADR is now taught in virtually every law school, and ADR programs exist as an adjunct to virtually every state and federal court system.

Second, the practice of negotiation has been transformed in the last twenty-five years by the growing use of interest-based, rather than positional, bargaining. This approach to negotiation was described in the path-breaking book *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher, William Ury, and Bruce Patton.[8] First published in 1981, and now translated into 25 languages, *Getting to Yes* introduced the ideas of (a) separating the people from the problem, (b) using principled benchmarks for arriving at agreement on contested issues, (c) assessing each party's BATNA (best alternative to a negotiated agreement) when considering settlement options, and (d) communicating about the parties' underlying interests so that mutually advantageous exchanges can occur. Prior to the publication of *Getting to Yes*, negotiation theory and practice focused primarily on competitive techniques for gaining advantage; Fisher, Ury and Patton opened the door for a more cooperative approach.

Third, the American Bar Association's publication of the book *Unbundling Legal Services*, by Forrest Mosten, in 2000, validated a new approach to lawyering, based on the recognition that some clients might not want – or might not be able to afford – the full range of services that lawyers offer.[9] Clients who use 'unbundled' legal services may want to be actively involved in handling their case and may seek only one (or more) of the following legal services: advice, research, drafting, negotiation, review/editing of contracts or agreements, or a court appearance.

Mosten introduced the idea of unbundling in 1993, and it has been embraced in a variety of settings, including some legal services offices which, because of the lack of funding, cannot provide the full range of legal representation to all clients. Another important manifestation of unbundling has appeared in the area of family law, in which a number of lawyers have begun limiting their practices to advice and negotiation and refer their clients to other counsel if a court appearance is needed.

Finally, CL, which is a prime example of unbundling, has grown dramatically since 1990, when the movement's founder, Stuart Webb, began representing clients solely for the purpose of negotiation. (CL is described more fully in chapter 2 of this book.) During the past fifteen years, thousands of lawyers and other professionals have been trained in collaborative negotiation techniques and tens of thousands of divorces have been negotiated with the use of CL participation agreements. As noted above, in the CL process, the parties and counsel sign a participation agreement in which all agree that, if litigation is needed, (a) the lawyers will withdraw and new counsel will be hired, and (b) current counsel will be disqualified from further involvement in the case. The purpose of the withdrawal/disqualification provision is to align everyone's economic incentives toward settlement. There are other important features of the process, which are discussed in chapter 2, but it is worth mentioning at least one of those in this chapter: for proponents of CL, a major part of the value of the process comes from the greater trust that can be created in negotiations because the parties do not have to fear that they will one day face their spouse's lawyer in adversarial proceedings in court, and this trust enables the parties to achieve deeper levels of communication and resolution, which are difficult to attain in other processes.

C. COOPERATIVE ALTERNATIVES TO COLLABORATIVE LAW

CNAs were developed as a means of accomplishing the vital goals of the CL process while at the same time allowing the parties to continue with their counsel if negotiations fail. A sample CNA, included as an appendix to this chapter, is virtually identical to a CL participation agreement with two exceptions: (a) the withdrawal/disqualification provision is omitted, and (b) the agreement includes both a

60-day cooling-off period and mandatory mediation before the parties are permitted to file papers in court, unless there are exigent circumstances (such as domestic violence or a danger to the parties' children). There is no magic in these particular terms – for example, a CNA could just as easily specify a longer or shorter cooling-off period, or specify case evaluation instead of mediation, or omit such terms altogether.

The defining characteristic of a CNA is that it takes the form of a legally enforceable contract to express the parties' intentions to resolve their conflict amicably through the use of cooperative negotiation techniques. Unlike a CL participation agreement, there is no single essential ingredient – no *sine qua non*, such as the withdrawal/disqualification provision, other than the commitment to cooperate in trying to achieve a negotiated resolution of the matter.

One of the characteristics that CNAs share with CL participation agreements, and for that matter with mediation agreements, is the parties' willingness to establish explicit protocols for negotiation. In other words, CNAs, CL, and mediation are all examples of a larger ADR phenomenon, in which the parties negotiate about how the negotiation process will be conducted. This is not an entirely new phenomenon – for example, in the world of business, companies often negotiate for bargaining rights and negotiate the terms on which those bargaining rights can be used.

Some family law attorneys have developed a set of negotiating principles that are merely precatory – i.e., non-binding – but are intended to promote principled, cooperative bargaining. An example of such principles can be found in the materials published by the Divorce Cooperation Institute ("DCI") in Milwaukee.[10] (A copy of DCI's principles can be found in the online appendix to this chapter.) However, for purposes of this chapter, the focus will be on cooperative principles that are embodied in enforceable agreements.

One might question whether, and to what extent, even written and signed commitments to cooperate – e.g., to share information, communicate respectfully, and engage in interest-based negotiation – are legally enforceable. In order to succeed in court, a legal claim for breach of contract must establish one of two things – that the non-breaching party either (a) has suffered compensable, monetizable damages that were caused by the breaching party, or (b) is entitled to injunctive relief (such as an order to go to mediation) because of the likelihood of harm that cannot be remedied by an award of money damages. In the case of a failed

divorce negotiation, if one party went immediately to court without adhering to the terms of a CNA, the non-breaching party could make the argument in the divorce action that s/he is entitled to payment of the money that s/he spent needlessly on a cooperative negotiation process, the terms of which were violated by the other party. There are also cases in which courts have awarded injunctive relief and ordered the parties to participate in mediation or other forms of alternative dispute resolution.[11] Moreover, wholly apart from the ability to obtain an injunction or recover monetary damages in court, there are advantages to embodying the commitments contained in a CNA in a signed document that transcend legal enforcement, such as (a) achieving a higher level of clarity about how the parties will conduct their negotiations, and (b) causing the parties to take those commitments more seriously because they have affixed their signatures to them.

D. ADVANTAGES AND DISADVANTAGES OF CNAS

In divorce cases, as in many other cases, when attorneys first meet their clients, they engage in an initial triage process in which the lawyers, with the help of the clients, try to assess which process will best suit the clients' needs and interests. For those cases in which some form of cooperative negotiation is the preferred option, the two primary choices have been mediation or CL, and now CNAs provide a third option. In assessing the advantages and disadvantages of each process, it is crucially important that clients are able to make well-informed choices. It is hardly surprising that each of the options available to clients has its proponents and detractors. The role of professionals, however, is to give their clients unbiased advice that is independent of their own views about promoting the greater use of one type of process or another.[12]

In considering the options available to divorcing couples, professionals must bear in mind that cooperative solutions are not suitable for everyone. The full range of options extends from, at one end of the spectrum, those requiring minimal third-party involvement (such as the "kitchen-table negotiation" in which the parties work out the essential terms of their divorce on their own and ask a lawyer to incorporate them into a divorce agreement) to more adversarial methods, such as neutral case evaluation, arbitration or even trial, with a wide variety of cooperative, collaborative, or mediative processes occupying the middle zones of the spec-

trum. Even in those cases where adversarial representation is needed, however, there are opportunities to mitigate the cost and delay associated with the process by entering into agreements to cooperate in information sharing and affording each party a fair opportunity to present the merits of the case for decision.[13]

Negotiation	Cooperative Process Agreements	Collaborative Law	Mediation	Arbitration	Litigation

A Spectrum of Dispute Resolution Options

Among the advantages of CNAs are the following: (a) clients are not required to "reinvent the wheel" by hiring new counsel if negotiations fail, and (b) if the agreement calls for a cooling-off period and mandatory mediation or neutral case evaluation, these provide additional incentives to resolve the case amicably. In addition, CNAs commit the parties to a set of norms and practices which foster information sharing, interest-based negotiation, respectful communication, and confidentiality – all of which give the parties a greater opportunity to resolve their dispute without destroying their relationship. Among the disadvantages is the possibility that the negotiations could be less amicable because the lawyers retain the option of going to court.

A comparison of CNAs with the advantages and disadvantages of CL is also useful.[14] Among the advantages of CL are the following (a) as noted above, both the lawyers and clients have a strong financial incentive to reach a settlement, and (b) for both the clients and counsel, knowing that the lawyers in the CL process will never appear in court may foster an atmosphere of trust. Among the disadvantages is the concern that clients might feel pressured to settle because the cost of hiring new counsel could be prohibitive.

In one organization of family law practitioners – the Mid-Missouri Collaborative and Cooperative Law Association ("MMCCLA") – clients are offered both CL and CNAs as an option.[15] The MMCCLA web site also discusses the advantages and disadvantages of the two processes.

There are a number of advantages that CNAs and CL participation agreements have in common, such as encouraging transparency about the parties' interests, reducing the transaction costs associated with divorce, and fostering direct and respectful communications between the parties. One of the biggest advantages of these two processes is the opportunity for extensive face-to-face contact in four-way meetings between each of the parties and his/her opposing counsel. These meetings create opportunities to counteract the natural tendency of the parties to assume the worst about the intentions of the attorney representing their soon-to-be-ex-spouse. Thus, four-way meetings, conducted with ground rules that the parties negotiate and agree on, can increase the feeling of safety and trust in even those negotiations where lawyers are heavily involved. In divorce mediation, counsel are often coaching from the sidelines – i.e., not present in the mediation sessions – and one of the downsides of those arrangements is that they may breed mistrust of the opposing lawyer.

There are also disadvantages that CNAs and CL participation agreements have in common in comparison with mediation. For example, the involvement of lawyers in negotiation sessions may create a more adversarial feeling than would be present in mediation, even if the lawyers are collaboratively trained and doing their best to observe the agreed-upon norms of collaborative negotiation. In addition, mediation provides an opportunity for divorcing parents to try out new modes of direct communication and to work on relationship issues, which may be easier to address in the more private setting of mediation as compared with the four-way meetings used in the CL process or with CNAs.

There is one other important comparison to keep in mind when discussing options with clients – namely, the advantages of having a CNA, or any written protocol for negotiation, in the first place, as compared with no agreement at all. It is not uncommon for clients, opposing parties, and/or opposing counsel to question the need for such a document. "Why," they might ask, "can't we just shake hands and agree to handle this negotiation in a cooperative manner?" In addition to the advantages discussed above (e.g., clarity, compliance, and enforceability), a CNA can provide specific terms – such as a "cooling off" period, or mediation as a required step before either party can go to court, and these terms might not get spelled out with clarity or even be considered in a handshake deal.[16]

Another important consideration in all of these processes in which the primary focus is a negotiated agreement is the opportunity to bring mental health profes-

sionals and financial professionals into the process as coaches and subject matter experts. This can be done with mediation, CL, or CNAs. The use of a team of professionals has been pioneered by the Collaborative Divorce movement,[17] but these techniques are sometimes used in mediation or cases involving CNAs.

The bottom line in comparing the advantages and disadvantages of the parties' various options is that there is no substitute for independent, unbiased professional advice in making the choice. There are so many variables in each case that it is virtually impossible to prescribe a set of factors that would work as a matrix for the successful triage of all cases. And even with the best professional advice, there is an irreducible element of uncertainty in predicting how the mix of skill, experience, objectives, and interpersonal chemistry between and among the lawyers and clients will affect the process of negotiation, and therefore professionals will often be surprised to find that cases that seem like excellent candidates for cooperative or collaborative processes become highly contentious, just as there are seemingly contentious cases that surprise professionals with amicable resolutions. With the high percentage of cases that are resolved by settlement as opposed to trial (virtually all studies and estimates place the settlement rate at 95% or more[18]), there is little likelihood that clients choosing *any* of these processes – mediation, CL, or the use of a CNA – will wind up going to trial instead of reaching a settlement. There does not appear to be enough data at this point to show whether any one of these processes – mediation, CL, or the use of a CNA – produces a lower risk of going to trial compared to one of the other processes. With an overall rate of trials of substantially less than 5%, answering that question seems less important than figuring out how to triage cases effectively and choose the best process for each case, so as to shorten and smooth the path to settlement.

E. LESSONS FROM THE PRACTICE OF COLLABORATIVE LAW

The use of CNAs builds on experience gained from mediation and CL, not only in creating a legally enforceable structure for the negotiations, but also in the practices, norms, and protocols for the successful handling of negotiations. The practices discussed in this section, which derive primarily from the customs of CL, do not exhaust the subject but instead exemplify some of the better known prac-

tices.[19] Experience has shown that, regardless of whether the parties are using a CNA, a CL participation agreement or no written protocol for their negotiations, the practices described below foster more effective negotiations.

1. Meeting of counsel

Even before the negotiations begin, the lawyers meet to discuss the case and renew, or begin, their professional relationship. Such meetings cultivate cordiality, trust, and cooperation.

2. Use of four-way meetings

The primary engine for collaborative and cooperative negotiations is the four-way meeting. Ordinarily, the parties and counsel meet at one lawyer's office and then the next time at the other lawyer's office. But if one lawyer's office is substantially less convenient than the other lawyer's office, all of the meetings might occur at the latter's office. In some highly contentious cases, the parties may find that they aggravate each other to such an extent that four-way meetings are counterproductive, and therefore some version of shuttle diplomacy may be needed. When four-way meetings are used, the participants usually agree in advance on who will provide refreshments of some kind. (Food not only keeps the participants well-fueled, but also promotes a caring and cooperative atmosphere.)

3. Review and signing of participation agreement

If the parties wish to execute a CNA (or a CL participation agreement), one of the first items on the agenda is to review carefully the provisions of the agreement that the parties are going to sign. Experience has led some practitioners to postpone the signing of a CNA or CL participation agreement until the second four-way meeting, in case it turns out that the discussions at the first meeting are so contentious as to warrant serious concern about the likelihood of success in using a CNA or a CL process.

4. Setting agendas and taking notes

Like a business meeting, a four-way meeting in a divorce case is likely to be more successful if the attendees agree in advance on an agenda and, to the extent possible, stick to it. A common practice is for counsel to exchange draft agendas prior to the meeting, and for the lawyer who is not hosting the meeting to take notes. After the meeting is over, the note-taker usually turns the notes into a memo summarizing the meeting, and distributes them to the parties and counsel for review, comments, and, if needed, editing for completeness and accuracy. The memo serves to remind the parties and counsel of tasks or action items that each has agreed to undertake in preparation for the next negotiation session.

5. Interim agreements

In order to preserve the status quo, or to deal with front-burner issues that need to be addressed immediately, the parties and counsel often negotiate and execute interim agreements. In some cases, the interim agreement states that it is "without prejudice" – i.e., it is not binding as part of the final outcome of the case. In other instances, however, the parties may wish to make the interim agreement binding – e.g., an advance distribution of marital assets that the parties can spend or invest as they see fit.

6. Use of jointly retained experts

In keeping with the *Getting to Yes* principle of using neutral and objective benchmarks for the resolution of disputed issues, lawyers in a CNA or CL process often use jointly retained experts, usually on a non-binding basis, when addressing such issues as real estate or business valuation, the best interests of a child for purposes of custody or parenting plans, or the value of a pension.

7. Division of labor

When agreement has been reached on all, or substantially all, of the disputed

issues, ordinarily one attorney does the first draft of the parties' agreement, while the other attorney takes on the job of preparing the papers necessary for a court filing to present the agreement. This has the effect of distributing the cost of legal services more evenly and avoiding the appearance that one side or the other is driving the process.

8. Follow-up meetings and discussions between counsel

Ordinarily, for lawyers, when a case is over, it's over. No more meetings, no more conference calls. It has become common – and indeed a recommended practice – for collaboratively trained lawyers to discuss and 'debrief' the case once it is concluded, in order to learn from what went well and what could have been done better in the negotiation. Usually these conversations do not include the clients but lawyers often seek feedback from the clients separately. It is also a common practice for the lawyers to check in with each other between four-way meetings, by phone or in person, while the case is still pending, in order to assess how the negotiations are proceeding and how the lawyers could enhance the negotiations.

The practices described above are not essential for cases in which a CNA is used, but they have proven to be helpful in supporting a cooperative tenor of negotiation, and therefore should be strongly considered.

F. ETHICAL ISSUES

The increasing use of CL has led to a robust ethics debate among legal scholars and the issuance of advisory ethics opinions in seven states (Colorado, Kentucky, Maryland, Minnesota, New Jersey, North Carolina, and Pennsylvania) and by the American Bar Association.[20] The general consensus that can be derived from these ethics opinions is that even though CL departs from the traditional paradigm of adversarial negotiations, there is nothing unethical about the use of CL so long as the clients are making well-informed choices about the process.[21] In addition, the Colorado opinion specifically approves of the use of Cooperative Law by lawyers as being consistent with that state's canons of ethics for lawyers. However, there are specific cautions that emerge from these opinions that deserve particular atten-

tion, in particular those that apply to the use of CNAs.

1. Who is the client?

One of the opinions (Pennsylvania) raises the question of whether the CL participation agreement creates so many duties to the family as a whole that the family becomes, in effect, the client. It is important for lawyers to recognize that their paramount duty is to the client that has retained them, and that the lawyer's concern about other family members – including the client's children and soon-to-be-ex-spouse – derive from the client's objective of achieving an amicable resolution that also serves the best interests of other family members.

2. Client confidences

Lawyers are required to maintain the confidentiality of information about their clients, but the typical CL participation agreement requires the parties to share information on any matter that is pertinent to their case, and some agreements obligate the lawyer to correct inadvertent mistakes made by the other attorney. One of the basic principles of collaboration is that transparency about the parties' interests will enable the parties to maximize their joint gains from a negotiation. Two of the opinions (North Carolina and Pennsylvania) caution that the client must be sufficiently informed to consent to such limitations on the ordinary duty to protect the client's information.

3. Forgoing the protections of court processes

The Minnesota opinion expresses concern about forgoing the protections afforded to clients by (a) formal discovery procedures and (b) motions for temporary orders that establish judicially enforceable obligations of the parties while their negotiations ensue. Accordingly, lawyers need to advise clients about what they are forgoing in that regard and should (a) consider what safeguards are needed to ensure that their clients are getting full information about the case, and (b) use interim agreements, where needed, to protect the clients' rights during the

negotiation process.

4. Partisanship and zeal

One of the opinions (Kentucky) focuses on the question of whether the canons of ethics for lawyers require unbridled partisanship by counsel and concludes that they do not. So long as the client gives informed consent to "non-adversarial representation," it is permitted, but the lawyer is still held to a duty of diligence and competence.

5. Independence

Several of the opinions (Kentucky, Maryland, New Jersey, and Pennsylvania) address the question of whether the formation of collaborative law practice groups, in which the lawyers – while retaining independent practices – refer cases to each other creates a de facto firm or otherwise create a conflict of interest for the attorneys. The bottom line with respect to these concerns is that such groups are acceptable so long as (a) they do not engage in activities that would constitute the practice of law, and (b) the lawyers do not undertake representation of clients in a case where the lawyers' close relationship would impair their ability to effectively represent the clients. This is a potentially complicated area because one of the elements of collaboration that fosters effective negotiation is that the lawyers know each other well enough that they can cooperate in a negotiation with a high degree of confidence that such cooperation will be reciprocated.[22] The essential element, from an ethical standpoint, is disclosure to the client of the relationship between the attorneys so that the client is making an informed choice of counsel.

6. Screening for appropriateness because of risk of disqualification

Several of the opinions (Kentucky, New Jersey, and Pennsylvania) remind lawyers that they must screen cases for their appropriateness for collaboration. It is not enough that the client expresses a preference for such a process – the lawyer must exercise independent judgment as to whether the use of a CL participation agree-

ment (or, by implication, a CNA) will serve the client's best interests. The Colorado opinion and some commentators have noted that the CL process has the effect of leaving the client vulnerable to having his/her lawyer fired, in effect, by the opposing party if that party decides to go to court.[23] The New Jersey opinion states that the canons of ethics do not permit a lawyer to recommend CL if there is a "significant possibility" that the CL process will not succeed. The opinion states: "given the harsh outcome on the event of such failure [i.e., disqualification], we believe that such representation and putative withdrawal is not reasonable if the lawyer, based on her knowledge and experience, and being fully informed about the existing relationship between the parties, believes there is a significant possibility that an impasse will result or the collaborative process will otherwise fail."[24] Thus it is important for lawyers to consider (a) whether a CL or CNA process will be a waste of the client's time and money, and (b) (a related question) whether entering into a CL process might create undue pressure on the client to settle because of the potentially prohibitive cost of hiring new counsel. The ABA opinion nevertheless underscores the importance of informed consent of the client.

7. Withdrawal

Three of the opinions (Kentucky, Minnesota, and Pennsylvania) caution that the client must understand, and give informed to consent to, the provisions regarding withdrawal from the case. In addition, if a lawyer does withdraw, s/he must do so in a manner that protects the client's interests (e.g., the lawyer must remain involved until a transition to new counsel can be made) and does not misrepresent the reasons for withdrawal.

All but the last two of these concerns are as much a concern when lawyers and clients are considering the use of a CNA as when they are considering the possibility of using CL.

One scholar, Prof. Christopher Fairman, has gone so far as to suggest that the practice of CL warrants the drafting of new rules of legal ethics that apply solely to that form of practice.[25] Prof. John Lande makes a convincing case that such measures are not needed,[26] and they are probably needed even less in connection with the use of CNAs. However, it is essential that lawyers who use CNAs in their

cases recognize that they have non-waivable, non-disclaimable duties created by the canons of ethics, and therefore any provision included in a CNA must be consistent with those duties.

G. CASE STUDIES

As noted above, one of the vital functions that a family law attorney performs is triage – i.e., helping clients make an initial determination of the best process for handling their cases. My experience in making these initial determinations suggests that there are basically three types of cases: (a) those that are clearly unsuitable for mediation or collaboration of any kind and need to be resolved in court (because of, for example, domestic violence, a history of hiding assets or other deception, intractable patterns of bullying by one of the spouses, or emergency financial or child-related issues that the opposing party is unwilling to negotiate); (b) those that are excellent candidates for mediation, a CNA, or CL (because, for example, the parties communicate with each other effectively, are successfully managing co-parenting or other joint decisions, and have a track record of flexibility in their negotiations with each other); and (c) those in-between cases where it is unclear whether the parties can succeed in a non-litigation process. Unfortunately, it is not always easy to tell at the outset which of these three categories is applicable to a given case and, of course, cases change over time – cooperation may vanish, for example, when an issue that the parties had never discussed before suddenly becomes a sticking point.[27] CNAs are often a useful tool for the third category of cases described above.

There are an increasing number of collaboratively trained lawyers who have decided that they will not go to court under any circumstances. For them, the use of CNAs may be less appealing. However, even if such a lawyer is not willing to go to court, and will refer his/her client to other counsel if litigation is needed, it still may be in the best interest of that lawyer's client for the parties to sign a CNA as opposed to no agreement, for reasons described above (such as the commitment to an interest-based negotiation, or the requirement of a cooling-off period). Moreover, lawyers have an ethical duty to explain to their clients all of the available options – even if one of those options would necessitate hiring other counsel – so that the client can make an informed choice about which process to use.[28]

The first of the case studies below[29] illustrates a situation where CL was used but, in retrospect, it is likely that a CNA would have been preferable. In the second case study, a CNA was used because there was a lack of consensus among the parties and counsel as to whether both parties could sustain a commitment to collaboration. In the third case study, it was clear that the parties were excellent candidates for CL, but they chose a CNA because they did not want to take the financial risk of hiring new counsel if problems developed in their negotiations.

1. Walker and Rosen

In this divorce case, the parties had been separated for several years and had two middle school children. They had a 50/50 parenting plan, with the children spending one week with their father (Walker, my client) and the next week with their mother (Rosen). The parties had read about CL and decided that is what they wanted – the idea of going to court was anathema to them, primarily for cost reasons. The parties had resolved all of the major financial issues – asset division, child support, and a waiver of alimony (the wife earned far more than the husband, and he did not want alimony). The only remaining issues – they thought – were child-related (such as children's vacations, choices regarding summer camp, and extra-curricular activities). What was not readily apparent until after the parties and counsel signed a CL agreement was that Walker and Rosen were like oil and water when it came to communicating about even the simplest of issues. An extraordinary amount of time was spent on such issues as the time of day when each of the parties could contact the children by phone at the other party's home, or how the parties would allocate time with the children on the children's birthdays. The case was eventually resolved by agreement but it took two and a half years; it would likely have taken less than a year if it had gone to court. The intensity of the antagonism between the parties throughout the CL process was so pronounced that it is difficult to say that presenting the issues for decision by a judge would have caused greater bitterness. Moreover, it is not clear that taking the case to court would have been more expensive. The primary reason, in my view, that the parties continued with the CL process is that retaining and educating new counsel (i.e., litigation counsel) would have imposed a financial hardship. Had the parties executed a CNA instead of a CL process agreement, the matter

would almost certainly have been resolved more quickly by bringing it to court, and, while the contentiousness of court might have exacerbated their conflict, it seems that the parties needed someone to play the role of "decider," since their intense antipathy made compromise of any kind anathema.

2. Brown and Morgan

In this case my client (Brown) had considerable concerns about whether her husband (Morgan) could negotiate cooperatively. But both of them were extremely phobic about the idea of going to court. The marital estate was substantial, and so they could afford to hire new counsel if they had to. However, both expressed a strong preference to have the right to continue with their initial choice of counsel. Because both parties were articulate and well educated, and had read extensively about collaborative processes, I believed that their decision to sign a CNA and proceed in that way was sound. Within six months, however, it became apparent that no agreement was in sight on the issues of alimony and child support. My proposal for case evaluation was alternately accepted and then rejected by Morgan and his counsel. Prolonged delays caused by the parties' demanding careers exacerbated the need for interim support and, when none was forthcoming from Morgan, Brown decided to hire litigation counsel and get court-ordered support. The case – one of the few CL or CNA cases that I have been involved in that did not settle – is still pending. The major lessons I learned from the experience were (a) to be more attentive to the client's insights about her spouse's style of negotiation, and (b) that, regardless of how many years of practice experience one may have, it remains very difficult to predict in advance whether a case will settle, therefore some clients will benefit from retaining access to courts without changing lawyers.

3. Smith and Jones

In this case, my client (Smith) and her husband (Jones) were divorcing after a 25-year marriage. They both wanted a collaborative process and seemed like exceptionally good candidates for one. They were involved in productive couples counseling to discuss how best to co-parent their younger child and they intended to

remain working together in a small business that they co-owned. They clearly respected each other and cared for each other a great deal, despite their decision to divorce, and they communicated effectively. They had considered carefully the advantages and disadvantages of a CL participation agreement and decided on a CNA instead. The primary reason for their decision was that their funds were limited, and they feared having to hire new counsel. They also said they were very pleased with their choice of counsel and did not want to lose the opportunity to work with us. The five four-way meetings that were held in this case were among the most productive, collaborative, and deeply meaningful sessions I have had in 23 years of work in the area of family law. There were a few challenging issues, and one *very* challenging issue regarding the primary residence of their younger child (the older was in college). But the parties had enormous respect for each other, and the principles contained in their CNA supported their good intentions. At the final four-way meeting, my client asked if someone in my office could take a picture of the four of us, because she wanted it as memento of the good feelings that the process had engendered. (I have never, in the several hundred divorce cases I have been involved in, had such a request and I found it a rewarding reminder of the potential of cooperative negotiations.)

My experience with the use of CNAs is still somewhat limited because it has been little more than four years since I began using them as one of my forms of practice. My experience in the cases described above, and many other cases (involving CNAs, CL and cases involving neither) suggests that the best predictor of a successful process – involving interest-based problem-solving, respectful communications, and collaborative negotiations – is not whether a particular form of agreement is signed but rather the chemistry, intentions, and skill of the participants. There are some lawyers with whom I seem to have almost invariably amicable and successful negotiations, and not all of them are collaboratively trained practitioners. And there are some well-trained and experienced CL practitioners with whom cases are frequently rocky. My bottom line on this issue is: find me two lawyers who are good at interest-based negotiation, collaborative communications, and have a deep commitment to resolving their cases fairly and amicably, and, if their clients are willing to follow the lead of their attorneys (or perhaps have a similarly collaborative orientation themselves), I believe that a successful negotiation – and possibly even a transformative one – will likely occur.

CONCLUSION

One of the hallmarks of the dispute resolution movement has been creativity about process issues. In other words, creative lawyers and other professionals involved in helping their clients manage or resolve conflict have applied the same think-outside-the-box approach to designing the *process* that they have brought to bear on the substantive terms of the resolution. To that end, some practitioners have developed new ground rules for cooperation, in order to address what some see as the biggest leap that clients and counsel must take when they are considering the use of CL – namely, the commitment to hire new counsel if negotiations fail. CNAs are not a panacea, but they do offer significant advantages over bargaining without any explicit protocol for the conduct of negotiations. It remains to be seen whether the use of CNAs will become a common method of dispute resolution for divorces and other family cases, as CL and mediation have clearly become, or simply (like case evaluation or arbitration) a technique that sophisticated family law attorneys consider when the major methods do not quite fit. In either event, there appears to be considerable value in adding CNAs to the toolbox that family law practitioners use to help their clients resolve conflict.

APPENDICES

To access this chapter's appendices, go to:
http://www.afccnet.org/resources/resources_professionals.asp

Appendix 1: Mid-Missouri Collaborative and Cooperative Law Association – Participation Agreement in Cooperative Law Process

Appendix 2: Boston Law Collaborative, LLC – Cooperative Negotiation Agreement

Appendix 3: Divorce Cooperation Institute – Principles of the Process

NOTES

1. I received invaluable editing and research assistance from my colleague, Nicole DiPentima, at Boston Law Collaborative, LLC, and very helpful suggestions from Israela Brill-Cass, Ken Dehn, John Lande, and Lynda Robbins. The views expressed in this chapter, however, are my own, as are any mistakes. Comments and responses are most welcome: DHoffman@BostonLawCollaborative.com.
2. See D. Hoffman & K. Tosh, "Coaching from the Sidelines: Effective Advocacy in Divorce Mediation," 17 *Mass. Family L. J.* 85 (1999).
3. It appears that the first example of an organized group of lawyers promoting cooperative law principles was the Association of Family Law Professionals in Lee County, Florida, which now has approximately 100 members and has used this model since the early 1990s. See J. Lande & G. Hermann, "Fitting the Forum to the Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases," 42 *Family Court Rev*. 280, 284 & n.32 (2004).
4. See sample agreements at http://www.mmccla.org/forms.htm.
5. See sample agreements at http://www.bostonlawcollaborative.com/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html.
6. Many of these elements are discussed as possible elements of a 'negotiation protocol' in J. Lande, "Negotiation: Evading Evasion: How Protocols Can Improve Civil Case Results," 21 *Alternatives to High Cost of Litig.* 149 (2003).
7. See R.H. Mnookin & L. Kornhauser, "Bargaining In the Shadow of the Law: The Case of Divorce," 88 *Yale L.J.* 950 (1979).
8. See R. Fisher, W. Ury & B. Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1991) (2d ed.).
9. See F. S. Mosten, *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte* (American Bar Association 2000) and Chapter 5 of this book.
10. See forms published at http://www.cooperativedivorce.org/index.cfm.
11. See, e.g., *AMF Inc. v. Brunswick Corporation*, 621 F. Supp. 456, 462 (E.D.N.Y. 1985). See also *Haertle Wolf Parker, Inc. v. Howard S. Wright Construction Co*., 1989 LEXIS 14756 (D. Or. 1989) (holding that "a contract providing for alternative dispute resolution should be enforced, and one party should not be allowed to evade the contract and resort prematurely to the courts"). But see S. Warshawsky, "Gilmer, the Contractual Exhaustion Doctrine, and Federal Statutory Employment Discrimination Claims," 19 *The Labor Lawyer* 285, 305-14 (2004) (discussing cases in which courts have failed to enforce contractual grievance procedures in the workplace prior to filing discrimination claims in court). See generally J. Coben & P. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV.

NEGOT. L. REV. 43 (2006) (surveying cases in which mediation issues were litigated).

12. In an in-depth longitudinal study of CL cases in the United States and Canada, Prof. Julie Macfarlane found that there was a tendency on the part of CL practitioners to promote the use of CL in their discussions with clients – in some cases without a full discussion with the client about the risks inherent in the process. See J. Macfarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases," published by Ministry of Justice, Canada (2005), available at http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/index.html.

13. For a proposal advocating for the use of such agreements, see M. Perlmutter, "Cooperative vs. Competitive Strategies: Rewriting the Unwritten Rules of Procedure," 2000 *Tex. B. J.* 848 (2000).

14. For an excellent comparison and discussion, see J. Lande & G. Hermann, "Fitting the Forum to the Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases," 42 *Family Court Rev*. 280 (2004); and J. Lande, "Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law" available at http://www.law.missouri.edu/lande/publications.htm#ccl.

15. The term "Cooperative Law" is used by some practitioners to describe a process in which CNAs are used. There is some possibility of confusion in using this term, inasmuch as it is also used to describe the body of substantive law concerning housing cooperatives and agricultural cooperatives.

16. For an excellent discussion of the advantages of written protocols for negotiation, see J. Lande, "Negotiation: Evading Evasion: How Protocols Can Improve Civil Case Results," 21 *Alternatives to High Cost of Litig*. 149 (2003).

17. For a description of Collaborative Divorce, see P. Tesler and P. Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues and Move on with Your Life* (2006).

18. See, e.g., M. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," 1 *J. Empirical Leg. Stud*. 459, 462-63 (2004). Although the data collection in the state courts appears to be less comprehensive than in the federal courts, anecdotal reports suggest that cases filed in state courts have similarly high settlement rates. See also P. Murray, "The Disappearing Massachusetts Civil Jury Trial," 89 *Mass. L. Rev*. 51, 54 (2004) (reporting that, in the year 2000, jury trials were conducted in only 2.65% of civil cases in Massachusetts Superior Court).

19. For a fuller discussion of this topic, see R. Ousky and S. Webb, *The Collaborative Way To Divorce: The Revolutionary Method That Results in Less Stress, Lower Costs, and Happier Kids - Without Going to Court* 106 (2006); J. Ryan, R. Shields & V. Smith, *Collaborative Family Law: Another Way to Resolve Family Disputes* 82, 87, 88 (2003); P. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* 106, 109-117 (2001); *Collaborative Law: A New*

Model for Dispute Resolution 40, 41, 43, 44, 46 (S. Gutterman, ed. 2004).

20. Copies of these ethical opinions are available at http://www.abanet.org/dch/committee.cfm?com=DR035000.
21. The Colorado ethics opinion is the only one of the seven issued to date that states that lawyers cannot ethically sign a CL participation agreement, although their clients can do so. The ABA opinion (#07-447) takes issue with the Colorado opinion and states that CL is entirely consistent with the Model Rules of Professional Conduct so long as the client gives his or her informed consent to the process.
22. See Ronald J. Gilson and Robert H. Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 *Columbia L. Rev*. 509 (1994).
23. See, e.g., J. Lande, "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering," 64 *Ohio State L. J*. 1315 (2003).
24. New Jersey Advisory Committee on Professional Ethics, Op. 699, 14 *N.J.L*. 2474 (Dec. 12, 2005).
25. See C. Fairman, "A Proposed Model Rule for Collaborative Law," 21 *Ohio State L.J*. 73 (2005).
26. See J. Lande, "Principles for Policymaking About Collaborative Law and Other ADR Processes: A Response to Professor Fairman," 22 *Ohio State L.J*. 619 (2007).
27. To give but one example, in a recent case the parties readily agreed on a broad range of parenting issues, asset division, child support, health insurance, and alimony but their negotiations ran aground on the issue of how remarriage or cohabitation of the parties should affect the support calculations.
28. See, e.g., Rule 1.4 of the Massachusetts Rules of Professional Conduct, Comment 5 ("There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation").
29. The names of the parties have been changed.

CHAPTER 4

FAMILY LAW SELF-HELP CENTERS: ACCESS ENHANCING FAIRNESS

Pamela Cardullo Ortiz, Esq.

REPRESENTATIONAL STATUS: CAUSE AND EFFECT

> *The Family Divisions endeavor to provide for each person within their jurisdiction, equal care and fair treatment without regard to representational status*. . . . Standard 3.4 – Treatment of Unrepresented Parties, Performance Standards and Measures for Maryland's Family Divisions.[1]

In Maryland, courts have come to recognize that they cannot operate an effective family justice system without responding to the needs of the large numbers of litigants proceeding without benefit of counsel. Self-represented litigants present a special challenge to courts who depend on those litigants' perceptions of fairness for the efficacy of their own pronouncements. An individual frustrated with the process is less likely to perceive the judiciary as fair, and less likely to honor the

order in which that case results. In other words, whether courts want to or not, to be effective they must address the needs of the self-represented – because access can enhance or detract from the perception of fairness. And it is the perception of fairness upon which the efficacy of the judiciary depends.

There are several types of fairness, each of which has an impact on the judicial system and its participants. *Interactional fairness*, as applied to the justice system, refers to the interaction between litigants and court personnel. *Procedural fairness* refers to the case management practices, scheduling, rules of evidence, the law and court policies that affect the experience of the self-represented litigant as they navigate the justice system. *Outcome fairness* refers to case resolution and how it relates to the litigants' perceived objectives.

Many of us working within the legal community may believe litigants are most concerned with outcome fairness. All three, however, have a critical role to play and are interrelated. Litigants who have been treated poorly or with disrespect by judges or court staff (lack of interactional fairness) or who fail to understand why a case was continued or why certain evidence cannot be considered (lack of procedural fairness) may be less happy with the outcome of the case and less happy with their experience with the justice system as a whole. Courts considering a comprehensive approach to the self-represented would do well to ensure that the resources they provide and innovations they adopt address all three types of fairness.

How Many Litigants are Self-Represented?

To effectively address the needs of the self-represented courts must begin gathering data to determine how many individuals appear before them without counsel. In civil case types this can be especially challenging. Court information systems, designed primarily for case management and not for research purposes, may not include fields that can be used to identify someone as self-represented. Simply entering a single flag field to designate someone as *pro se* may be misleading. Litigants may begin the case with counsel, but discharge them later, because they ran out of funds or disagreed with their attorney. They may remain self-represented for a period of time, and later engage another attorney. In Maryland, where the Judiciary provides a substantial body of forms online for the self-repre-

sented, litigants may begin their case on their own, but retain counsel when the case becomes contested or a trial is looming.

In Maryland we were able to collect data on self-represented litigants over the life of a family case by using information already entered about attorneys and litigants. Family cases include divorce, custody and related domestic matters filed in the Maryland Circuit Courts. Because these cases typically involved two or three parties, IT personnel designed a report which identifies the number of cases which include zero, one or "two or more" self-represented litigants at specific proceeding types. We chose to snapshot representational status at a variety of proceedings that are typically significant for family case types:

- At the time the answer is filed;
- At a scheduling conference. These are typically set early in a family case, ideally within 30 days of the filing of an answer;
- At a *pendente lite* hearing;
- At a settlement conference or pretrial;
- At an uncontested hearing;
- At a contested trial;
- At case disposition; and
- At a contempt proceeding (post-judgment).

The data has been remarkably consistent overtime, although there have been slight increases in the overall percentages of self-represented litigants. Figure 1 shows the percentage of self-represented litigants appearing in Maryland family cases during State Fiscal Year 2005, the last year for which data is available.

During State Fiscal Year 2005, 68% percent of domestic cases in Maryland included at least one self-represented litigant at the time the answer was filed. This is the population of individuals who would benefit from online forms, instructions, and packets of information on how to file a case or effect service of process. In Baltimore, Maryland's largest urban center, that figure rises to 86%. This is so even though Baltimore has the largest number of legal services providers in the state.

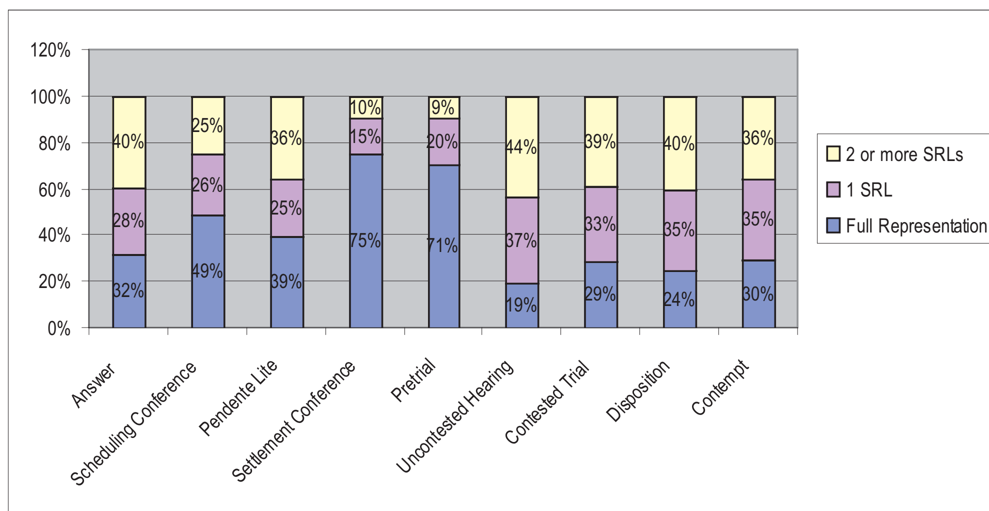


Figure 1. Appearances by Self-Represented Litigants (SRLs) in Domestic Litigation – FY05[2]

The data reveals that, as suggested above, the rate of self-representation can vary over the life of a case. While not all cases follow exactly the same order of events, the events tracked above are arranged roughly in the order in which they would happen in the life of any specific case. It appears that some individuals who begin the case on their own, elect to retain counsel prior to making their first court appearance (scheduling conference). Self-representation is predictably high in uncontested matters (81%) and is also surprisingly high (71%) at contested domestic trials. This latter group are the individuals who might benefit from programs that prepare litigants for proceeding at trial, those that educate them about the rules of evidence, or by policies to relax the rules of evidence when self-represented litigants are involved.

Reasons for Self-Representation

There are many reasons why litigants may proceed without counsel, especially in family case types. In Maryland, as in most states, individuals have a right to counsel in criminal matters but not in divorce or custody proceedings. Litigants who are not knowledgeable about the distinctions between the criminal and civil justice systems may mistakenly believe they have a right to counsel in all cases, based on

what they see on television. This disconnect between expectation and reality can further fuel the "engine of unfairness" and taint their perception of the justice system.

Other reasons abound why it is difficult to obtain representation in family matters. In Maryland, as in many states, contingency fees are not permissible or appropriate in divorce or custody matters. An individual can easily obtain an attorney if they slip and injure themselves in a grocery store, because that attorney can take the case whether or not the client has the funds immediately available to pay them. Before taking a family case, most practitioners will, perhaps wisely, demand the highest retainer they believe they can get from the client, knowing it may be the last dollar they receive for their services. This "upfront payment" model may be necessary, but it can be a barrier to representation. Family litigants also have less money at their disposal. The litigants are probably now supporting two households where once they supported one. Even where there are significant marital assets to divide in divorce, the relative deprivation of having to support two households between them may make it unpalatable to engage an attorney.

The legal services delivery system often has difficulty addressing the full range of needs for indigent clients in family law cases. *Pro bono* programs may have difficulty placing divorce or custody matters with volunteers because those volunteers know that even a case that appears uncontested may ignite in the future into a case requiring 100 or more hours. Even staff attorney programs have difficulty justifying accepting a single domestic case when, for the same amount of staff time, they can handle dozens of bankruptcy or housing cases.

Courts considering a comprehensive response to the self-represented may want to consider ways they can use the influence and/or resources of the judiciary to enhance the ability of the legal services delivery system to address the needs of these individuals.

By Providing Resources Do Courts Increase the Numbers of the Self-Represented?

American culture values self-reliance and independence. The tendency to "do-it-yourself" has increased in recent years. The phrase "disintermediation" has been used to describe this prevalence of individuals to pursue complex tasks on their

own which were formerly left to professionals.[3] Whether or not courts provide resources for those determined to be self-represented, there will continue to be a demand for them. If courts do not provide them, the marketplace will. A search for "Maryland court forms" on a reputable Internet search engine yielded 13,900,000 returns.

One example will illustrate this phenomenon. Several years ago the Maryland Judiciary elected *not* to provide forms to aid self-represented litigants in pursuing independent adoptions. The process involves several complex statutes and court rules, and imposes upon the petitioners a large number of specific evidentiary requirements. Even uncontested adoptions can be quite burdensome to pursue without counsel. For this reason, the Judiciary and its Family Law Self-Centers recommend litigants retain counsel. Despite this policy, the Administrative Office of the Courts, which maintains the forms website, receives frequent requests for adoption forms, especially for individuals seeking to pursue an uncontested step-parent adoption. Judges and clerks tell us that, despite the lack of forms, large numbers of individuals file petitions for stepparent adoptions without the benefit of counsel. For this reason, the Judiciary is revisiting whether it might be appropriate to develop a packet of forms and instructions for use by the self-represented in uncontested stepparent adoptions. If they are going to proceed anyway, it

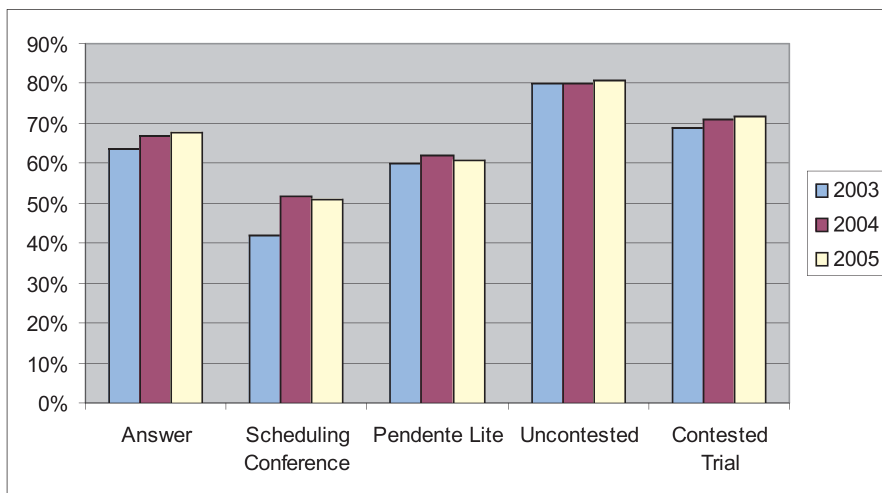


Figure 2. Percentage of Family Cases Involving at Least One SRL at Various Proceedings – SFY 2003-2005

behooves the court to aid them in doing it correctly the first time.

It is important to truly understand whether access to resources drives self-representation. Unfortunately, little research is available on this topic and more is warranted. In Maryland it is possible to examine changes in the rates of self-representation in family cases over time, as this data has been collected since State Fiscal Year 2002. Figure 2, above, shows the percentage of cases involving at least one self-represented litigant at various stages of the proceeding.

The rate of self-representation appears to have been fairly consistent over time with some very slight percentage increases. Throughout this period Maryland Circuit Courts were all operating Family Law Self-Help Centers and users had access to the same web-based materials and online family law forms. Few new services for the self-represented were added during this period. Unfortunately, Maryland does not have benchmark data available from the period before those services were added which would permit us to evaluate the impact of those programs.

Interestingly, the number of individuals making use of those programs has significantly increased over time – 41% in five years. Figure 3, below, reflects increases in the use of the Maryland Circuit Court Family Law Self-Help Centers.

Questions of program impact and efficacy are important questions for states and courts considering how best to respond, if at all, to the needs of the self-represented. This article is intended to aid courts in developing one type of response

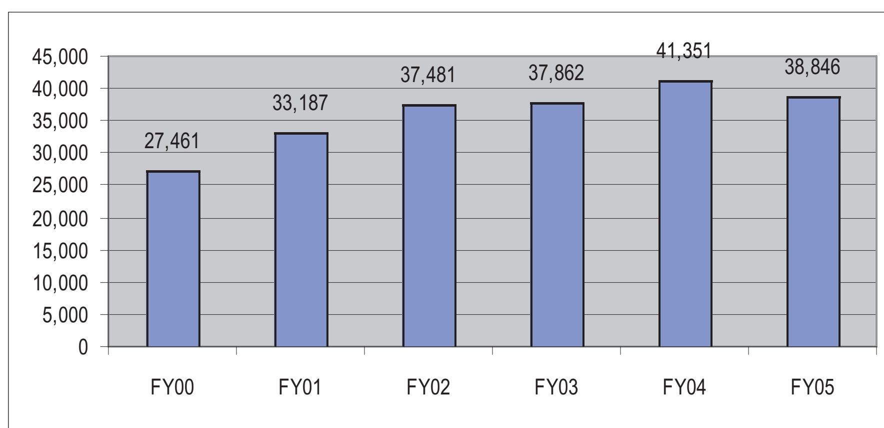


Figure 3. Individuals Assisted by Family Law Self-Help Centers – SFY 2000-2005[4]

– a court-based self-help center. Developing a consensus that the need should be met and that a new program will not have a deleterious effect on the justice system is an important first step in moving forward to develop a self-help center.

Impact of Self-Representation on Outcome

In order to know whether the justice system provides "outcome fairness" courts need to know what impact self-representation has on the outcome of a case. Courts considering establishing a self-help center or other innovation to aid the self-represented will also want to know whether those programs are efficacious. Do they increase the likelihood that self-represented litigants will achieve their objectives, when appropriate? While little research has been done on either topic, there are a few indicators.

In a study of five court jurisdictions, researchers from the National Center for State Courts, the Chicago-Kent College of Law and the Illinois Institute of Technology's Institute of Design looked at case outcome data over a range of case types to determine whether having an attorney affected case outcome. Two trends emerged from the data. The rate of dismissal was higher when neither party was represented. The presence of at least one attorney in the case, appearing on behalf of either party, increased the likelihood that the case would settle. In other words, self-representation (especially where both were self-represented) was associated with higher dismissal rates and lower settlement rates.[5]

For the last several years, researchers in Maryland have been conducting a study of custody and financial distribution in divorce. The first phase of the study examined outcomes for cases filed during State Fiscal Year 1999. In that phase of the study there was a positive correlation between representation of both parties throughout the case and whether spousal support/alimony was awarded.[6] The self-represented may waive legal rights and remedies they might otherwise be entitled to, and they may be more likely to prevail in seeking those remedies if represented. In the second phase of the study researchers will be looking more closely to evaluate the impact of self-representation on case outcomes.

Can self-help programs and other services to aid self-represented litigants reduce the negative impact on the administration of justice suggested by the National Center for State Court's study? While they track *pro se* appearances,

Maryland courts do not currently track whether self-represented litigants appearing in court took advantage of self-help resources. It is therefore not currently possible to evaluate the impact of those programs on case outcomes.

The Trial Court Research and Improvement Consortium (TCRIC) attempted to design an evaluation instrument for self-help centers to help capture some of this information.[7] The original instrument included two in-court observation tools – one to be completed by a court staff person serving as an observer, the other to be completed by the judge conducting the proceeding. This data, paired with an exit survey of the litigant, was intended to aid researchers in correlating program use with case outcome. Unfortunately, problems with the in-court observation tools have lead the evaluation designers to recommend dropping those tools from the assessment toolkit. In an evaluation of nine court self-help programs using the tool, researchers found there was an inconsistency between how judges reported case outcomes, and how the court staff observers reported the outcomes from the same proceeding. Researchers point out that even though the tool was not successful, there are lessons to be learned. "If knowledgeable court staff do not correctly perceive who prevailed and whether an order was entered, how is it possible to expect self-represented litigants to do so?"[8]

That lack of understanding can underscore for the litigant the already palpable feeling that they are outsiders operating in a system where everyone else seems to be an insider. They may even have done well in the courtroom, but may not be able to tell. In such instances a lack of procedural fairness, or inattentiveness to interactional fairness may taint perceptions of outcome fairness. Fair treatment means giving the litigant a fighting chance to succeed in meeting their legal objectives. Of course, the benefits of fair treatment are lost if not understood or appreciated.

KEY TOOLS IN THE TOOLBOX

Maryland's initial response to self-represented litigants, then called *pro se litigants*, was to create a body of forms for use by those initiating a family law case without counsel. That act was preceded by key conditions which made it possible to consider a statewide body of forms. That act also became the precondition for other key developments in the state's evolving response to self-representation.

Together these innovations highlight some of the key tools states may want to develop in forging their own response.

Tool 1. Uniform State Rules

In general, Maryland's local county courts, the Circuit Courts, are precluded from making local rules. With a few exceptions, the rules governing civil procedure in the Circuit Courts are developed by a statewide committee and are reviewed and adopted by the state's highest court, the Court of Appeals.[9] Other states considering a statewide strategy have despaired over the plethora of local forms currently in use in their state. Few Maryland attorneys would consider the state a haven of uniformity; having a common set of rules does, however permit attorneys to practice more easily across jurisdictional boundaries, and aids planners and policymakers seeking to develop resources for statewide use. Forms and resources that relate to substantive law and court rules can be easily developed in such an instance.

Tool 2. A Comprehensive Body of Forms

In the early 1990s the Maryland Judiciary established a committee charged with designing a basic set of forms and instructions for self-represented litigants. In those days, when page layout and design software was still rather rudimentary, the Judiciary was providing these simplified forms, largely pleadings, for a variety domestic case types. Litigants are often concerned about what papers to file and how to start their case. They are typically less concerned about how to proceed at trial or present evidence. The "Domestic Relations Forms" satisfied demands for access, at least at the pleadings stage. Forms were distributed in hard copy through the Office of the Clerk in each Circuit Court. Clerk's office staff were provided with a master and sent updated copies when forms were modified.

While the state maintains a uniform set of court rules, individual courts are given much more leeway in establishing case management policies and procedures. Courts are much less likely, therefore, to use standardized case management forms. The Judiciary does maintain online a body of sample and suggested case management forms. Generally, however, these are developed locally. They are

more likely to be generated by the court *sua sponte* and have less relevance for the self-represented, except that courts would do well to adopt simplified, standardized language in such orders if they want unaided litigants to understand and obey them.

Tool 3. Family Law Self-Help Centers

It did not take long for stakeholders within Maryland to realize that litigants would benefit from help with the newly developed forms. The idea and impetus for what today are called "Family Law Self-Help Centers" began with two law school clinical programs at the University of Maryland and University of Baltimore. The initial centers or "*pro se* clinics" were operated in several large Circuit Courts by law students, under the supervision their professors. Circuit court clerks and other court staff were quick to recognize the benefits of the new clinics. Prior directives from state's Office of the Attorney General had directed clerks to avoid providing legal advice to litigants. Now, clerks could satisfy their own desire to effectively serve the public, without saying "no" every time someone asked for more detailed assistance. Litigants could be sent down the hall to meet with law students who would aid them. A small initial grant was provided by the Administrative Office of the Courts to fund the newly created clinics.

Funding and Institutionalization

Within a couple of years, courts began recognizing the limitations of the clinic model. The program was most consistent during the school year, when class was in session. During semester breaks, the program was often closed or law professors substituted for their students. Because both law schools are located in Baltimore, it also became challenging to attract students willing to travel to outlying jurisdictions. By mutual consent, the law schools passed their programs onto the courts who found alternate methods of keeping the programs running. Several courts including, for example, the Circuit Court for Montgomery County, chose to replace the student-run clinics with full-time paid court staff. The program now operates with several full-time attorneys and paralegals. Other courts, for example the Circuit Court for Anne Arundel County, chose to contract with private vendors to provide the service on-site in the courthouse. Others have collab-

orated with local *pro bono* organizations, or contracted directly with local counsel to provide the service a certain number of hours per week.

These changes also dovetailed with the state's family court reform effort. With the creation, in 1998, of Family Divisions in the state's five largest jurisdictions and Family Services Programs in the remaining nineteen jurisdictions, Maryland created a mechanism for funding these programs. The reform effort culminated in a new rule which not only created Family Divisions, but it mandated that, to the extent that funding was available, the new divisions would provide "information services, including procedural assistance to *pro se* litigants."[10] With reform came funding; since 1998 the Maryland General Assembly has provided an appropriation which monies are in turn provided to each Circuit Court to fund their Family Division or Family Services Program. Those funds, provided as grants, are administered by the Administrative Office of the Courts. As a condition of accepting the grants, local jurisdictions are required to report to the Administrative Office of the Courts on the use of grant funds. Their reports include aggregated information on every person assisted through the self-help center.

More recently, the state has been successful in including the funding for the programs in its statewide cooperative reimbursement agreement for Title IV-D (child support enforcement) funds. The state is reimbursed for 66% of the costs of assisting litigants with Title IV-D matters. To capture those dollars, the state and its grantees must track and report data on the types of cases handled by the self-help programs.

Now called "Family Law Self-Help Centers," these on-site programs now operate in each of the state's 24 jurisdictions. Most operate on a walk-in basis only. Some smaller jurisdictions make appointments for the litigant. Some programs have certain hours during which they accept telephone calls. The programs tend to operate full-time or close to full-time in larger jurisdictions; they may be available only a few hours per week in the state's smaller, single-judge jurisdictions.

Tool 4. Enhanced Service Delivery Mechanisms

Once a comprehensive body of forms is available, courts can also enhance the

means through which those forms and related information are disseminated, extending the reach of these key resources. Maryland's Domestic Relations Forms, once distributed in hard copy only, are now available online in fillable-Portable Data Format (PDF). In creating fillable-PDF files, a distinct naming convention was followed for the fields so that, if e-filing were ever possible in domestic relations cases, the forms could be easily modified to be filed electronically and the data contained therein used to automatically populate the case information system.

The forms are made available through the Judiciary's website, a section of which has been especially designed for stakeholders of the family justice system: www.mdcourts.gov/family. The forms interface is a very simplistic mechanism that lists the various case types, and describes different scenarios. Users select the package of forms that is associated with the scenario that best describes their case. While this aspect of Maryland's forms delivery system is simple, it was extremely easy and inexpensive to develop. A link on all form pages permits users to email the Department of Family Administration to provide feedback on the forms and is occasionally used by those with simple questions about where to find a particular form.

A number of courts have successfully developed more sophisticated forms delivery mechanisms including document assembly systems and video-enhanced interfaces for websites and online forms. Document assembly programs, when integrated with court forms, permit users to answer a series of questions as if they were engaging in an online dialogue with an interviewer. Their responses are used to determine which forms are appropriate and to populate the fields in those forms, producing a completed document ready for filing.[11] The Interactive Community Assistance Network (I-CAN!) Project is an example of a web-based forms application enhanced with informational videos.[12]

A comprehensive body of forms can also provide a mechanism through which courts can begin to address the needs of special populations. Maryland's family law website, referenced above, and the Domestic Relations Forms have all been translated into Spanish. Plans are underway to translate these same materials into other key languages. The goal of the initial Spanish translation project was to provide to Spanish-speakers the exact same resources that were available to English-speakers. This makes it critically important that forms and textual information be updated regularly to keep pace with changes made to the English versions which

can be challenging. Forms can be translated and provided as an accompaniment to the English forms, i.e., provided in parallel, or foreign-language material can be interlineated with English. In Maryland we chose the latter solution which enables Spanish-speakers to see exactly what they are completing and permits them to file the same bilingual document with the court. Although they are bilingual, the textual information on the form must be provided in English, and a notice to that effect is at the top of every page in Spanish. To promote the use of these materials, the Administrative Office of the Courts hosted an orientation session for community-based organizations serving Latinos in our state.

Court forms can and should also be designed to address the needs of low-literacy adults and individuals who may have vision impairment. Readability guides and information on cultural competency and translation can be found at http://www.selfhelpsupport.org/library.cfm under “Culture, Language and International Issues.”

Tool 5. Complementary and Supportive Programs

Finally, no program need stand alone. Basic innovations like forms or self-help centers can be enhanced and augmented with complementary services. All services need not be provided by a single entity. In Maryland, our statewide spectrum of resources for the self-represented has been the product of a collaboration between the courts, the bar and the legal services delivery system. This collaboration benefits all stakeholder groups, and enhances the overall experience of the self-represented with the justice system.

The Maryland Judiciary provides a grant to a local legal services provider, the Women’s Law Center of Maryland, Inc., to operate the Legal Forms Helpline. This service which is operated several days per week, permits users seeking help with the forms to call a toll-free number for free assistance over the phone. When the forms were translated into Spanish, the service was expanded to include a Spanish-speaking attorney who assists litigants one half-day per week. This statewide service permits self-help centers, for example, to concentrate on providing walk-in assistance to individuals in the courthouse and obviates the need for those programs to each also provide telephone help.

A statewide legal content website, the People’s Law Library, www.peoples-

law.com, is operated by the Maryland Legal Assistance Network (MLAN). Originally a project of the state's IOLTA organization and now housed at the Legal Aid Bureau, MLAN fills an important role in the spectrum of resources for the self-represented by maintaining a comprehensive legal information website. Links between the Judiciary's family WebPages and the People's Law Library aid litigants seeking up-to-date written information about family law, as well as links for finding lawyers, low-cost legal help, or mediators.

The Circuit Court for Prince George's County several years ago began offering *pro se* orientation courses for family law litigants proceeding without benefit of counsel. The course helps advise litigants of their rights, educates them about what they will need to proceed alone, and helps them begin the process effectively.

The Administrative Office of the Courts has more to do to educate litigants to ensure they are making an informed choice when they elect to proceed *pro se*. In family matters, it is critical that litigants be knowledgeable about the remedies available to them and have, not only the forms necessary to begin, but the skills to succeed, if in fact their position has merit.

A SPECTRUM OF RESOURCES FOR THE SELF-REPRESENTED

Together these various tools constitute what can become, in any given jurisdiction or state, a spectrum of resources for the self-represented. Courts can build on their strengths and the local consensus about what is appropriate or possible, by selecting certain portions of the spectrum that are immediately feasible. Which portion of the spectrum is developed first may depend on the type or amount of funding available, the resources already available, and the consortium of available partners and their resources.

Figure 4, below, was developed by the Maryland Legal Assistance Network and the author to describe what a full spectrum of resources might look like.

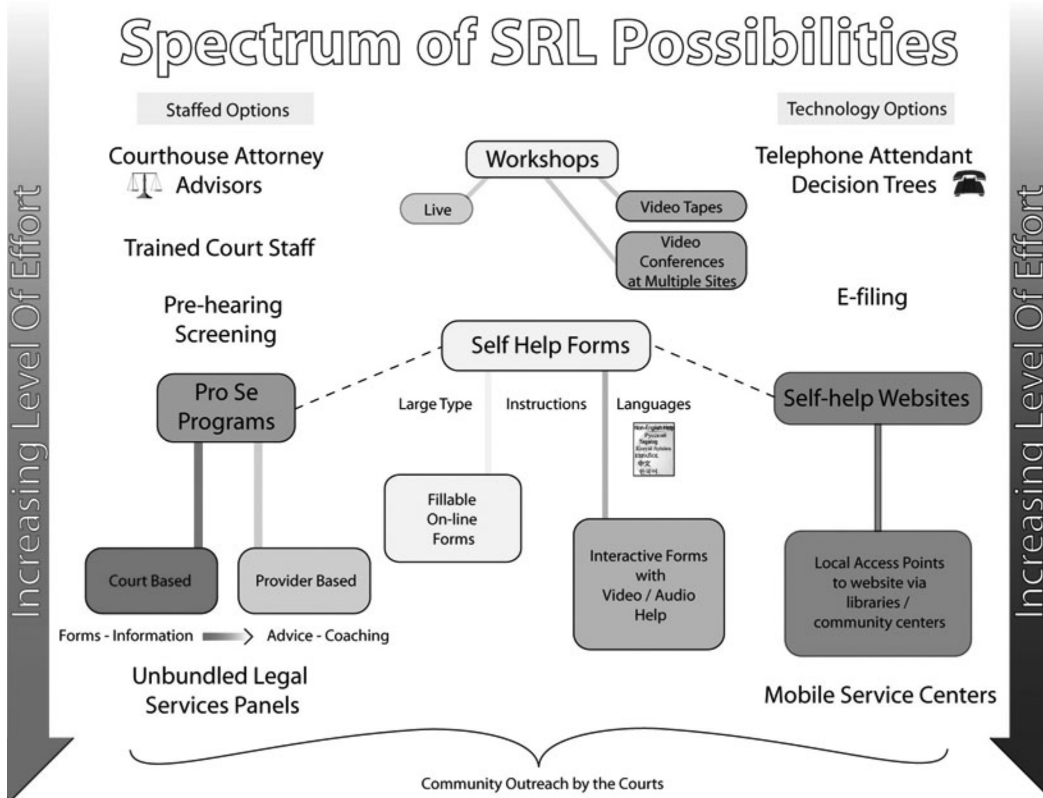


Figure 4. Spectrum of SRL Possibilities[13]

This, of course, represents only those resources specifically directed at the litigants themselves. Other responses to the phenomenon of self-representation include innovations for whom the audience is primarily court personnel, i.e, innovations focused on judges and judicial practice, and innovations focused on clerk's office personnel and non-judicial court staff. These additional innovations have included, for example, the development of guidelines or standards for judges in dealing with SRLs[14], and training for clerks on the distinction between legal advice and information and on how to effectively and ethically aid the unrepresented.[15]

MANAGING EFFECTIVE SELF-HELP PROGRAMS

While Maryland has pursued a statewide agenda in developing Family Law Self-

Help Centers, it would be an exaggeration to suggest that all 24 programs operate identically. Maryland has been called "America in Miniature" because its topography ranges from the mountains in the West, to the coastal plains of the Eastern Shore, the rich marine ecoscape of the Chesapeake Bay and the rolling hills of Central Maryland. It includes a large urban center, as well as a number of small rural jurisdictions. This varied geography is an apt metaphor for the diversity of legal practice in the state. Individual Circuit Courts, which are not unified but stand as independent county courts, are given deference in determining how to develop and manage their self-help programs and other family law services.

To aid courts in managing these programs effectively and ethically, the Judiciary has developed and adopted a set of *Best Practices for Programs to Assist Self-Represented Litigants in Family Law Matters.*[16] A copy of the document is provided as an appendix to this text. Designed to be a non-threatening guide for existing programs, the document describes what a "good program looks like." The document does not set a minimum standard for performance but is instead intended to be aspirational.

After an initial *apologia* describing the goal of access to justice and how it is exemplified in these programs, the *Best Practices* identify and attempt to tease out solutions to some of the key issues that arise for courts in managing self-help programs. Courts in other states may have policies that differ from those of the Maryland Judiciary. Regardless of the specifics of law or policy, the *Best Practices* document can guide other courts in walking through a discussion of the various critical issues that courts must consider in developing self-help centers.

Needs Assessment

Maryland's Family Law Self-Help Centers are intended, from the first, to serve a key screening function:

> There are some case types that are more appropriate than others for self-representation. There are also some individuals whose age, temperament, mental health, or cognitive ability may impede their ability to represent themselves effectively, even in simple matters. It is important that programs designed to assist the self-represented

> adopt screening mechanisms to ensure that individuals seeking the program's assistance receive service only if that is appropriate, and if not that they are referred to other organizations or services that might better address their needs.[17]

In operating such a program, courts should consider whether to perform a range of screening functions as a part of program intake:

- Income screening
- Case type appropriateness
- Personality / personal skills
- Identification of critical issues – domestic violence or substance abuse

In Maryland the Family Law Self-Help Centers are also expected to perform a role in screening divorce and custody cases for underlying domestic violence issues. Court rules permit judges and masters to order the parties to participate in child access mediation over their objection. Judiciary policy precludes the use of mediation, however, in cases involving families with a history of domestic violence. Unfortunately, the self-represented may not be knowledgeable about this policy, or may be fearful of raising the issue of domestic violence in open court. In general, they may be unwilling to counter the judge's mediation order. Self-help providers play an important in role in helping the litigants recognize and raise the issue, so that cases are not inappropriately referred for self-representation. The Judiciary has developed screening tools and protocols to aid self-help providers and others conducting the screening.[18]

Service Delivery

A number of service delivery mechanisms have been discussed above. Before launching a program, courts should carefully consider the constraints imposed by specific rules, statutes or case law in their state to determine the appropriate scope of service for the program. Programs operated by non-lawyers, for example, will be constrained from providing legal advice. The scope of service may also vary

depending upon whether the provider is a court employee or a vendor. Committees or courts designing a program should reiterate for program personnel the ethical standards to which they will be held in providing service; members of the public should also be put on notice and information should be provided at the time they utilize the program.

A program staffed by attorneys is essentially a small law firm, and in most instances will be bound by the ethical guidelines governing the practice of law. Until recently many Maryland program providers felt obliged to maintain a conflicts database to ensure they were complying with the provisions governing attorney conflicts of interest. In 2005, however, the Maryland Court of Appeals adopted Rule 6.5 of the Maryland Lawyers' Rules of Professional Conduct. Rule 6.5 is based on ABA Model Rule 6.5.19 The Maryland version provides:

> **Rule 6.5. Nonprofit and Court-Annexed Limited Legal Services Programs.**
>
> (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
>
>> (1) is subject to Rules 1.7 [Conflict of Interest] and 1.9(a) [Duties to Former Clients] only if the lawyer knows that the representation of the client involves a conflict of interest; and
>>
>> (2) is subject to Rule 1.10 [Imputation of Conflicts of Interest] only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
>
> (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Commentary to the rule refers to programs including "legal advice hotlines, advice-only clinics, *pro se* counseling programs or programs in which lawyers represent clients on a *pro bono* basis for the purposes of mediation only." In such programs there is an attorney-client relationship, but no expectation that representation will extend beyond the brief consultation.

By adopting a version of ABA Model Rule 6.5, states can aid court-based self-help centers, eliminating the need for those programs to maintain conflicts databases, and reducing the time spent in intake. This can be critical in large jurisdictions where walk-in programs are frequently in high demand. Adoption of the rule gives providers greater confidence that they can aid litigants efficiently and effectively without running afoul of ethical rules.

Judicial Neutrality

One of the biggest challenges courts face in expanding access to justice for the self-represented are the "limitations imposed by the demands of fairness and neutrality."[20] Essentially, how can courts address the needs of SRLs without creating an unfair advantage for some individuals at the expense of others? How can these resources be provided in a way that does not compromise the neutrality or independence of the judicial system? In establishing self-help centers, courts should be careful to insulate judges from playing any type of supervisory role over the program or program personnel. This is more difficult where providers are directly employed by the court; some courts, as a result, feel more comfortable contracting the service out to a local legal services provider or a bar-related organization.

Program Outreach

Once programs are created, they must be effective at informing the public about the services now available. Courts have too often been reluctant to adequately market self-help programs, often fearing that if individuals know the service is available, courts will be deluged with more SRLs. If the court has designed the program, at least in part, to ensure SRLs do not clog the dockets with incomplete or inappropriate filings, and to ensure that the self-represented will have an enhanced sense of fairness and will be more likely to succeed in their litigation

goals where those goals have merit, then it is essential that those programs be utilized. Courts may want to consider requiring that SRLs do not proceed to the next phase of litigation without working with the court-based self-help center. One of the court-based programs evaluated in the TCRIC study, the Eleventh Judicial District Court of Miami-Dade County, Florida, does mandate use of the program by SRLs.[21]

Whether or not they mandate use, courts should pay close attention to signage, written material about the program, web-based information and networking the legal services delivery system and community-based services to ensure litigants are knowledgeable about and take advantage of the program.

Access, Language and Literacy

In most states, self-help programs are designed to aid those who cannot afford counsel. Low-income litigants are more likely to have other barriers precluding them from effectively participating in the justice system. These barriers may include low-literacy, medical issues affecting their mobility, lack of transportation, or a first language other than English. Self-help programs must design materials, procedures and accommodations to address these needs.

When Maryland designed its *Best Practices* document, one of the first suggestions made was to abandon the term "*pro se.*" The programs, formerly referred to as "*pro se* assistance projects," became "family law self-help centers." A simple change, but one that can turn an impregnable sign that most members of the public will not think has any relevance for them, to simply a sign pointing them in the right direction.

Again, http://www.selfhelpsupport.org has an excellent library of materials for programs seeking to help SRLs overcome language, literacy and access barriers. Programs should also be provided in physical spaces that comply with the Americans with Disabilities Act. Program managers should develop plans to address the needs of individuals who are hearing-impaired or who will require an interpreter. Many of these issues can be addressed using resources available to the court for litigants. In general self-help centers should be able to take advantage of other resources, including interpreters, available to the court.

Staffing, Quality Assurance and Evaluation

Whether the program is operated by court personnel, a contractual vendor, or volunteer attorneys, courts should take steps to ensure that only qualified individuals are providing the service and that their work is appropriately supervised. Clear staff qualifications should be articulated before hiring and should be listed in any request for proposal. Proposals for contracts should be competitively bid and evaluation criteria established to ensure the court has a clear decision-making framework for evaluating potential providers. All non-attorney staff should be supervised by on-site attorneys and all participants, attorneys and non-attorneys alike should understand the ethical limitations of their roles. Contracts for legal services vendors should be reviewed annually and renewed only if the work has been satisfactory. Staff should be required to maintain their professional expertise and funding made available to provide for continuing education.

Written materials should be updated regularly. For courts that maintain their own forms, protocols should be in place to ensure forms are updated to reflect the most recent statutory, rule and case law changes. Specific staff should be assigned this task to ensure that it is accomplished in a timely fashion, rather than when other staff have a few free moments.

Descriptive Data

All programs should collect basic demographic information about program users. This can aid the court in understanding who the client base is and how best to address their needs. It can also help the program determine if outreach efforts have been successful. For courts that are unable to track SRL appearances or filings, it can give the court some idea of who is appearing without counsel in their courtrooms.

Randomized Controlled Trials

Ongoing research is critical to ensure that the programs are meeting the goals the court had in mind when creating the program. Evaluation means more than client satisfaction surveys. A comprehensive evaluation should be able to aid courts in answering the following questions:

1. Are potential clients knowledgeable about the program?
2. Are potential clients using the program?
3. Does use of the program increase the accuracy and appropriateness of pleadings and other filings?
4. Does use of the program increase the ability of SRLs to effectively participate in courtroom proceedings?
5. Does use of the program have any impact on the settlement rate?
6. Does use of the program have any impact on case outcome and/or whether SRLs achieve their litigation goals?
7. Do program users perceive a greater sense of fairness than SRLs who did not use the program?

These questions should be answered through evidence-based research using randomized controls.

Satisfaction Surveys

Finally, stakeholder satisfaction surveys do have a place. They are especially useful in helping courts understand whether the program is having an impact on perceptions of fairness. In particular surveys can be used to answer questions like:

8. Is the program perceived by litigants as helpful and effective?
9. What impact does the program have on attorneys' perceptions of fairness and neutrality?
10. What can self-help providers do to improve the program?
11. Do judges and clerks perceive that SRLs complete pleadings and proceed in the courtroom more effectively with the aid of the program.

Not all courts will have the resources to conduct randomized controlled trials. That being said, there are still ways to evaluate program performance to identify large problems. Evaluation protocols based strictly on satisfaction surveys will be able to answer some of these basic questions, but will be less helpful for those try-

ing to build a consensus that self-help programs are effective and will not have a deleterious effect on the justice system as a whole.

The TCRIC tools, published in *An Executive Program Assessment for State Court Projects to Assist Self-Represented Litigants – Final Report*,[22] were designed as a "quick and clean" process for courts to use in the alternative of lengthier, more expensive evaluations. As indicated in the *Final Report* submitted to the State Justice Institute, the evaluation model can provide courts with valid, useful observations on the performance of their programs and can be used to identify program enhancements or improvements. The assessment of the evaluation tools suggests, however, that the TCRIC tools are not useful as a "self-assessment" tool, but require that they be administered by a consultant or consultants. Report authors also recommend that courts evaluate not only their self-help center, but conduct an assessment of the court's overall response to the self-represented.

Additional evaluation instruments are available through http://www.selfhelp-support.org/library.cfm under "Evaluation Tools and Resources."

PROMOTING A STATEWIDE RESPONSE TO SELF-REPRESENTED LITIGANTS: MANY PATHS TO CHANGE

Each court has a unique set of existing resources, a unique legal and legal services community, and its own history of change. Courts envisioning a comprehensive response to the self-represented should not be intimidated by the extent of the problem or the seemingly broad innovations of other courts or states, but should begin to craft a network of resources by using existing programs and building on its own strengths. In Maryland, the creation of domestic relations forms and the expansion of the Judiciary's family court reform initiative provided an opportunity for the creation of self-help centers in each court. Other states have been more successful in garnering support for education of court personnel and have begun to explore standards for judges and clerks, while these remain areas for future growth in Maryland. Regardless of the climate for change, courts can begin with an aspect of self-representation where there is some consensus before moving to other innovations that may be more controversial.

Within the justice system, as in other areas, there are many paths to change. Change is the result of some type of force prompting innovation. That force may

be internal to the justice system, or external. Leadership may play a key role, or it may be largely the result of grassroot initiatives. Change may happen in one of the four following ways:

- Leadership Driven – Here the Chief Justice or another court leader launches an initiative, appoints a person or group to carry it out, and secures the necessary resources.
- Consensus Driven – When change is consensus driven, a large representative group with the justice system may appeal to judicial leadership to support a work group or commission. That entity may in turn make recommendations based on a pre-existing consensus.
- Pressure Driven – The justice system may respond to pressure applied by external stakeholders to promote change in some way.
- Practically Driven – Change may happen program by program, innovation by innovation as courts respond to locally-identified needs.

Of course, these processes may coalesce or combine to produce change. In order to get to a point where meaningful change is initiated and ultimately institutionalized, however, all the factors represented above will eventually need to be addressed. Judicial leadership will need to support the innovation; the innovation must have the general support of the majority of those who make up the justice system; it must be accepted by those outside the justice system; and it must solve real-life problems on the ground.

In Maryland we are still working on building a consensus for the innovations we have been and are developing to respond to the needs of the self-represented. Change need not wait until all the pieces are in place; but similarly it would imprudent to try to implement a full-scale reform until a general consensus has been cultivated.

Court performance standards, program goals and system-wide values can also be used to cultivate and support the court system's consensus on how it should response to SRLs. For example, shortly after Maryland launched its family court reform initiative, the Judiciary adopted a set of *Performance Standards and Measures for Maryland's Family Divisions*. Standard 3.4 states:

> The Family Divisions endeavor to provide for each person within their jurisdiction equal care and fair treatment, without regard to representational status. To this end, should a party who is not represented wish legal representation, Family Divisions refer them to potential legal representation resources.[23]

Standard 3.4 reinforces the goal of providing procedural, interactional and outcome fairness for the self-represented. It has been useful to point to Standard 3.4 as we move forward with new innovations, or when there is reluctance to address these issues adequately. Reiterating the basic underlying values for innovative court programs can help keep us focused on why those programs were created in the first place and ensure that program goals are not diverted, or that programs with multiple goals can keep those in balance. It is equally important, in evaluating programs, to return to the programs' articulated goals to measure that program's efficacy.

As discussed above, innovative programs for the self-represented should be enhanced by other complementary and supportive programs, many of which can be provided by entities other than the court itself. This means that critical to the success of any court response to the self-represented is collaboration among community and justice system partners.

Maryland has benefited from an extraordinary amalgam of dedicated and committed partners in its efforts to serve the self-represented. The state's IOLTA organization, the Maryland Legal Services Corporation (MLSC), has played a key role, as has one of its spinoff projects, the Maryland Legal Assistance Network (MLAN), now housed at the Legal Aid Bureau of Maryland. MLSC early on recognized that self-help programs were one end of the legal services delivery spectrum; they have collaborated on projects to round out the legal services delivery system in a way that complements the work courts are doing to aid SRLs. MLAN partnered with the Judiciary to develop the *Best Practices* document, maintains the legal content website, the People's Law Library, and has been involved in a broad range of projects designed to enhance the legal services delivery system and integrate the courts more effectively in its design. The Legal Aid Bureau serves as a contractual self-help provider in several jurisdictions, and its leadership played a key role in the passage of Maryland Rule 6.5, and in aiding the Judiciary in developing effective policies and procedures for self-help providers. The statewide *pro*

bono organization, the Maryland Volunteer Lawyers' Service was one of the original contractual vendors called upon by courts to aid them in setting up local self-help programs. The Women's Law Center of Maryland operates the English and Spanish-language Legal Forms Helpline and its other legal services programs, including the Family Law Hotline, have become an important part of the spectrum of resources for the self-represented.

In some jurisdictions it may be more feasible for legal services providers to take the lead in developing resources for the self-represented. In others, the courts will be the driving force, using its resources to identify and engage providers and determining which innovations to address. Regardless of the approach, whether the innovations are small or large, courts can begin to improve access for the self-represented, and through access fairness.

ONLINE RESOURCES

American Judicature Society Website. The American Judicature Society has done some research and has compiled a good compendium of materials on self-help topics, available from the "*Pro se* Forum" on their website. www.ajs.org/prose/home.asp.

Maryland Judiciary's Family Law Website. This general purpose family law website is designed for all family justice stakeholders, including litigants. Through the website litigants can access the forms and the Peole's Law Library, as well as information about other legal resources and information about self-help centers. www.mdcourts.gov/family/.

People's Law Library. Maryland's legal content website, managed by the Maryland Legal Assistance Network. www.peoples-law.com.

Selfhelpsupport.org. This award-winning website is an excellent resource for self-help providers and courts exploring innovations to aid the self-represented. Its extension library of materials is invaluable for courts looking for solutions developed by other jurisdictions on a broad range of topics. www.selfhelpsupport.org.

The **Self-Represented Litigant Network** (SRLN) is a national amalgam of major access-to-justice stakeholders, hosted by the National Center for State Courts. This new network will be, among other things, conducting research and developing an evaluation toolkit to enhance understanding of the dynamics of self-represented litigants and courtroom interactions. Information on SRLN is available on www.selfhelpsupport.org.

NOTES

1. MARYLAND JUDICIARY, PERFORMANCE STANDARDS AND MEASURES FOR MARYLAND'S FAMILY DIVISIONS (2002).
2. MARYLAND JUDICIARY, ANNUAL REPORT OF THE MARYLAND CIRCUIT COURT FAMILY DIVISIONS AND FAMILY SERVICES PROGRAMS – FISCAL YEAR 2005 (2005).
3. For an explanation of this phenomenon and the origins of the term, see Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens* Created by Self-Represented Litigants in Family Court, 33 RULJ 105 (2001) at 121.
4. MARYLAND JUDICIARY, *supra* note 2, at 9.
5. Hannaford-Agor and Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 Just. Sys. J. 163 (2003) at 171.
6. WOMEN'S LAW CENTER OF MARYLAND, INC., CUSTODY AND FINANCIAL DISTRIBUTION: AN EMPIRICAL STUDY OF CUSTODY AND DIVORCE CASES IN MARYLAND (2004) at 32.
7. TRIAL COURT RESEARCH AND IMPROVEMENT CONSORTIUM(TCRIC)/MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, AN EXECUTIVE PROGRAM ASSESSMENT FOR STATE COURT PROJECTS TO ASSIST SELF-REPRESENTED LITIGANTS. (2005).
8. *Id.*, at 55.
9. MD. RULE 1-102.
10. MD. RULE 16-204.
11. For more information on document assembly or document generation software, see Moore, Hough, Zorza, Deamer, McDermott and Amateau, HOW TO ESTABLISH A TECHNOLOGY BASED SELF REPRESENTED LITIGANT ASSISTANCE PROJECT: VOLUNTEERS, PARTNERSHIPS AND TECHNOLOGY. (2005) at 36.
12. http://secure.icandocs.org/icanweb/index1.asp.
13. Maryland Legal Assistance Network and P.Ortiz, Materials Presented at a Plenary Session Entitled "Assisting the Self-Represented: Models that Address Local Needs" at the Eastern Regional Conference on Access to Justice for the Self-Represented, White Plains, New York, May 11-12, 2006. For an example of a spectrum of SRL resources envisioned for Maryland by John Greacen, see GREACEN, REPORT ON THE PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS OF THE STATE OF MARYLAND: FINAL REPORT, (2004).
14. Albrecht, Greacen, Hough, and Zorza, JUDICIAL TECHNIQUES FOR CASES INVOLVING SELF-REPRESENTED LITIGANTS, 42 JUDGES J. NO. 1 at 16 (Winter, 2003). For links to a number of protocols designed to aid judges and clerks in working with SRLs, see http://www.ajs.org/prose/pro_resources.asp as well as

http://www.selfhelpsupport.org/library.cfm under "Judicial Resources."

15. See, for example, Greacen, *Legal Information vs. Legal Advice: Developments during the Last Five Years,* JUDICATURE 84 (2001).
16. MARYLAND JUDICIARY, BEST PRACTICES FOR PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS IN FAMILY LAW MATTERS (2005).
17. *Id.* at 8.
18. MARYLAND JUDICIARY, SCREENING CASES FOR FAMILY VIOLENCE ISSUES TO DETERMINE SUITABILITY FOR MEDIATION AND OTHER FORMS OF ADR (2005).
19. *Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct*.
20. Ortiz, *Facing the Faceless: The Pale Green Pants with Nobody Inside Them*, FAM. MATTERS, VOL. 6, NO. 1 (Summer, 2006).
21. TCRIC, *supra* note. 6.
22. *Id*. at 2.
23. MARYLAND JUDICIARY, *supra* note 1 at 36.

CHAPTER 5

UNBUNDLING LEGAL SERVICES TO HELP DIVORCING FAMILIES

By Forrest S. Mosten

OVERVIEW

This chapter is designed to give the family professional a working knowledge of the importance, concepts, and fundamental skills of recommending and providing unbundled services.[1] Unbundling is as much a mindset and approach to helping clients as it is a form of practice. Therefore, in order to put unbundling into historical and sociological context, after defining the concept and setting out its benefits to divorcing family members, the judiciary, and family professionals, section one of this chapter will describe the history and development of this approach to practice. Section two of the chapter will show how unbundling is a cutting edge and creative process that clients seek and lawyers use. It will also go through the eight key steps to delivering an unbundled legal services. Finally, section three will close the chapter with some of the initiatives that will guide unbundling through the next several decades.

SECTION ONE: UNBUNDLING MODELS AND HISTORY

Unbundling is not a new concept. Essentially, unbundling is an agreement between the client and lawyer to limit the scope of services that the lawyer renders. Unbundling the full package into discrete affordable tasks is not just a theory. It has been developed and adapted over the last eighteen years and is currently used in law offices worldwide.

Part A: Vertical and Horizontal Unbundling

There are numerous replicable models of lawyers successfully unbundling their services to increase legal access. Unbundling can be either vertical or horizontal. Vertical unbundling is breaking up the lawyer role into a number of limited services, each service or a combination available for sale. Horizontal unbundling is the limitation of lawyer involvement to a single issue (spousal support) or combination of issues (child custody and property excluding retirement rights).

Examples of vertical discrete task representation include the following:

> *Advice*: If a client wants advice only, it can be purchased at an initial consultation or throughout the case as determined by the client with input from the lawyer. The lawyer and client collaborate in helping the client decide if and when further consultations may be needed.
>
> *Research*: If a client wants legal research, a personal or telephonic unbundled service provides this legal information. Research may take as little as fifteen minutes or as much as ten hours. The client is in charge of determining the scope of the job and who will do the work: the lawyer, client, or a negotiated collaborative effort between the two.
>
> *Drafting*: Lawyers ghostwrite letters and court pleadings for the client to transmit, or just review and comment on what the client has prepared.
>
> *Negotiation*: Lawyers teach clients how to negotiate with opposing parties, court clerks, and governmental agencies.
>
> *Court Appearances*: If a client desires, an unbundled lawyer can convert to full representation for court appearances, hearings, and mediation.

Discrete tasks are agreed on between the lawyer and client.

Preventive legal wellness checkups are also a form of unbundled services. The lawyer diagnoses and counsels the client concerning a current or potential legal problem. The client determines whether to take action to prevent or cure the issue. If the client decides to pursue active treatment, a lawyer or non-legal professional (e.g., accountant, insurance broker, or therapist) may actually do the work. In short, unbundling is possible in a variety of replicable models.[2]

In horizontal unbundling, the lawyer may be engaged for only one issue. For example in a family case, the lawyer may handle the issue of spousal support only and the client will either represent himself and/or engage another representative for all other issues. In the same way, a lawyer might represent a client in a hearing on single temporary child custody hearing but the client will represent herself at subsequent hearings on child custody or at trial on all issues. Lawyer and client work together to determine the scope of representation and in unbundling-friendly jurisdictions, the court and other party is required to honor that lawyer-client decision.[3]

Limitation of legal services based on informed consent and a written agreement is permitted in every state and in many Western countries.[4] Every consultation with a lawyer, therapist or accountant that does not result in an agreement to provide future service is an unbundled service. The professional has a multitude of services to offer and either the client chooses not to pursue or cannot afford the "full service package" offered by the professional. "Second opinions" are classic unbundled services: the professional limits his/her scope to review and comment on the work of another professional but does no more. Every time a lawyer writes a single letter instead of three possible letters or making several phone calls, the services are limited and unbundled.

Even where it hasn't been labeled as such, unbundling and limitation of scope exist because very few clients want or can afford unlimited legal service. What makes modern unbundling so unique is that clients either expect or are proactively informed and educated about the option of unbundling. Similarly, the professional proactively offers a single client or a client population an explicit choice to utilize limited services. Lawyers now have many institutional and ethical protections that allow them to offer these services without being unreasonably sued or disciplined.

Rich individuals and companies use legal unbundling every day. If a doctor has

an employment issue with a nurse, the doctor probably has a relationship with a lawyer whom she can call for advice, to review or write a letter, or to look up the law before the doctor sits down with the nurse to try and sort out the problem. Most poor spouses, working persons, and middle income individuals do not have regular relationships with family lawyers, do not believe they can afford to pay them if they did, and often are not given the resources or help to know how to handle a limited relationship with their attorney. The lawyer may also not be trained and or willing to offer limited services to new clients. Unbundling offers assistance to lawyers and clients, both of whom will benefit from its use.

Part B: History and Origins of Unbundled Legal Services

In 1978, one of the national investigations of the department of Consumer Protection for the Federal Trade Commission at its Regional Office in Los Angeles concerned unfair trade practices in the real estate industry. Specifically, innovative "maverick" real estate brokers were "unbundling" their services by discounting their prices to sellers who wanted to do most of the work themselves. These sellers would show and negotiate sales themselves and the brokers would offer kits (flags, signs, forms for agreement) and arrange for these do-it-yourselfers to advertise their homes on the local Multiple Listing Services (MLS). These discount brokers were being harassed and denied access to the MLS by their broker competitors. The investigation had some positive impact on the real estate industry as the National Association of Realtors and many state regulators affirmed the consumers' right to negotiate terms and price of services. Home sellers no longer felt it was their legal duty to agree to pay the standard 6% commission; they were able to negotiate.

In 1991, the ABA Standing Committee of Legal Services was studying the effect of the *pro se* movement on consumers, the courts, and lawyers. It became apparent to the committee reviewing the Sales5 study of *pro se* innovations led by Judge Rebecca Albrecht[6] in Maricopa County, Arizona, that the downsides of self-help in divorce (poor results in child support and child custody issues, no tax advice, no mediation or counseling referrals, living without orders or not modifying outdated orders, etc.)[7] could be ameliorated if self-help litigants could have some legal help, short of the expensive and often disempowering full service pack-

age.

Due to my experience as Assistant Director of the Consumer Protection Unit and my membership on the ABA Standing Committee, I was able to bring my experience of unbundling in the real estate industry and explain how these concepts could be applied in legal services to my colleagues on the committee[8] and unbundling was born.

Growth of Legal Clinics

On September 14, 1972, Leonard Jacoby, Stephen Meyers, and I opened the world's first private legal clinic on Van Nuys Blvd in the San Fernando Valley in Southern California. Jacoby and Meyers and thousands of clinics that followed changed the legal landscape in many ways. One of the clinic's major contributions was a harbinger of unbundling: the set fee consultation.

Jacoby and Meyers offered a consultation to the public for a set price–it started at $15 and then later was raised to $25 and beyond. The importance of offering this service cannot be overstated. By paying in full, the client was entitled to the lawyer's undivided attention and paid for loyalty to give legal information, realistic options, and guidance–without any further obligation.

This is pure unbundling: the lawyer provided a discrete service–the consultation–and it was up to the client to decide if further services were needed, and whether Jacoby and Meyers would be the service provider. This bifurcation of roles between legal diagnostician and provider is the essence of unbundling.

Based on these origins, the concept and movement of unbundling have evolved and grown. The following abridged history gives a brief highlight of unbundling's development to date:

- 1992: Australia: Unbundling Keynote. Due to the pioneering efforts of Professor John Wade and many others, Australia has created a highly receptive environment for mediation and the Australian family law community was open to exploring the concept of unbundling. The key interest for Australians was to find a way to promote mediation within the law office and unbundling seems to attract mediation-friendly lawyers.
- 1993: First Journal Article on Unbundling. Professor Linda Elrod of Washburn University was the Editor of the ABA Family Law Quarterly

and had the courage to publish my first article on the subject that has led to a growing literature in this area of legal access.[9]

- 1992: ABA Needs Study and 1994 Recommendations for Legal Access. The largest legal needs study in history revealed the critical state of unmet legal needs for middle income individuals. The 1996 white paper based on the 1994 study contained recommendations for action by government, the organized bar, and by the private sector. Unbundling was hailed as one of the most important legal access initiatives for the 21st century.[10]
- 1994: England National Conference on Legal Access. Lord Justice Harry Woolf played a large role in Britain in his address to over 400 lawyers in London during this conference. In addition to my keynote on unbundling, Carrie Menkel Meadow and other thinkers on legal access met for a seminar and contributed articles compiled in Shaping the Future: New Directions in Legal Services (London Legal Action Group, 1995) that led to the Woolf Report. The report has served as a blueprint to encourage unbundling and other access reforms in Britain.
- 1996: Professor Michael Milleman's Field Study. Seeing law students as the future of the mediation and unbundling reforms, Professor Michael Milleman of the University of Maryland School of Law unleashed law students on the courts of Baltimore to help unrepresented litigants. The study documents the satisfaction and importance that law students derived from helping people help themselves by offering unbundled coaching rather than full service representation.[11]
- 1996: ABA Louis M. Brown Legal Access Award. The ABA Standing Committee established this award to recognize innovations in legal access. Nearly all of the nominations and winners of this award reflect permutations of the unbundling concept to maximize scarce resources to offer limited help to the underserved in a variety of fields.[12]
- 1997: Wisconsin and Oregon Unbundling Statewide Conferences. As the legal landscape differs from state to state, it has been crucial for leaders in state bar associations to sponsor conferences that lead to an understanding and acceptance of unbundling as competent and protected practice of law. These early states have spawned friendly environments where unbundling

innovation has been permitted to flourish.

- 1999: Colorado Rules on Unbundling. Building on a statewide conference held in Denver in September 1997, the Colorado State Bar issued the most comprehensive state rules legitimizing unbundling as an accepted practice of law and giving protection to lawyers who ghostwrite court pleadings.[13]
- 2000: First National Conference on Unbundling: Baltimore. In addition to the keynote by the ABA President, Robert E. Hirshon, legal services innovator Richard Zorza, and this author, the conference resulted in the publication of 26 recommendations that remain the unfulfilled blueprint for unbundling today.[14]
- 2002: Florida Rules on Unbundling. Florida is a leader in quality certification and continuing education for mediators; therefore it is little wonder that the Florida Supreme Court approved rules that expanded on the Colorado model. Key improvements include a process for limited scope court appearances and protection and permission for lawyers to treat unbundled clients as *pro se*. This allows lawyers representing the other spouse not to fear discipline nor civil liability for communicating with a represented client even though such clients may have unbundled representation.
- 2003: California Rules and Judicial Council Forms. In its Rules of Court in effect July 1, 2003, the California Judicial Council promulgated standards that differ from Colorado and Florida in two major respects. First, lawyers making limited court appearance with proper notice can withdraw without leave of court if the proper Judicial Council issued forms are filed and served.[15] Second, ghostwriting lawyers are not required to disclose their involvement in the preparation of court documents.
- 2003: Lerner v Laufer. The most important American case on unbundling is Lerner v Laufer (819 A2d,484, New Jersey, 2003) in which the court absolved from malpractice a family lawyer who had reviewed a mediated settlement and had limited his scope to the review of the agreement, specifically excluding any investigation or discovery. When the client (the wife) discovered later that the husband's company was more valuable than she thought, she successfully vacated the decree and negotiated a better

deal. The client then sued the lawyer for $10,000,000 contending that the stock had been more valuable at the time of the original agreement. The court held that the client's expectations were for limited representation, she received limited representation, and the lawyer had no duty to perform outside the limited scope of representation.

- 2004: ABA Section of Litigation: Modest Means Report. With its report, the ABA Section of Litigation provided unbundling with the imprimatur of mainstream trial lawyers and litigators. This professional support will pave the way for increased use and acceptance of unbundling.
- 2007: Growth and Acceptance of Collaborative Law. In addition to the formation of an international professional association, the essence of this rapidly growing method of practice is its limited scope and the limitation of service disqualifying collaborative lawyers from representing their clients in court if the matter is not settled.[16]

SECTION TWO: THE POTENTIAL AND THE STRUCTURE OF UNBUNDLED LEGAL SERVICES

Part A: The Potential, or How Unbundling Helps Lawyers and Clients

Unbundling meets the needs of many lawyers who went to law school to offer clients personal help through difficult situations. To quote Avenue Q,[17] unbundling often gives lawyers a "sense of purpose" in their work that provides professional satisfaction. An unbundled practice also gives lawyers a sense of control over their lives free from deadlines imposed by courts and opposing counsel.

Unbundling also arose from a need for family lawyers to reduce the possibility of a malpractice claim. Family lawyers are often the targets of unhappy divorcing spouses who want someone to blame for a failed marriage and the financial and emotional trauma that often goes with it. When lawyers sue clients for past due fees, clients who are going through this tough time may start to find fault with the services rendered and file a malpractice action. High fees resulting from the need to practice defensively as a full service attorney may be beyond the ability of clients to pay. All of these issues help create the circular pattern of high insurance costs, high fees, high receivables, negative attorney-client relationships, high client

dissatisfaction and resulting malpractice claims. Since unbundled clients often pay as they go, lawyers who practice in this model often are paid in full and on time–reducing receivables and giving a sense of financial satisfaction.

In addition to being viewed as overpriced, lawyers are often victims of the perception that lawyers are somehow evil parasites feeding off of family trouble and the idea that lawyers stoke conflict for personal gain. In their 1994 ABA Study, Sales and Beck[18] found that over 50% of people who self-represented could afford a lawyer but didn't want one for two main reasons. First, lawyers were seen as disempowering their clients by superimposing lawyer value and approaches rather than customizing a solution for the family. The second reason is that lawyers were seen as deal wreckers rather than problem solvers–bring in a lawyer and a bad situation would get worse.

Clients today, more than ever, are consumers. They want information, control, and options, and this is evident in how they shop for professional services. As with other professional services, clients today often comparison shop and "kick the tires" in various law offices before plunking down a retainer. They also shop around on the Internet for legal information, templates, checklists and problem-solving systems.

Clients want "client friendly" office space. They want easy to read glossy brochures describing the background of the service providers and the range of services offered by the law office. They want clear explanations about fees and available financing terms. Consumer savvy clients want to know about lawyer availability for office visits and telephone contact when it is convenient for the client, not just the lawyer. Many clients want to know how staff members are going to be involved, substituted, or delegated. Clients are seeking options for reducing their legal costs and retaining control. Many clients want to have financing options provided by the law firm, such as credit cards or lines of credit with streamlined procedures.

Lawyers compete in a marketplace with each other and with burgeoning number of non-lawyer providers. Consumers have learned (and are continuing to learn) purchasing techniques and how to improve their leverage in the lawyer-client relationship. Even more, clients expect lawyers to understand this trend and to react positively.

Litigants are also demonstrating their consumer preference for less than full service lawyering by using paralegal document services at a fraction of the cost that

an attorney would charge, or self-representing with the assistance of commercial self-help books and materials. The rate of *pro se* representation (litigants without lawyers) is at least fifty percent of all litigants in many jurisdictions. More and more litigants are choosing self-help. In progressive jurisdictions, such as Maricopa County (Phoenix), Arizona, an ABA Report (1993) found that 88% of divorce cases are filed with only one party represented by a lawyer and 62% of the cases progress through the court system with no lawyers at all.[19]

With the loosening of restrictions on non-authorized practice of law, the proliferation of independent paralegal and document preparation services is staggering. In 1995, the American Bar Association Commission on Non-lawyer Practice recognized this consumer preference and recommended that the legal profession take an open access approach. Many states are now recognizing legal technicians and the growth of companies such as We the People[20] send a message to consumers and lawyers alike.

In the past 25 years, mediation has developed from a vague, unrecognized concept to the center of the legal landscape. Mediation's contribution to unbundling is the underscoring of client empowerment of control over "how" to resolve family conflict (the process) as well as "what" will be the ultimate terms of resolution. Family law mediation got its jump start from consumers who felt that the family lawyer's main service product (husband and wife each being represented by adversarial lawyers operating in or around the courthouse) was not sensitive to their needs and the needs of their children. Mediation was seen as better meeting family member concerns of cost, privacy, client control, speed, and client-generated creative solutions. Mediation also empowered clients to decide whether to use lawyers. If lawyers were involved, the clients were still in charge as to what role the lawyers would play in the mediation process (including the review, drafting, and approval of agreements).[21]

While mediation has been well received by judges as a means to reduce court dockets and by lawyers to incorporate skills and supplement their traditional practices, mediation's major contribution to unbundling has been:

- Self-empowerment: Rather than delegating decision-making responsibility to the lawyer, the mediation participant is in charge of determining both the process and ultimate terms of the resolution.
- Direct Communication: Instead of using a lawyer to be an advocate or

buffer from the other side, mediation has taught the public to speak directly with others. It also teaches improved communication skills for resolution.

- Negotiation Coaching: A key element of mediation is for participants to learn negotiation planning, strategy, and techniques to effectively bridge gaps and make deals. A key unbundled role for lawyers is to serve as a negotiation coach on the sidelines and for the parties to negotiate directly at Starbucks or even at the courthouse.
- Expanded Perspectives of Process: Malleable in form and structure, mediation has taught participants how to think outside the box as to "how" to resolve conflict. Participants may be exposed to one or more of the following mediation pieces: joint sessions, private sessions, bringing in experts, co-mediation and other structural permutations.
- Mediation experience is helpful preparation for an unbundling relationship.

Part B: The Unbundled Delivery System in Stages[22]

The Mosten System of Delivering Unbundled Legal Services has eight stages. It is important to examine each of them to demonstrate how they should be implemented into a practice and how the process is explained to clients. In essence, this will unbundle the unbundled delivery system.

The 8 Stages of Unbundling	
Stage 1	**Office Preparation**
Stage 2	**Clarify Your Approach**
Stage 3	**Initial Client Conference**
Stage 4	**Unbundling Assessment**
Stage 5	**Contracting for Unbundling**
Stage 6	**Follow-up and Monitoring**
Stage 7	**Conversion from Unbundled to full service representation**
Stage 8	**Evaluation of Client Satisfaction**

Stage 1: Office Preparation

If unbundling is a new and different approach for a particular law practice, the office set-up and staff training should be made unbundling-friendly before the client ever makes initial contract. The office personnel should take the Unbundling Friendly Office Quiz[23] and take steps to redesign the office, provide consumer information and resources, and train the staff so that the entire office will be equipped to provide competent limited-scope services. It is critical that the office reflect a dedication to offering a client-centered practice. Otherwise the fact that the desire exists to offer unbundling legal services may go unnoticed by potential clients.

Stage 2: Clarify Your Approach

Clients who need unbundled services will seek help in a variety of ways. When they contact an office, they may never have heard of the concept of unbundling, but the attorney may assess that they are appropriate candidates, or they may call to inquire about an unbundled arrangement. Before that first phone call, attorneys must take the time to determine how to position their practices and their roles within that practice. Does it make sense to position the practice in its current mode and respond to client inquiries for unbundling or should the office proactively market an unbundled approach? The response to the client should flow from this self-definition.[24]

A. Responding to requests from clients

Waiting for clients to initiate the possibility of an unbundled relationship, i.e., reacting to client inquiries for coaching or other discrete task services is the most common and often most comfortable approach for many lawyers.

This allows an attorney to continue his current practice with his current marketing efforts as a full service practitioner. Whether someone is a general practitioner or has a specialization, that attorney would continue to stress her substantive background and experience with the assumption (well-founded) that most clients want full service representation. Under this model, an attorney only serves in an unbundled capacity when the client requests that an attorney take on a more limited role or the attorney assesses that the client does not have the financial

resources for full representation or determines that the client is otherwise a good candidate to share the responsibility. (See Stage 4, Assessment, below.)

Once the client is in the office and a bond has been established, without being distracted by the novel and perhaps confusing choice of whether to go full service or limited scope, the client may naturally opt for full service, pay an up-front retainer, and rely on the attorney to handle the matter. This may be the most comfortable approach for both the attorney and the client. In short, the attorney is unbundling savvy and aware, but keeps limited scope options as a fall-back position.

On the other hand, if the client raises the possibility of an unbundled relationship, assuming the client is an appropriate candidate (see Stage 4), an attorney can positively and competently offer the limited scope approach. In choosing to take limited proactive steps to include materials or articles on unbundled services in client packets or in office displays, an attorney may encourage clients to raise the unbundling possibility.

Another way to use unbundling as a fall back is to bring up the limited scope option as a way of helping the client when it is apparent that the client cannot pay the full service fee or an attorney doesn't wish to take on full representation for other reasons. Rather than turning the client away, an attorney may help in a limited way by offering coaching and drafting with the client negotiating directly with the other party or other party's attorney. Using this fall back approach, an attorney can be paid on an hourly basis and can prevent the client from walking out the door. This preserves the full service option and ensures that the client gets needed help.

B. Proactively offering unbundling services

Waiting for the client to bring up unbundling is certainly not the sole option. Because unbundling is so new to consumers, marketing the availability of discrete task services and the broad range of services may be the key to attracting new clients. If attorneys pursue such a proactive approach, initial contact with the client will be far different than if unbundling is treated as a fall back strategy. In fact, the client may contact a particular office because an attorney has announced himself to be an unbundling provider and has taken the time and money to market his firm as such.

It may be that he had signed up to be on an unbundling referral list from the court, bar association, or mediation organization. It may be that he features unbundling on his website or in his telephone ad. It may be that she is getting the reputation as a lawyer who will offer limited scope services. It may be that she highlights unbundling in her client information packet or around the office.

Whatever the reason, the client comes ready to learn about how to utilize the attorney in a limited way. This means that from the first moment of entering the office, the client should be treated as a co-equal partner and given the information and empowerment to handle all the work that the attorney does not.

The initial contact should inform the client that the office supports and utilizes unbundling. Reflection and information are twin features of the unbundled approach. An attorney should recommend that the client learn about unbundling before the initial meeting. This can be done in two ways. The first is to send client information including an unbundling packet full of information and forms. A supplementary approach is for the firm website to incorporate unbundling services and recommend the client to visit the site before the packet arrives.[25]

Another way for the client to learn about legal issues and the unbundling approach is to visit the client library before the actual appointment. In addition to being a free way of learning, this preparation time both makes the initial appointment more productive and accustoms clients to taking responsibility (or choosing not to) for the information and legwork necessary to do the work themselves. A side benefit of dropping by is that the client can chat with office staff or even with other clients using the client library at the same time.

In confirming the appointment for the initial client intake conference, the attorney or staff should clarify the purpose of the conference, what the client should bring, the time parameters of the conference, and terms of payment.

C. Clarifying potential unbundling roles

One of the challenges is to define the various roles in a new unbundled relationship. One way to view this concept is a spectrum ranging on one side from the Full-Service Take-Charge attorney to the Behind-the-Scenes coach on the other side. The Limited Scope Attorney Client Agreement will help clients and attorneys define their roles.

LETTER TO CLIENT CONFIRMING INITIAL CONSULTATION

Dear Client:

This will confirm our conversation today scheduling an initial consultation for [date] from 2:00 to 3:00 p.m. Our offices are located at [address], [near the corner of ___ and __, or between _____ and ______]. Parking is available in the building ($8.00) or on the street.

Please plan to come at least 30 minutes early if you'd like to visit our Client Library and browse through our books and videotapes on various legal topics.

Please bring the following information with you:

- Documents beginning legal proceedings, if any, such as a Summons and Complaint
- A list of the names and addresses of all the people who are involved in the dispute or who have any personal knowledge about the situation that is the subject of your dispute–both those you believe would be helpful to you and those who oppose you or whom you believe might be witnesses for the other side
- Any documents or papers containing information about the problem you wish to discuss. For example: pictures, letters, police reports, medical records, appraisals, contracts, accident reports, insurance policies, wills, deeds, etc.

If you are uncertain whether a particular document or other piece of information is important, bring it. It is better to have too much information than too little when evaluating your legal position.

The fee for this session is $___ payable by cash, check, VISA or MasterCard. Payment is due 24 hours in advance in order to hold the appointment. As I explained, I do not charge a lump sum retainer. Payment for each service is due at the time it is rendered.

Enclosed please find a packet of information about self-representation and/or engaging a lawyer for discrete legal tasks and services. If you have any questions or need to reschedule your appointment, please contact me at (999) 999-9999.

I look forward to meeting with you.

With best regards,

Forrest S. Mosten

Enclosures

Unbundling Spectrum

Full Service	Preventive Legal Health Provider	Limited Representation	Manager of Dispute Resolution	Consultant in Mediation	Ghost-writing	Coaching	Lawyer On-call	Client Self-Representation

The full service attorney is in charge of the case, often not even informing the client of some of the details of the process. The unbundled attorney is more of a partner and the extent of the partnership is largely determined by the client's ability to perform and desire to share responsibility. If clients are highly motivated and have the time, background and ability, they can serve as a true partner, one who shares responsibility. This utilizes legal skills in the most efficient way. However, if the client just wants a very limited role, then the attorney is the leader and the client is a contract player. The Initial Consultation will serve to help define the roles that the lawyer and client will play.

Stage 3: Initial Client Intake Conference

Since unbundling is a client-centered process, the initial conference should focus on the client from inception to conclusion. Any information or advice should be focused around client concerns.[26] Client comfort and empowerment can be emphasized both directly and indirectly by the way the conference is structured and the client lawyer communication is facilitated. This initial interview is crucial to the success of the unbundled relationship.[27]

The following is an agenda that may be used when discussing unbundling with the client at the in-take conference:

- Discuss the Following Questions:

  A. What is Unbundling?

  B. What Unbundled Services do I offer?

  C. What are the benefits and risks of utilizing unbundled services?

  D. How will unbundled services compare with full service representation in your case?

  E. Assessment (see Stage Four following this section for more detail):

a. Are you the type of person who will be satisfied with an unbundled arrangement?

b. Is this the type of the problem that can be successfully unbundled?

c. Assuming you choose to unbundle, what tasks will you do and what tasks will I do?

- Review the Limited Task Engagement Client Lawyer Agreement and discuss its provisions with the client
- Discuss Fee Arrangements
- Conclude the In-Take Conference

Alternative 1—Conclude conference so that the client can think about the choices, read the agreement more carefully, and decide whether to unbundle, and if so, with whom (building in possibility of shopping for other lawyers).

Alternative 2—Take time to read the Limited Task agreement during the meeting, sign the agreement, pay the agreed fee, and begin limited services immediately or at a later time.

Initial Conference Topic Checklist

The following are topics that will help clients make informed decisions as to whether they wish to unbundle. As in any structure, flexibility and adaptation are required. As conversations flow between attorney and client, the attorney should be prepared to go out of order, add new topics, and address client concerns and questions as they arise.

A. What is Unbundling?

Visual aids are very helpful to explain the unbundling concept. As previously indicated, a bundle of Popsicle sticks labeled with the different lawyering tasks is a great way to illustrate the concept, especially when the client manipulates them:

"I want you to take this bundle in your hand–pretend it is the full package

> of services that I would perform for you if you paid me a retainer and I assumed full responsibility for your case.
>
> "Now take the yarn off the sticks and place each one on the table–don't let the service-sticks touch because they aren't necessarily linked. You can buy only one service, two, three, or all of them if you want to. I must say though, that if you are buying all seven, it may mean that you want or need my full involvement and you might consider converting to full service. Think of each stick as an a la carte offering on a menu–the full package is like ordering a fixed price seven-course meal. If you unbundle, you can buy only those services that you want to buy–don't worry I'll help you decide which of my services I think you could use–but you make the final choice.
>
> "Let's look at one of the services. You pick. OK, you picked up the stick that says Discovery. Let's say, you need some information from the other side…"

After this the attorney should finish the explanation of discovery and how tasks could be divided and do the same with some or all of the other sticks until it becomes clear that the client understands the interplay with the coach in performing the tasks.

B. What Unbundled Services Do I Offer?

Services include:

- All purpose counselor, coach, and advisor;
- Ghostwriter for letters, contracts, and court documents
- Negotiation Planner and Simulation Role Player
- Court Coach
- Consultant During Mediations (both on the sidelines and in mediation sessions themselves)
- Dispute Resolution Manager

- Preventive Legal Health Care Advisor

C. What Are the Benefits and Risks of Utilizing Unbundled Services?

Pros and Cons of Unbundling (adapted from Lee Borden's website at www.divorceinfo.com):

Advantages

- It costs less when you do most of the work yourself and bring in an attorney only when you need one.
- It allows you to stay in control. You decide what issues to negotiate and when to discuss them.
- You have a great deal of power in negotiating with the other party. You're free to make concessions that make sense to you, not just to someone else.

  Because unbundling almost inevitably results in more contact between you and the other party, you can often work out the issues between you without going to court.
- If you're dealing with a party who's hired a lawyer, unbundling can provide you a critical negotiating advantage. Every time there's a meeting involving the other party's lawyer, every time the other party's lawyer writes a letter, every time the other party's lawyer makes a phone call, the other party pays more money, and you don't. Because the process is costing them more money than it's costing you, they may eventually make concessions to end the fighting that they wouldn't make otherwise.

Risks

- With all the freedom of unbundling comes responsibility.
- Your coach can give you lots of background information and make suggestions, but it's your job to apply it to your case and carry through.
- It's up to you to make sure you file your pleadings on time.
- You are responsible for gathering all the information you need.

- If you end up going to court, it's especially important that you ask enough questions and understand your coach's advice. Judges tend to be impatient with litigants who are not represented if they talk about issues the judge doesn't need to know, ask questions the judge expects lawyers to know already, and make speeches about things that may seem important to them but will not actually affect the judge's decision.

D. How Will Unbundled Services Compare With Full Service Representation In Your Case?

The answer to this question builds on the previous discussion. Looking at the various tasks that need to be performed, will the cost savings (if any) be worth the burden on the client and the risks to the case? As experts of the Full Service Package, attorneys should do a comparative cost analysis of each task so the client can see the difference.

Stage 4: Unbundling Assessment

At this point the attorney and the client, or the client on their own, should assess their strengths, weaknesses and the issues to determine if unbundling is right for them. The following questions are a good starting point for a client considering some type of unbundled arrangement.

A. Are You the Type of Person Who Will be Satisfied with an Unbundled Arrangement?

I.	YES	NO
1. I can make good decisions under pressure	☐	☐
2. I keep a running balance in my check-book	☐	☐
3. I am good at handling details	☐	☐
4. I follow through on deadlines	☐	☐
5. I can easily ask for help when I am stuck	☐	☐
6. I am very patient	☐	☐
7. I can make decisions without being terrified of making the wrong decision.	☐	☐

8.	I shop at Home Depot, Costco or other Discount stores	☐	☐
9.	I wash my own car and/or fix minor repairs in my home	☐	☐
10.	I am computer literate and can compose letters on my computer	☐	☐
11.	I usually follow my doctor's instructions	☐	☐
12.	I am not afraid to learn new skills and formats	☐	☐

II.		YES	NO
1.	I am free from feelings of anger or revenge and can assume legal work in a detached way	☐	☐
2.	I can read technical documents effectively	☐	☐
3.	I can keep legal and technical documents organized	☐	☐
4.	I have time to spend representing myself	☐	☐
5.	I am not personally or legally dependent on family members or any third person to make legal decisions	☐	☐
6.	My eyesight, hearing and other physical conditions permit me to represent myself	☐	☐
7.	I have at least one year college education.	☐	☐
8.	I have some legal training	☐	☐
9.	I am comfortable in paying a professional to help me with some of the work	☐	☐
10.	I have transportation to get me to the lawyer's office, to the court and to the library to do legal research	☐	☐
11.	I like the idea of working with an attorney and sharing the responsibility	☐	☐
12.	I appreciate that my attorney is willing to work with me to help me save fees	☐	☐

("Yes" answers are indicators that unbundling is appropriate.)

B. Is this the Type of Problem that Can be Successfully Unbundled?

Even if the client has the personal characteristics and capability to use limited legal services, it may be that the case is not suitable for unbundling. The litmus test is simple–is the expertise required so overwhelming that the client will have a difficult or impossible task of achieving a satisfying result?

C. Assuming You Choose to Unbundle, what Tasks Will You do and what Tasks Will I do?

This is the beginning of the Contracting Stage. Actually there are two major goals in this part of the consultation. First, there must be a plan for what issues and tasks are going to be handled by the client and what issues and tasks are going to be handled by the attorney. The second goal is to review the Discrete Task Client Lawyer Agreement with the client and set out the parameters of the unbundled engagement.

To properly handle this aspect of the consultation, attorneys need to have their tools ready with copies for the firm and the client. The first tool is the Limited Scope Task Agreement. The second tool is the group of detailed task and issue lists that apportion what the client will do and what the attorney will do. It is possible to have the two tools integrated into the Limited Scope Agreement or the apportionment list can be attached as an exhibit. If an attorney coaches in one area of the law (i.e., family law) the issue and task lists should be integrated into the agreement.

Stage 5: Contracting for Unbundling

The key to the contracting is the Limited Scope Client-Attorney Agreement. A sample of this agreement is located in Appendix 1.

Stage 6: Monitoring Limited Services

In every unbundled relationship, it is the attorney's professional responsibility to monitor the client's ability to handle their role both on a personal as well as a legal level. Clients may start out strong, and then fade as the responsibility becomes overwhelming to them. Attorneys must build in a system to continually assess and

be prepared to amend the discrete task agreement, the task allocation check-list, or both. A useful example is to think of a family dentist. Other than when it is time for a cleaning the dentist may not hear from a client unless she chips a tooth. But clients are sure to hear from the dentist's office. That reminder card comes every three or six months. The same may be done with unbundled clients. Part of the plan should be how the attorney and the client will stay in touch. Who will initiate contact between lawyer and client? How frequent will the contact be? Will the attorney be responsible for monitoring the plan–so a contact schedule should be set up on Outlook, Palm Pilot or another tickle system? Will the client get back to the attorney to report progress–by telephone, email, or scheduled office visits? Or will the attorney and client just part company, with or without advance payment, and leave it up to the client or regular dentist-type routine contact by the office to stay in touch. Whatever the plan, it should be clear and agreed to by the attorney and the client. Louis Brown, the father of Preventive Law, had a maxim: A client should never leave the office without knowing when and how the next contact with the lawyer will occur.

Stage 7: Converting from Unbundled to Full Service Representation

Communication during the course of the unbundled relationship is essential so that there can be a mutual ongoing assessment as to whether the limited scope arrangement is working for the client–and for the attorney. If it is not working successfully, there are several options:

- The limited scope arrangement can be terminated and the client can go it alone
- The client can find another coach and continue unbundling
- The limited scope arrangement can be converted to a full service package.

Converting to full service is one of the great surprise benefits for lawyers who unbundle. Although initially smitten by the cost savings and control over their case, many unbundling clients soon tire from the emotional and time drain inherent in running a case, especially one's own. Many litigation clients started off as unbundled situations. Once clients see that an attorney treats them competently,

SAMPLE LETTER TERMINATING THE UNBUNDLING RELATIONSHIP

Dear Client:

This will confirm my withdrawal as your legal advisor in the above matter effective immediately. I will do no further legal work, so you must do it on your own.

[ALTERNATIVE SAMPLE PARAGRAPHS]

I cannot advise you effectively if you do not keep me informed of the status of your case. I have not heard from you in more than 60 days, and I have attempted without success to contact you on several occasions. Therefore, I assume that you are in agreement that my withdrawal is appropriate.

OR

As I advised you, it is my professional opinion that certain of the claims we discussed cannot be supported by a good faith legal argument. Although it is your right to proceed with them as you have chosen to do, it is unreasonably difficult, in fact unethical, for me to continue to advise you regarding the pursuit of claims that I believe are without legal merit. Therefore, it is appropriate that I withdraw as your consultant.

OR

You will recall that I advised you to take certain steps in handling your case. Those steps are outlined in my letter to you of [DATE], summarizing our meeting of that date. You have not taken those actions, and you have indicated that you do not intend to do so. I am very concerned about the possible consequences to you of your decision not to follow my advice. Consequently, I am withdrawing as your consulting lawyer in the hope that you will obtain advice from someone whose opinion you will value more highly.

I am returning all of your documents with this letter, together with a check in the amount of $150 in unused fees for your case. Please see the attached accounting.

I urge you to consult immediately with other counsel to obtain a second opinion regarding the merits of your claim and to be sure you do not allow any deadlines to pass, such as statutes of limitations or pleading deadlines, which might make it impossible for you to protect your rights.

It was a pleasure to work with you, and my entire staff and I wish you much success in this matter and in all aspects of your life.

Sincerely,

Forrest S. Mosten

accessibly, and as adults, the firm will often be the client's first choice for a full service lawyer.

This conversion discussion can be initiated either by the client or the attorney. Some of the warning signs that the case should be converted include: if the case is beginning to unravel, the client starts to complain about the load, and/or the scope of representation and involvement begin to escalate for the attorney.

The attorney and the client will need to meet and discuss the pros and cons of continuing unbundled, modifying the limited arrangement, or going full service. If the latter course is decided upon, have the client execute the standard full service retainer agreement, terminate the limited engagement agreement, and make new financial arrangements including an appropriate retainer. If an attorney is impressed with the client's payment history he or she might be willing to bend the rules and give the converted client a special break on the amount of required retainer or other terms in order to set up a full service engagement; however, attorneys should be mindful of the risks of taking on extra work without having some type of retainer in place.

Stage 8: Evaluation of Client Satisfaction

If unbundling is truly a client-centered process, unbundlers need to have a keen interest in their clients' satisfaction. When the "case" is over, most lawyers just move on to the next crisis. If a client who pays a bill never returns to the office or never gives a positive referral, an attorney won't have a clue that there is a problem.

It does not take much effort to demonstrate to clients that an attorney cares enough to ask them what they think. Start with the limited service clients. After the initial consultation, attorneys should ask clients to fill out a sample evaluation form. An attorney may also want to follow up with post case evaluation forms to see what the client thinks about the representation and the scope of service after the case is over.

SECTION 3: THE FUTURE OF UNBUNDLING

Unbundling in family law has five major and distinct constituencies:

1. Current and future traditional family lawyers seeking new methods to obtain new clients
2. Mediators and other family peacemakers who see unbundling lawyers as the key to increased use of empowering conflict resolution tools
3. Proponents of increased legal access for the underserved
4. Collaborative lawyers who depend on limited scope of non-court representation as the essence of their service
5. Judges and other policy makers who see unbundled representation as key to limiting court congestion and increasing satisfaction of families with the legal system

The scope of this chapter is too limited to explore the future of unbundling in respect to each of these constituencies. However, the following are some initiatives that may help expand unbundling in the years to come.[29]

A. Unbundling Training and Education for Lawyers and Law Students

B. Legal educators and Continuing Education Officials[30] need to identify the concepts and skills that will help prepare current and future practitioners to competently deliver unbundled services. The Family Legal Education Reform Project (FLER) has included unbundled services as a foundation of future law school curriculum.[31]

B. Training for courts including judicial officers, administrators, court clerks, and neutral family law facilitators[32]

C. Increased Consumer Awareness and Education. Public and private funding is needed to finance Public Service Announcements, Publicity, Advertising, and Mass Media coverage of unbundling success stories.[33] Incentives can be developed to encourage professionals and non-profit organizations to maintain and/or develop unbundling educational materials on site.[34] Such incentives could include discounts on CLE courses or credits for maintaining a client library, State Tax Credits, Discounts and Subsidies when purchasing books and other materials on unbundling, or discounted bar dues for lawyers who practice unbundling and/or provide unbundling educational materials.

D. Reforms in Courts to Increase Client Education on Unbundled Legal Options. In the Los Angeles Superior Court, Judge Aviva Bobb, former Presiding Judge of the Family Law Department, initiated a letter to all self-represented litigants to inform them of mediation and collaborative law.[35] Similar letters could be developed to include other lawyering developed by unbundling.

E. An Ethical Duty or Aspirational Pledge for Lawyers to Discuss Unbundling as a viable option to Full Service Representation. Similar duties have been promulgated to increase the use of mediation.[36] In my own teaching, I have found that most lawyers and law students appreciate unbundling more if they can help clients compare it to full service lawyering using the criteria of overall result, improvement of relationships, client control over their process and result, reduced cost, and speed of resolution.[37]

F. State Legislature and Bar Association Endorsement of Unbundling. As indicated earlier in this article, the California Judicial Council's endorsement and development of court forms have been instrumental in the growth and use of unbundling in that state. In 2005, the Family Law Sections of the local bar associations and courts of Santa Clara and Los Angeles formally endorsed unbundling.[38] In 2007, similar endorsements have occurred for Collaborative Law and Australia.[39] The American Bar Association Standing Committee on Delivery of Legal Services (William Hornsby, Staff Counsel) has played a similar supportive role in promoting unbundling for the past 15 years.

G. Development of a Legal Specialization in Unbundling and Middle Income Representation. Throughout the United States, legal specialization has been a vehicle to instill public confidence in lawyers' competence and increase business to those lawyers who have met the standards for specialization. Such specialization can be expanded to recognize those lawyers with the training and experience to effectively practice in this model.[40] This certification could be an incentive for many public interest and legal aid attorneys to obtain this recognition for coaching poor and middle income clients (sometimes referred to an "involuntary unbundling") that could be transferred to the private sector. Such recognition might provide increased incentive for quality lawyers to choose this important area of

legal services.[41]

H. Adoption of a Statutory Model Unbundling Client-Lawyer Contract. As has occurred in Massachusetts[42] and other states, approval of a limited scope contract can provide comfort and a safe harbor for lawyers who wish to offer unbundled legal services. By having a model contract, practitioners can have a readymade agreement available for clients. While lawyers still have liability for any professional negligence committed for issues undertaken, a model contract can begin an increased awareness that lawyers cannot and should not be held liable for acts outside the scope of representation.[43] Perhaps such a model agreement will be a baby step toward immunity for such activity that falls outside the agreed upon scope of representation (as occurs in many states in mediation).[44]

CONCLUSION

Although many developments have incurred in unbundled legal services since its inception in 1972, more research, study, and adoption/modification of workable and replicable models need to occur in future so that families can receive the benefits of unbundling in both the public and private sectors.

APPENDICES

To access this chapter's appendices, go to:
http://www.afccnet.org/resources/resources_professionals.asp

Appendix 1: Limited Scope Agreement

Appendix 2: State by State Unbundling Rules Presented by the National Center for State Courts

Appendix 3: California Unbundling Rules and Approved Court Forms for Limited Scope Representation

Appendix 4: Legal Check-up Questions

NOTES

1. Also known as limited scope representation, discrete task representation, and legal coaching. Since I started writing about the concept utilizing the term "unbundling," I'll stick with it for this chapter.

2. See the Legal Check Up Form in Appendix 4.

3. See Appendix 2 developed by the National Center for State Courts (www.ncsconline.org) describing the unbundling laws and rules state by state. See also Appendix 3, sample court forms for limited representation developed by the California Judicial Council.

4. See Model Rule of Professional Responsibility 1.2 (c): "A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

5. Bruce Sales, Connie Beck, and Richard K. Hahn, *Self Representation in Divorce Cases* (ABA Standing Committee on Legal Services, 1993).

6. One of the themes of the unbundling movement is the impact that a few courageous pioneers can make in developing replicable models on the local level. With her inspirational leadership, Judge Albrecht and Court Administrator Gordon Grillo and their staffs transformed the Maricopa Superior Court into the Mecca of the *pro se* movement where litigants were treated as valued customers and the entire fourth floor of the courthouse was remodeled into a Self-Help Center.

7. Sales Report, note 5.

8. The ABA Standing Committee on Delivery of Legal Services has been a think tank on unbundling and expansion of legal access for the past two decades. See www.abanet.org/legal services/delivery.html. Led by its Staff Counsel, William Hornsby, the committee has been a treasure trove of ideas and initiatives in this field. One of the committee's most long-lasting achievements may be the establishment and annual selection of the ABA Louis M. Brown Award for Legal Access. The winners of this prestigious award are virtually all innovators of unbundled legal services.

9. Forrest S. Mosten, Unbundling Legal Services and the Family Lawyer, *Family Law Quarterly*, Volume 28, Fall 1994.

10. American Bar Association Comprehensive Legal Needs Study (1994) and Recommendations from the ABA Comprehensive Legal Needs Study (1996). The findings and recommendations of this study have been replicated by many states and other research. See www.unbundledlaw.org developed by the State of Maryland.

11. Michael Milleman, Natalie Gilfrich, and Richard Granat: Limited Scope Representation and Access to Justice: An Experiment. *American Journal of Family Law*, Volume 11, (1997), pp1-11.

12. See www.abamet.org/legalservices/delivery/brown.html.

13. The Colorado Comment to Rule 1.2c of the its Model Rules is most instructive:

    "The scope or objectives or both, of the lawyer's representation of the client may be limited if the client consents after consultation with the lawyer.

    In litigation matters on behalf of a *pro se* party, limitation of the scope or objectives of the representation is subject to CRCP 11b, or 311(b) and CRCP 121 Section 1-1 and therefore, involves not only the client and lawyer but also the court. When a lawyer is providing limited representation to a *pro se* party as permitted by CRCP 11b or 311b, the consultation of the client shall include an explanation of the risks and benefits of such limited representation. A lawyer must provide meaningful legal advice consistent with the limited scope of the lawyer's representation, but a lawyer's advice may be based upon the *pro se* party's representation of the facts and the scope of representation agreed upon by the lawyer and the *pro se* party.

    A lawyer remains liable for the consequences of any negligent legal advice. Nothing in this rule is intended to expand or restrict in any manner, the laws governing civil liabilities of lawyers."

14. See Special Issue on Unbundling, Forrest S. Mosten, Editor. 40 *Family Court Review*, January 2002. Information can be found at www.unbundledlaw.org.

15. The mere issuance of approved (required or encouraged) court forms for unbundling makes unbundling practice safer for lawyers and appear more legitimate to clients. See sample Judicial Council Forms in Appendix 3.

16. International Association of Collaborative Professionals, www.iacp.org. See Pauline Tesler and Peggy Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move On with Your Life*, Harper-Collins (2006). But, see, David Hoffman's chapter in this book on Cooperative Negotiation Agreements, which may extend the collaborative process to the courtroom.

17. Broadway musical.

18. See *supra*, Note 5.

19. Bruce D. Sales, Connie J Beck, and Richard K. Haan, *Self-Representation in Divorce Cases* (American Bar Association Standing Committee on Delivery of Legal Services, January 1993).

20. http://www.wethepeopleusa.com.

21. See Forrest S. Mosten, Complete Guide to Mediation (ABA, 1997), Chapters 15-18, Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 Harv. Negot. L. Rev. 103 (Spring 2005); Harold Abramson, *Mining Mediation: Rules for Representation Opportunities and Obstacles*, 15 Am. Rev. Int'l Arb. (2004).

22. This section is an abridged version of Chapter 3 of my book, *Unbundling Legal Services* (ABA 2000).

23. Unbundling-friendly Office Quiz:	Yes	No
Does my waiting room have client educational materials?	____	____
Do I have a dedicated space for a client library?	____	____
Have I prepared written instructions and checklists for clients to help them?	____	____
Do my clients self-represent effectively with my help as coach?	____	____
Do I have a staff training program geared to the unbundled client?	____	____
If I were a client would I feel welcomed and made to feel that my comfort and my empowerment was the #1 priority of the law firm?	____	____
24. Unbundling Mindset Quiz:		
I want to spend more time in direct contact with clients and less time interacting with lawyers on the opposing side or the court system.	____	____
I am able to give up control of doing the legal work myself and am comfortable in helping clients who do most of the work on their own.	____	____
I am flexible with changing roles with clients and even adapting to new roles requested by the client (that do not conflict with my own professional or personal ethical boundaries).	____	____
I am willing to accept payment for current work only and begin an engagement without an advance retainer or deposit.	____	____
I like helping people make better decisions.	____	____
I like having people get help they can less "unafford."	____	____
I am able to handle watching clients take my sound advice and make poor or self-destructive decisions and am still willing to help them pick up the pieces and try to make lemonade out of lemons.	____	____
I like to teach clients skills and concepts that will make their case go better–and maybe even improve their lives.	____	____
I like to prevent problems from ever ripening into conflict.	____	____
I like to reduce my billing load and work on more of a cash and carry basis.	____	____
I like to have more control over my life by not being subject to canceling vacations or working nights and weekends.	____	____
I am willing to try new approaches that are different from the way I currently practice or even different from the way I was trained.	____	____
I like working with people who like to shop for bargains.	____	____

I am willing to work with people who may have a high mistrust or disregard for lawyers. ___ ___

I am willing to work with people who have mucked up their legal rights and/or case strategy when the best that can happen is cutting a loss rather than gaining a win. ___ ___

I want to provide clients with space in my office so they can do their own background reading, watch helpful videos, do their own legal research, prepare their own work, or just relax and calm down. ___ ___

I want to help people maximize their lives and reduce their legal risks in areas far removed from the presenting problem that brought them into the office. ___ ___

I want to meet and learn from other innovative and caring lawyers who share a common set of goals and professional commitments that I do. ___ ___

25. See www.divorceinfo.com (Lee Borden, Birmingham, Alabama) and www.divorcelawinfo.com (Richard Granat, Baltimore, Maryland) for two examples of consumer-friendly unbundling-coaching websites.

26. For an excellent primer on client-centered lawyering, see David Binder, Paul Bergman, Susan Price, and Paul Tremblay, *Lawyers as Counselors: A Client Centered Approach, 2nd Edition*, (Thompson-West, 2004). Also useful are the standards for the Louis M. Brown International Client Counseling Competition http://www.usyd.edu.au/lec/ICCC2007; www.law-competitions.com.

27. Chapter 4 of *Unbundling Legal Service*s presents an in-depth look at how to handle this meeting.

28. To review the 26 recommendations of the First National Unbundling Conference in Baltimore in 2000, see www.UnbundledLaw.com.

29. As a potential benefit to both family lawyers and legal malpractice insurance carriers, the insurance industry is beginning training for its policy holders. For example, Lawyers Mutual has conducted five seminars around California on "The Nuts and Bolts of Limited Scope Representation. A statewide unbundling CLE program in Indiana in 2006 featured a legal malpractice insurance broker on its prestigious panel of experts. A DVD and written materials of this program can be purchased from James Whitesell, ICLEF Senior Program Director, 230 East Ohio Street, Indianapolis, Indiana 46204.

30. See Mary O'Connell and J. Herbie DiFonzo (Reporters), FLER Final Report, Family Court Review, Fall 2006; Forrest S. Mosten, "The Potential for Family Lawyers of FLER", Family Court Review, Winter 2006.

31. Under the leadership of Judge Rebecca Albrect and Court Administrator Gordon Grillo, the Maricopa County Superior Court has developed training for court personnel throughout the

country. This training stems in part from the unbundling training program from attorneys in the Maricopa Bar Association and the unbundling referral list that includes lawyers (at their own market rates) who have completed this training.

32. Under the leadership of Judge Bell, Maryland has set the standard for statewide promotion of mediation. Similar public campaigns can replicate the Maryland experience in this important area of improving legal access.

33. In November, 2006 at its Annual Conference, The Southern California Mediation Association initiated the SCMA/Forrest S. Mosten Conflict Resolution Library Fund to provide financial assistance to libraries, law schools, limited scope non-profit organizations, and other institutions to increase consumer awareness of mediation. Similar projects could be initiated for unbundling. See http://scmediation.org/western_justice_center_library.asp.

34. Dear Court Litigant:

    You have a case in our court. During this time in your life, you have a number of decisions to make about your future. I would like you to know that our court would like to help make this process as easy as possible for you.

    However, going to court is not the only way to resolve disputes. Some other ways include having attorneys negotiate directly, having a neutral third party help both sides negotiate a solution (mediation) or using a problem-solving method such as collaborative law. These other ways help people find solutions that are mutually acceptable. You can speak with your attorney, if you have one, about these options so the two of you can decide whether any of these are right for you.

    You may want to consider these other ways of resolving your dispute for several reasons:

    1. You will directly participate in finding solutions
    2. You probably will be able to resolve your dispute sooner
    3. It may be much less expensive
    4. You will end the process with better relationships and less conflict, and
    5. You will likely find it less stressful than court hearings

    Your agreement does not need to be perfect. It does need to be acceptable to both of you.You can speak with your attorney, if you have one, about all of these methods of resolving your case.

    It is to your benefit to consider opportunities to reduce conflict and reduce expenses incurred in the court process. Many people spend time, effort, and money attempting to obtain satisfaction by prolonging the dispute with the other party, but this does not guarantee either party will be fully satisfied with the outcome.

    Sincerely, Supervising Judge, Los Angeles Superior Court

35. See Frank Sander and Michael Prigoff, "Should There Be a Duty to Advise About ADR Options," 76 *American Bar Association Journal*, 50; Robert 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 *Washington and Lee Law Review*, 819 (1990).

36. The Dispute Resolution Section of the Beverly Hills Bar Association, CPR in New York, and the Better Business Bureau have all used aspirational pledges to encourage their members to use mediation. This model can be used to encourage unbundling as well.

37. JOINT RESOLUTION OF THE LOS ANGELES COUNTY SUPERIOR COURT JUDICIARY, THE LOS ANGELES COUNTY BAR ASSOCIATION, AND THE FAMILY LAW SECTION OF THE COUNTY BAR ASSOCIATION REGARDING LIMITED SCOPE REPRESENTATION, COMMONLY KNOWN AS "UNBUNDLING"

    (Passed April 19, 2005)

    WHEREAS, the judges of LOS ANGELES County Superior Court and the attorneys appearing in those courts continue to work together on ways to improve equal access to the courts for all people, and

    WHEREAS, judges and attorneys recognize the growing problem of members of our community unable to afford legal representation in the civil courts, especially in the area of family law, and

    WHEREAS, there is a high number of self-represented persons in Family Court who face complex and varied custody and financial issues, and

    WHEREAS, limited scope representation permits a person to hire an attorney to assist with specific tasks on one or more issues in a case, while the client continues to represent him/herself in all other aspects of the case, thereby limiting the cost of legal assistance, and

    WHEREAS, recent developments, including the enactment of new California Rules of Court provide guidance for attorneys offering limited scope representation in Family Court, have made the concept of limited scope representation readily available for attorneys to offer, and

    WHEREAS, limited scope representation presents a way for the courts and attorneys to work together toward assisting parties with limited financial means in handling their legal matters,

    THEREFORE BE IT RESOLVED THAT,

    - The LOS ANGELES County Superior Court supports limited scope representation in family law cases, and will honor agreements made by attorneys to provide limited scope representation, and will not expect an attorney to go beyond the limits set by the attorney's contract with his or her client.

- The LOS ANGELES Bar Association supports limited scope representation, and will assist attorneys through training, and will establish a limited scope representation panel for the Bar Association Lawyer Referral Service.
- The Bench and Bar will work together to inform the public of the availability of limited scope representation.

38. Effective January 1, 2007, California Family Code Section 2013 recognizes collaborative law process as an alternative dispute resolution process. The code is currently being expanded, and it is expected that more detailed legislation will be chaptered this year. Since 2004, Los Angeles County Rule 14.26 endorses collaborative law. On March 3, 2007, the following news story in Australia announced the endorsement of Collaborative Law by the Australian Family Court's Chief Justice, Diana Bryant. http://www.abc.net.au/pm/content/2007/s1861944.htm.
39. When I served on the California State Bar ADR Task Force in 2004, I made the following recommendation for a new area of specialization: ADR Lawyering. While the proposal was not accepted, perhaps some of the concepts can be studied and incorporated into existing and future family law certification programs and be part of curriculum planning for law school and certification preparatory courses:

TASK REQUIREMENTS FOR CERTIFICATION

An Applicant must demonstrate that within the five (5) years immediately preceding the initial application, he or she has been substantially involved in ADR Legal Practice, which shall include actual experience in the following areas:

- Representing Clients in Court Mandated Mediation
- Representing Clients in non Court Mandated Mediation, Arbitration, Collaborative Law Sessions, or other ADR Processes
- Negotiating, reviewing and drafting ADR arrangements including setting up mediation, arbitration, collaborative law, and other ADR processes
- Negotiating, reviewing, and drafting terms of settlement within mediation, collaborative law, and other ADR processes; and/or
- Negotiating, reviewing and drafting future dispute resolution clauses for contracts and settlement agreements

A *prima facie* showing of substantial involvement in the area of ADR Legal Practice is made by completion of at least two (2) of the following categories:

- Principal counsel in twenty-five (25) Court Mandated Mediations involving at least one (1) session with parties and counsel for minimum of at least three (3) hours in duration
- Principal counsel in twelve (12) Mediations (not mandated by a court) resulting in a

written Memorandum of Understanding or Settlement Agreement involving at least one (1) session with parties and counsel for a minimum of at least three (3) hours in duration

- Principal counsel in twelve (12) Collaborative Law Proceedings resulting in a written settlement agreement involving at least two (2) sessions with parties and counsel for a minimum of at least three (3) hours in duration per session
- Principal counsel in twenty-five (25) Court Mandated Arbitrations involving at least one (1) session with parties and counsel for a minimum of at least three (3) hours in duration
- Principal counsel in twelve (12) Arbitrations not mandated by a court resulting in a written decision involving at least one (1) session with parties and counsel for a minimum of at least three (3) hours in duration
- Principal counsel in twelve (12) Other ADR Process matters resulting in a written agreement or decision involving at least three (3) hours per matter
- Principal Counsel in fifty (50) matters of Unbundled Representation of *Pro Se* parties participating in mediation involving at least two (2) hours per matter
- Principal Counsel in fifty (50) matters involving Conflict Prevention Legal Services involving at least two (2) hours per matter

Principal counsel is the attorney who spends a majority of the time on a case in the activities of preparation, review, and providing ADR Legal Services to a client. There can be only one principal counsel per case.

EDUCATIONAL REQUIREMENT FOR CERTIFICATION

An applicant must show that, within the three (3) years immediately preceding the application for certification, he or she has completed not less than forty-five (45) hours of activities specifically approved for ADR Legal Practice as follows in addition to completion of a minimum of fifty (50) hours of mediation training as a neutral *or* twenty-five (25) hours of mediation training *and* twenty-five (25) hours in collaborative law training, *or* twenty-five (25) hours of mediation training *and* twenty-five (25) hours of arbitration law training:

- Not less than four (4) hours in interviewing and advising clients on alternatives to litigation
- Not less than ten (10) hours in negotiation planning and strategic interventions
- Not less than twenty (20) hours in mediation advocacy and/or advanced collaborative law training, and/or advanced arbitration training, and/or advanced training in other ADR processes
- Not less than three (3) hours in unbundled legal services and/or other legal services for unrepresented persons

- Not less than four (4) hours in ethical issues involved in ADR Legal Practice
- Not less than four (4) hours in law office management supporting ADR Legal Practice

40. This recommendation is not without significant challenges. When I served as a member of the ABA IOLTA Commission, I found major resistance among many legal services attorneys to significantly increase unbundling and coaching to provide some help to those citizens who are being turned away due to budget cuts for full service representation. This could be the subject of a chapter (or book) in and of itself.
41. Massachusetts Bar Association Committee on Professional Ethics Opinion 82-8 (1997).
42. See *Lerner v Laufer*, 819 A2d,484, New Jersey, 2003.
43. See *Howard v Drapkin*, (1990) 222 Cal.App.3d 843, 271 Cal.Rptr. 893.

CHAPTER 6

THE EVOLUTION OF THE FAMILY COURT DUTY COUNSEL PROGRAM IN ONTARIO

By Carmelo Runco

INTRODUCTION

One of the basic principles of evolutionary theory is that when a species is confronted with a drastic change in its environment that threatens its existence, it must develop a competitive advantage relative to the change in order to survive. The same can be said with Legal Aid Ontario's delivery of Duty Counsel services in the family courts. As we approach the 40th anniversary of Legal Aid in Ontario, it is interesting to consider how the family court Duty Counsel program has evolved to meet the changing needs of the bench, the bar and most importantly, the needs of the public.

The Duty Counsel program provides two levels of limited service to clients who do not qualify for full representation under the Canadian certificate program. This chapter provides a historical and current overview of the Duty Counsel program, with a particular emphasis on the family court perspective. In addition, the future of the family court Duty Counsel program will be forecasted, taking into consideration the needs of key stakeholders. In order for a program such as this to survive, it must continue to evolve.

PART 1 - HISTORICAL OVERVIEW

Duty Counsel in Its Infancy

In the 1940s and 1950s, when faced with unrepresented parties, a judge would call upon a junior lawyer in the legal community who was present in the courtroom and remind him or her of the lawyer's responsibility to represent the needy. With only a moment's notice and an encouraging word, young lawyers often found themselves "volunteering" their services to assist persons involved with the legal system. As family law in Ontario was still in its infancy, the bulk of these services were reserved for people facing serious criminal charges.

However, it did not take long to realize that this ad-hoc approach could not be sustained and in 1965, a governmental committee on Legal Aid convened to recommend and implement a more formal approach. The resulting plan was based on a model used in Scotland for centuries. Basically, services provided in connection with serious legal matters were delivered through a certificate program while more routine matters were handled under the Duty Counsel program. The Law Society of Upper Canada ("the Law Society"), which governs lawyers in Ontario, administered both programs.

The Duty Counsel program was incorporated into Ontario's first substantive legal aid statute – the *Legal Aid Act*, S.O. 1966, C-80. Under that statute, Duty Counsel were present in all criminal courts to provide advice and limited representation to any person wishing to use the services of Duty Counsel on that given day. This was the case, whether or not that person was eligible for a certificate and without any financial eligibility assessment. Each community had a roster of lawyers who were willing to act as Duty Counsel. They rotated their services on a daily basis and were paid according to a set rate. It was presumed that although both senior and junior members of the local bars would act as Duty Counsel, those lawyers who were willing to participate in the Duty Counsel program were merely supplementing their existing practices.

During the 1970s, the breadth of the Duty Counsel program steadily grew as the program was expanded beyond the criminal courts. However, it was not until 1976 that the Duty Counsel program was formally implemented in family law. During that year, a family Duty Counsel program was set up as a pilot project in one of the busier courthouses in Toronto. It consisted of lawyers giving advice in

matters such as child welfare, initial support applications and support reviews. It took almost three years for the pilot project to become permanent and for similar programs to be introduced into the other family law courts in the province.

The Growing Pains of the Duty Counsel Program

At first, the expansion of the family court Duty Counsel program was welcomed by all. Duty Counsel settled a sufficient number of cases to reduce the waiting period for trial. They also served the public by providing basic advice on family law matters, representation in simple matters, and by de-mystifying the court process for the public.

However, it was soon evident that the program was far from utopian. By the early to mid-1980s, complaints surfaced concerning both the lack of continuity of counsel and the quality of service resulting from the use of rotating Duty Counsel crews. In addition, questions arose about the cost-effectiveness of the Duty Counsel program.

The Duty Counsel Program in Crisis

Unfortunately, over the next fifteen years, the family court Duty Counsel program faced several serious obstacles. As is the fate of some species in nature, these forces pushed the program to the brink of extinction. First, changes to all areas of law (especially the blossoming of family law litigation), constitutional reform, and a downturn in the Ontario economy created an increase in the number of persons in need of legal services between the mid-1980s and the early 1990s. More people saw the program as a viable alternative to retaining a lawyer privately or applying for a legal aid certificate. The use of family court Duty Counsel was seen as quick, cheap, and painless.

Second, despite the increased demand for services, funding was inadequate. Although Ontario had elected a socially conscious government in 1991, serious over-spending by the government in certain social services programs resulted in grievous under-funding of other services, especially legal aid services. By 1994, there was a cap on funding of legal aid certificates, resulting in a temporary freeze on payment of lawyers' accounts in the fall of 1994. A legal aid crisis was in full swing.

Third, over the course of a generation, the profession's view of the Duty Counsel program changed drastically. Some lawyers saw the Duty Counsel program as the perfect place in which to establish a personal client base. Others used the program as the exclusive basis of their livelihood as opposed to merely supplementing it. Unfortunately, the Duty Counsel program sometimes benefited lawyers more than the public.

Accordingly, in the fall of 1995, the Law Society's Legal Aid Committee recommended the adoption of measures to return to the traditional use of Duty Counsel. The resulting McCamus Report suggested a mixed model of delivery systems including an expansion of the Duty Counsel program. The report was met with some criticism, and it took a few years for many of the recommendations to come to fruition. But it was clear that the family court Duty Counsel system had survived its greatest challenge to date and would emerge as an improved and innovative service delivery model, one which would serve as a benchmark for legal aid organizations throughout the world.

PART 2 - THE "NEW" FAMILY COURT DUTY COUNSEL FRAMEWORK

Duty Counsel Services - One Size Does Not Fit All

In 1999, an independent governmental agency, Legal Aid Ontario ("LAO") was charged with oversight of the certificate and Duty Counsel programs. Revised Duty Counsel functions were set out in the *Legal Aid Services Act (LASA)*, the main *LASA* regulation (O. Reg. 106/99), and in various policies that would be adopted over the years.

As it pertained to family law, LAO abandoned the all-or-none approach to providing Duty Counsel services in the family court. While some people favoured use of staff lawyers, others preferred the traditional Duty Counsel model. In response, LAO adopted a multi-pronged approach to delivering Duty Counsel services in family courts throughout Ontario. In most courts, LAO continued to pay per diem Duty Counsel roster lawyers to assist clients who had matters in court and needed basic family law advice. But in order to anchor its delivery model, in several selected courts, LAO employed staff Duty Counsel lawyers in

addition to per diem Duty Counsel.

In some offices, there was only one staff lawyer, complemented by one or more per diem private bar lawyers. Using private bar lawyers prevented conflicts where Duty Counsel represented both sides of a dispute, which was an increasingly common scenario in the family courts. In other offices, supervisory Duty Counsel worked with one or more staff lawyers in addition to a requisite number of per diem private bar lawyers. Finally, three special offices provided "expanded" Duty Counsel services. These offices were originally deemed "pilot projects" and they consisted of: (1) a supervisory Duty Counsel; (2) zero to two staff lawyers; (3) an administrative support person; and (4) the number of per diem Duty Counsel necessary for the functioning of the courts.

By 2005, almost every family courthouse in Ontario had an "anchor" supervisory Duty Counsel office, and the three "expanded" Duty Counsel pilot projects were made permanent.

PART 3 - THE EXPANDED FAMILY COURT DUTY COUNSEL OFFICE

The "Cadillac" version of family court Duty Counsel service delivery is the Expanded Duty Counsel (EDC) office. It is currently based only in three cities; Hamilton, London and Oshawa. The three offices are virtually the same except for the number of staff lawyers employed to complement the supervisory lawyer (none in Hamilton, one in London and two in Oshawa). This author had the good fortune and great privilege to be the Supervisory Lawyer in the Hamilton EDC from the fall of 2000 to the summer of 2005.

The EDC office is innovative and distinguishable from the basic Supervisory Duty Counsel (SDC) office by: (a) the presence of an administrative support person and standard law office equipment; (b) the ability of the Duty Counsel lawyers to provide additional services in some cases; and (c) the presence of Family Law Information Centers.

Duty Counsel Services for Clients Scheduled in Court

If a client needs Duty Counsel services on a day when the client is scheduled in

court, the client locates a dedicated EDC office in the courthouse. A support person asks the client to complete a one-page intake form. After receiving the completed intake form, the support person enters the information into the computer, conducts a "conflict-of-interest" check, and prepares a standard interview form. Support staff assigns the client to be seen by either the Supervisory Lawyer (an employee of LAO) or the per diem Duty Counsel lawyer (a private bar lawyer who is assigned for service on that day). Both lawyers perform the same functions and there is no advantage or disadvantage to the client to see one or the other, other than perhaps a preference of style.

At the interview, the lawyer conducts a brief financial eligibility test of the client. The rationale behind financial eligibility is to focus LAO resources on those clients who truly could not afford legal services and needed LAO's help in getting legal representation (as opposed to the well-to-do dentist who simply did not want to pay for a lawyer). Although the concept of financial screening was conceived prior to the implementation of the EDC office, it was not uniformly used until the EDC office standardized it.

If the client qualifies for expanded Duty Counsel services, the range of services available to her is vast. The client can receive detailed advice on the matter, be represented in negotiations with the opposing party, have court documents prepared (where time and circumstances allow for it), and be represented in court (whether for an adjournment or for a more substantive procedural step). However, the client is not represented at trials or other complicated hearings. Emphasis is placed on resolving the matter in some fashion (partial or complete, temporary or final), as opposed to merely adjourning the matter.

The assigned lawyer is not restricted in the amount of time he or she can spend with the client. Although the lawyer is expected to initially "triage" all clients who appear for Duty Counsel services on a given day, once all clients have been seen, the assigned lawyer can spend as much time as needed with the client to complete the service.

If the client does not qualify for expanded Duty Counsel services, the lawyer will advise the client accordingly, but will still give basic summary advice (limited to twenty minutes). However, the client will not be represented in court (except perhaps to speak to an adjournment on consent), will not have documents prepared, and the assigned Duty Counsel will not engage in detailed negotiations (except to review simple settlement proposals prepared by the opposing counsel).

The Duty Counsel records information about the case and returns the file to a support person at the end of the day. The support person tabulates information about the service provided and places the file into one of two filing cabinets: one for files handled by the Supervisory Lawyer, and the other for files handled by per diem lawyers.

In some cases, the assigned lawyer advises the client to either make an application for a legal aid certificate or to retain a lawyer privately. Nonetheless, if the client's matter is not completed on the day of the initial interview and, if the client decides to return to the EDC office on the next court date, the office has a record of the client's attendance and the services provided on the previous court date. This is quite beneficial for the client, as it eliminates the need for the client to repeat information about her case (which can often be emotionally painful). It is also quite beneficial for the next Duty Counsel, as he will know what the case is about, what has taken place, and what needs to be done.

If the client saw the Supervisory Lawyer on the previous occasion, the client will see that lawyer once again. This ensures the continuity of service between the lawyer and the client. It is this continuity of service, together with the retention of the intake information that are the key innovations of the EDC office. These two features allow the Supervisory Lawyer to help the same client, rather than requiring the client to repeat her case to a new Duty Counsel lawyer.

If the client saw a per diem Duty Counsel lawyer on the previous occasion, unfortunately, the client does not have the same benefit. The client is assigned to whoever is acting as the per diem Duty Counsel on that date. Due to scheduling conflicts, it would be logistically difficult (if not impossible) to arrange for the same per diem Duty Counsel to appear for each client seen on each client's return date.

Expanded Duty Counsel Services for Clients Seeking a Variation in Access or Child Support

Since the summer of 2001, in an effort to reduce the number of legal aid certificates issued in relatively simple variation matters, LAO has allowed the Duty Counsel offices and the EDC offices in particular to handle simple access and child support variations. Thus, if the client qualified for EDC services, and if the varia-

tion sought was in regards to a simple change of child support, access, or both, the client would be entitled to this new and innovative service.

In the case of a simple variation, the support person schedules an hour long appointment for the client and the Supervisory Lawyer. The client is tested for financial eligibility at that time and on each successive visit. The Supervisory Lawyer reviews the case with the client and prepares the necessary documents to commence or to respond to a motion to vary. The Supervisory Lawyer informs the client in writing that he or she will not "go on the record" for the client.

The client is responsible for completing each step in the case and making decisions about the case. Nonetheless, the Supervisory Lawyer assists the client in preparing, serving, and filing the court papers. In addition, the Supervisory Lawyer attends court dates and, if necessary, argues motions.

In cases where the Supervisory Lawyer cannot assist the client due to a conflict, the matter is assigned to a per diem Duty Counsel. That lawyer is paid for up to five hours of time to prepare all the necessary paperwork; however, a different Duty Counsel assists the client at court appearances. The benefits of this system, as opposed to simply issuing a certificate, are purely financial. The time limits imposed on the Duty Counsel are lower than those available to a lawyer if a certificate was issued. Duty Counsel does not go on the record for the client, but rather, assists the client in document preparation and court representation.

Family Law Information Centre Access for Clients Not Scheduled in Court

Each EDC office has a Family Law Information Centre ("FLIC") which can be used by clients who do not have court appearances scheduled on a given day. The Ministry of the Attorney General is responsible for the FLIC, but each FLIC has several components: (1) a government employee oversees the office, making sure it opens and closes as scheduled and gives clients court forms and informational brochures; (2) an information resource person provides additional information about specific resources and services available in the community including counselling services, mediation services, and interpreter services; (3) a mediator assists clients who have a matter before the courts (referrals to the on-site mediator can come for the EDC office, court staff, other lawyers, or from the judge); and (4) an

Advice Lawyer provides more limited service than traditional Duty Counsel.

The Advice Lawyer conducts a financial eligibility test and if the client does not financially qualify, the client is limited to non-case specific summary advice unless there is a situation of urgency in which case the Duty Counsel may intervene. If the client does financially qualify, the range of services available to the client includes case-specific advice, some document preparation, referrals to other agencies or service providers, and, in some circumstances, co-ordination of service with the Duty Counsel office to obtain an emergency order without notice.

If the matter is assessed as an emergency, the Advice Lawyer helps the client prepare the necessary court papers to be filed in court that same day. Depending upon the EDC office, either the same Advice Lawyer argues the case in front of the judge or the Advice Lawyer hands-off the file to the EDC office and has one of the Duty Counsel appear with the client before a judge. If an order is issued, the Duty Counsel lawyer (either the Advice lawyer or the in-court Duty Counsel lawyer) helps the client obtain a copy of the order and advises the client regarding service.

PART 4 - THE ROAD AHEAD FOR THE FAMILY COURT DUTY COUNSEL OFFICE

Why Does the Current System Work?

As mentioned earlier, the true innovation of the EDC/SDC program is in its delivery of quality legal services in a cost-effective manner. Under the old regime, cases were shuffled along from court date to court date, with little emphasis on resolution or substantive results for the client. From a Duty Counsel lawyer's point of view, he or she was paid the same amount despite the quality of service provided. Prior to the changes to the Duty Counsel system in 1999, once a lawyer was admitted to the Duty Counsel roster (usually upon their call to the bar), he or she was on the panel until he or she resigned. It was not uncommon to have lawyers use Duty Counsel assignments in a barter system, exchanging one Duty Counsel assignment for another lawyer's Duty Counsel assignment. This resulted in lawyers who did not regularly practice family law acting as family law Duty Counsel. Although there were some rudimentary protocols for being on the

panel and remaining on the panel, there was little (if any) direct supervision of the Duty Counsel's performance, and as such, the quality of their service to the public was rarely called into question.

With the implementation of the EDC/SDC offices, there were marked improvements to the system. First of all, the system became more cost-effective. The Supervisory Lawyer, among his other responsibilities, ensures that Duty Counsel lawyers are assigned to the appropriate courtrooms, and for the appropriate duration. If more Duty Counsel lawyers are needed, more are brought in. Conversely, if fewer lawyers are needed, some are sent home early. Further, the Duty Counsel office handles some services that were previously handled by private bar lawyers. The SDC/EDC offices are routinely handling simple access and child support variations. Where Duty Counsel in the past may have been quick to refer many cases to the certificate system, the emphasis on dispositive resolutions and a more "hands-on" approach has saved LAO money in the certificate system.

Second, more attention was paid to quality assurance. From 1999 to 2004, the EDC system was considered a pilot project and used as a basis to assess the post-1999 implementations. After several years of developing protocols, LAO introduced quality controls for its Duty Counsel in 2004. In fact, LAO created an entire office, referred to as the Quality Services Office, to ensure LAO would develop, recommend, and implement the best practices. These standards were arrived at after substantive consultation with various key stakeholders, including the private bar, judges, current Duty Counsel, court support staff and others.

The Supervisory Lawyer is charged with assessing the quality of the service that each Duty Counsel provided. On an annual basis, the Supervisory Lawyer reviews the panel roster to ensure that only those lawyers working with family law matters would continue acting as Duty Counsel. By actively managing the panel, the Supervisory Lawyer determines whether lawyers need to upgrade their skills. Emphasis is placed on training as opposed to removal from the panel at the first instance of less than adequate performance. LAO ensures that clients receive high quality legal services from its employees by distributing practical training materials, offering legal education seminars, and providing mentoring to young lawyers.

Proof that the current system is working well is evidenced by the fact that LAO is being asked by other Canadian provincial agencies and by international governments to share LAO's ideas and innovations. Over the past three years, representatives from several Canadian provinces, along with those from countries

such as England, Ireland, New Zealand, Chile, Vietnam and China have made substantive inquires about LAO in general, and specifically, about the Duty Counsel programs. In 2005, LAO sent representatives to China to help establish a legal aid system. The ability of the Duty Counsel program to reach so many people with fewer resources was of particular interest to the Chinese delegation. Future orientation and implementation sessions have been discussed and planned.

Where Do We Go From Here?

To think that the current Duty Counsel system is the pinnacle of achievement would be a bit naïve – it survives in spite of threats to its existence, and with some forethought, it can continue to thrive.

Financial sustainability is a major concern. Given the number of people who are served by the Duty Counsel program on a daily basis throughout the province, key stakeholders (and not just those in control over finances) need to remain cognizant of the importance of the family court Duty Counsel program.

In order for the family court program to thrive, it must expand into new service areas. There are two possible ways this can be achieved. The first way is to expand its current legal role. When the decision was made to assign simple variations to the Duty Counsel offices in the summer of 2001, the traditional role of Duty Counsel changed forever. It was clear that the Duty Counsel office was (or could be) well equipped to tackle new challenges. Perhaps the Duty Counsel office could handle cases where the cost of issuing a certificate is too costly, such as simple initial applications for custody, access and child support, or perhaps where the service is not being offered by a certificate, such as in support enforcement cases.

The second way to expand is to partner with non-legal service providers. With the implementation of the "Cadillac" FLIC offices, a precedent for partnering with other service providers was established. However, there is a need for a coordinated and multidisciplinary approach to family law disputes. This is especially true in highly contested custody-access cases and child welfare cases. When a matter is initially considered by a presiding judge, counsel for the parties frequently seeks time for clients to access social services. Common services include counselling for anxiety and/or depression, substance abuse counselling, anger manage-

ment counselling, supervised access facilities, parenting courses, and parenting assessments. Unfortunately, few agencies offer such services and waiting lists are many months long. As these lists continue to grow, people live their lives and patterns become established and entrenched. It is utterly ridiculous to expect that the parent-child bond will not be adversely affected by the egregious shortcomings in the social services sector.

One solution is to integrate social services most needed in family law litigation with those offered by the Duty Counsel office. Already, most Duty Counsel lawyers are aware of the services available in their community, but the extent of their involvement is limited to making referrals to these agencies. Perhaps some social service providers could be invited to tender bids to operate at or near the courthouse. By doing so services could be coordinated in a fashion similar to the bundling of health-care services offered by Health Management Offices.

The goal of such a project is not to put members of the private sector already offering these services out of business. Instead, the objective is to reduce unnecessary long waits for such services by investing monies and human resources at an early stage of family law disputes. To do so requires that many levels of government and the social services sector recognize the untold costs on society caused by the breakdown of the family. It would be more cost-effective to invest time and money *preparing* people to manage family breakdown, as opposed to *repairing* problems that develop when situations are left to fester due to inadequate resources. The Duty Counsel office is well-placed to be the anchor of such a multi-pronged approach to resolving family law disputes.

CONCLUSION

The Family Court Duty Counsel Office has come a long way in the past forty years. Although the people involved in the system, and the system itself, have changed, the most basic objective of the program remains the same – addressing the problems of people who cannot afford legal representation. But as the system tries to adapt to additional users and decreased funding, the clients' needs should be reconsidered. Legal problems are keenly intertwined with social problems – attempting to address them separately does a disservice to the client. If the Duty Counsel system could retain its current functions and develop working relation-

ships with other service providers, the program might evolve into an entity with even greater potential to assist families; otherwise, it may simply be a matter of time until it becomes extinct during the next ice age.

CONTRIBUTORS

Susan A. Hansen practices family law, collaborative divorce, mediation and arbitration. She has practiced in the southeastern Wisconsin area for over 25 years. She has extensive experience in all financial and child-related family law issues.

Attorney Hansen is the Past President of the International Academy of Collaborative Professionals (IACP). She has been active on numerous IACP projects to educate the public and promote professional excellence in collaborative practice. In addition, she has served as a member of the Guardian ad Litem Legislative Council Committee, the Wisconsin Bar Association Family Law Section Board of Directors and Training Chair for the Collaborative Family Law Council of Wisconsin. She is currently Treasurer of the Family Law Section of the State Bar of Wisconsin.

She is a member of many professional and community service organizations including the Wisconsin Association of Mediators, AFCC, ABA, Association for Conflict Resolution and the Leading American Attorneys Network Advisory Board. She is past-chair of the MBA Family Law Section, Bench Bar Committee and the Common Council Commission on Domestic Violence. She has frequently presented and written on financial and children's family law issues for attorneys, educators, and mental health professionals.

Attorney Hansen's primary practice areas include Milwaukee, Waukesha, Ozaukee, and Washington counties. She has consistently been named among Milwaukee's best divorce attorneys by *Milwaukee Magazine* and *Super Lawyers*. More information is available at the firm website: www.h-hlaw.com.

Gregory M. Hildebrand represents individuals in all matters affecting the family including: divorce, child custody and placement issues, as well as paternity, adoption and guardianship. In addition to mediation and litigation, he is trained to represent individuals in the collaborative divorce process. Attorney Hildebrand is currently Training Chair of the Collaborative Family Law Council of Wisconsin.

Attorney Hildebrand also holds a Masters in Social Work, and before attending law school was extensively involved in the advocacy and protection of abused and neglected children in the Milwaukee area and directed training programs for child protective service professionals.

Adding to his diverse background, prior to forming Hansen & Hildebrand, S.C., Attorney Hildebrand was an associate with a large law firm representing corporations in employment counseling and litigation.

David A. Hoffman is an attorney, mediator, arbitrator, and founding partner at the Boston Law Collaborative, LLC, a multi-disciplinary firm that provides collaborative law and dispute resolution services. Previously he was a partner at the Boston law firm Hill & Barlow, where he practiced for seventeen years. David is chair of the Collaborative Law Committee of the ABA Section of Dispute Resolution, past president of the New England chapter of the Association for Conflict Resolution, and cofounder of the Massachusetts Collaborative Law Council. He is a

graduate of Princeton University (B.A., *summa cum laude*), Cornell University (M.A. in American Studies), and Harvard Law School (J.D. *magna cum laude*), where he was an editor of the *Harvard Law Review*. David is the co-editor of *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (Jossey-Bass 2003), and he teaches mediation at Harvard Law School.

Forrest S. Mosten is recognized as the "Father of Unbundling" for his pioneering work in this approach to legal access. He is a Certified Family Law Specialist as recognized by the Board of Legal Specialization of the State Bar of California and limits his practice to serving as a neutral mediator and a limited scope collaborative attorney. He does not accept engagements that involve court representation or adversarial proceedings. Some of Mr. Mosten's pioneering innovations include the Client Library, legal and conflict wellness periodic check-up, confidential mini-evaluation, mediated case-management, and a variety of new client-oriented services. Mr. Mosten's book *Unbundling Legal Services: A Guide to Delivering Legal Services A La Carte* was published in 2000 by the ABA. He served as a Keynote Speaker at the first national conference on unbundling in October 2000 in Baltimore and Guest Editor of the *Family Court Review*'s Special Issue on Unbundling published in January 2002.

In addition to training mediators, lawyers, therapists and organizations world-wide and serving on the faculty at the UCLA School of Law, Mr. Mosten has published numerous articles on mediation and unbundling and is the author of The *Complete Guide to Mediation* (ABA, 1997), and *Mediation Career Guide* (Wiley, 2001). Mr. Mosten has been recognized for his work in unbundling by the ABA by receiving the Lifetime Award for Legal Access by the Standing Committee on Delivery of Legal Services and was named 2004 Lawyer as Problem Solver by the ABA Section on Dispute Resolution.

Mr. Mosten graduated Phi Beta Kappa from UC Riverside and earned his Juris Doctor at UCLA School of Law in 1972.

Kelly Browe Olson is the Director of Clinical Programs and an Associate Law Professor at the University of Arkansas at Little Rock. She teaches family law, ADR, domestic violence seminars and clinical courses. She has trained and supervised professionals and students in mediation and litigation skills in delinquency, dependency/neglect, special education and custody cases. She is currently the co-chair of the Law in Education Committee of the American Bar Association Section on Dispute Resolution and the Professional Development and Training Assistance Committee for AFCC. She earned her B.A. at Marquette University, J.D. at the University of Michigan and LL.M. in ChildLaw from Loyola University Chicago.

Pamela Cardullo Ortiz is the Executive Director of the Department of Family Administration for the Maryland Administrative Office of the Courts. Her office has administrative and budgetary responsibility for Maryland's Circuit Court Family Divisions and Family Services Programs. She and her staff work with the Maryland Judiciary to develop policies and initiatives to improve the management of domestic and juvenile cases, and to improve the courts' ability to serve the needs of the families and children who come before it. She served as the Family Law

Administrator at the Circuit Court for Anne Arundel County from 1996 to 1999. She had a public interest law practice in domestic and juvenile cases prior to 1996, serving first with the Legal Aid Bureau, and later as the managing attorney for the Anne Arundel Bar Foundation Pro Bono Program. She has been a member of the Maryland Bar since 1992 and holds a law degree from Georgetown University.

Carmelo Runco is the Area Director for Legal Aid Ontario for the cities of Hamilton, Hagersville and Simcoe. He is responsible for administering legal aid policies with respect to family law, criminal law, immigration and refugee law and some civil law matters. He was formerly the Supervisory Duty Counsel at the Superior Court of Justice (Family Court) in Hamilton from 2000 to 2005. He is currently a member of various family law-related committees in Hamilton, and he is currently a Trustee of the Hamilton Law Association. He earned his law degree at the University of Western Ontario in London, Ontario.

Andrea Kupfer Schneider is a Professor of Law at Marquette University Law School. In addition to having published numerous articles on negotiation and international law, she is the editor of *The Negotiator's Fieldbook* with Christopher Honeyman to be published by the ABA Section on Dispute Resolution. She is a co-author of *Negotiation: Processes for Problem-Solving* (Aspen 2006) and *Mediation: Practice, Policy & Ethics* (Aspen 2006) as well as *Dispute Resolution: Beyond the Adversarial Model* (Aspen 2005) with Carrie Menkel-Meadow, Lela Love & Jean Sternlight. Previously she had co-authored *Coping with International Conflict* (Prentice-Hall 1997) and *Beyond Machiavelli: Tools for Coping with Conflict* (Harvard University Press 1994) with Roger Fisher. She is also the author of *Creating the Musee d'Orsay: The Politics of Culture in France* (Penn State Press 1998). Professor Schneider received her A.B. *cum laude* from the Woodrow Wilson School of International Affairs and Public Policy at Princeton University and her J.D. *cum laude* from Harvard Law School. She also received a Diploma from the Academy of European Law in Florence, Italy.

Nancy Ver Steegh is a professor at William Mitchell College of Law where she teaches courses on family law, domestic violence, alternative dispute resolution and supervises family law externships. She is a co-author of two family law texts, *Work of the Family Lawyer* and *Family Law: Examples & Explanations*, and has published articles on domestic violence, mediation, child custody, and parent education. She serves on the editorial boards of the *Family Court Review* and the *Family Law Quarterly* and she is a member of the board of directors of the Association of Family and Conciliation Courts. She previously worked as a legal aid attorney and as a family mediator. She earned her J.D. at Washington University and her M.S.W. at George Warren Brown School of Social Work in St. Louis, MO.

ASSOCIATION OF FAMILY
AND CONCILIATION COURTS
Phone: (608) 664-3750
Fax: (608) 664-3751
Email: afcc@afccnet.org
Web: www.afccnet.org

PRINCIPLES AND GUIDELINES FOR THE PRACTICE OF COLLABORATIVE LAW

GOALS

We acknowledge that the essence of "Collaborative Law" is the shared belief by participants that it is in the best interests of the parties and their families in typical family law matters to commit themselves to avoiding litigation.

We therefore adopt the conflict resolution process, which does not rely on a court-imposed resolution, but relies on an atmosphere of honesty, cooperation, integrity and professionalism geared toward the future well being of the family.

Our goal is to minimize, if not eliminate, the negative economic, social and emotional consequences of protracted litigation to the participants and their families.

We commit ourselves to the Collaborative Law process and agree to seek a better way to resolve our differences justly and equitably.

NO CONTESTED COURT PROCEEDINGS OR FORMAL DISCOVERY

We commit ourselves to settling our case without contested court proceedings.

We agree to give full, honest and open disclosure of all information, whether requested or not. There will be no formal discovery.

We agree to engage in informal discussions and conferences to settle all issues. We agree to direct all attorneys, accountants, mental health professionals, appraisers and other consultants retained to work in a cooperative effort to resolve all issues without resort to litigation or any other external decision-making process except as mutually agreed.

CAUTIONS

We understand there is no guarantee that the process will be successful in resolving our case.

We understand that the process cannot eliminate concerns about the disharmony, distrust and irreconcilable differences which have led to the current conflict.

We understand that we are still expected to assert our respective interests and that our respective attorneys will help each of us do so.

We understand that we should not lapse into a false sense of security that the process will protect each of us.

PARTICIPATION WITH INTEGRITY

We will work to maintain the privacy, respect and dignity of all involved.

We shall maintain a high standard of integrity and specifically shall not take advantage of each other or of the miscalculations or inadvertent mistakes of others, but shall identify such mistakes when discovered.

EXPERTS

If experts are needed, we will retain them jointly unless all parties and their attorneys otherwise agree in writing.

In the event that the Collaborative law process terminates, all experts will be disqualified as witnesses and their work product will be inadmissible as evidence unless the parties agree otherwise in writing.

CHILDREN'S ISSUES

In resolving issues about the enjoyment of and responsibility for our children, the parties and attorneys shall make every effort to reach amicable solutions that promote the best interests of the children.

We agree to act quickly to mediate and resolve differences related to the children to promote a caring and involved relationship between the children and both parents.

NEGOTIATION IN GOOD FAITH

We acknowledge that each of our attorneys is independent from other attorneys in the Collaborative Law Council, and represents only one party in our collaborative marital dissolution process.

We understand that the process, even with full and honest disclosure, will involve vigorous good faith negotiation.

Each of us will be expected to take a reasonable position in all disputes. Where such positions differ, each of us will be encouraged to use our best efforts to create proposals that meet the fundamental needs of both parties and if necessary to compromise to reach a settlement of all issues.

Although each of us may discuss the likely outcome of a litigated result, none of us will use threats of litigation as a way of forcing settlement

ABUSE OF THE COLLABORATIVE PROCESS

The parties understand that both Collaborative Law attorneys shall withdraw from a case as soon as possible upon learning that either client has intentionally withheld or misrepresented information or otherwise acted so as to undermine or take unfair advantage of the Collaborative Law process. Examples of such violations of the process are: the secret disposition of assets, liabilities or income, failing to disclose the existence or true nature of assets and/or obligations, failure to participate in the spirit of the collaborative process, abusing the minor children of the parties, or planning to flee the jurisdiction of the court with the children.

DISQUALIFICATION BY COURT INTERVENTION

We understand that our attorneys' representation is limited to the Collaborative Law process and that neither of our attorneys can ever represent us in court in a contested proceeding against the other spouse.

In the event the case returns to court in a contested proceeding, both attorneys will be disqualified from representing either client except in a Collaborative process.

PLEDGE

BOTH PARTIES AND ATTORNEYS HEREBY PLEDGE TO COMPLY WITH AND TO PROMOTE THE SPIRIT AND WRITTEN WORD OF THIS DOCUMENT.

Dated:________________________________

____
Client

Dated:________________________________

____
Attorney

Dated:________________________________

____
Client

Dated:________________________________

____
Attorney

STATE OF WISCONSIN : CIRCUIT COURT : ___________ COUNTY
FAMILY COURT BRANCH

In re the marriage of:

Case Code: 40101 (Divorce)

Joint Petitioner-Wife

and

Case No. _______________

Joint Petitioner-Husband

STIPULATION AND ORDER FOR COLLABORATIVE LAW

In consideration of the mutual rights, obligations and commitments made herein, Joint Petitioner-Wife, ________________ and her attorney, __________________________ of _______________________ and the Joint Petitioner-Husband, _____________________ and his attorney, __________________ of __________________________ each stipulate that the Court may make and enter an Order for the following:

I. COLLABORATIVE PROCESS

The parties and attorneys believe that it is in the best interests of the parties and their family to commit to avoiding adversarial legal proceedings and to adopt a conflict resolution process that does not rely on court-imposed resolution. By signing this stipulation, the parties commit themselves to proceeding in the collaborative process to find solutions that are acceptable to both parties with integrity, dignity, professionalism, respect and honesty.

By entering into this agreement, each party has limited the scope of the attorney's representation. Therefore, each attorney is forever disqualified from appearing as attorney of record for either party in any contested matter in this proceeding or in any other contested family law matter involving both parties. This disqualification may not be waived or modified by subsequent court order or agreement of the parties.

Notwithstanding the above, the attorneys may appear as counsel of record for purposes of filing all documents reflecting the agreement of the parties, completing any court required final documents, appearing at any status conference ordered by the court, and appearing at the final hearing.

II. NEGOTIATION IN GOOD FAITH

The parties and the attorneys will take a reasonable approach to all issues. Where the approaches or interest differ, the parties and the attorneys will use their best efforts to create a range of resolution options and reach an ultimate settlement that meets the reasonable needs of both parties and their children.

While the parties will be informed about the applicable law and the litigation process, neither the parties nor the attorneys will use threats of litigation as a way of forcing settlement.

The parties and attorneys will maintain a high standard of integrity. No one will take advantage of the other or the miscalculations or inadvertent mistakes of the other, but shall identify such mistakes when discovered.

The parties and attorneys will work to maintain the privacy, respect and dignity of all involved.

III. FULL AND VOLUNTARY DISCLOSURE

The parties and attorneys acknowledge and understand that honesty and the full disclosure of all information having a material bearing on the case, whether requested or not, is an integral factor in the reaching an agreement in the collaborative process. The parties and attorneys agree to voluntarily provide full disclosure in a timely manner of all such information available to party, and to cooperate in securing information from third parties. The parties and attorneys may use formal discovery methods to obtain information from third parties upon agreement between the parties and attorneys. Neither party will commence formal discovery from the other.

The parties understand that they will be required to file a signed individual or joint financial disclosure statement to the Court as provided by the Wisconsin Family Code.

IV. MENTAL HEALTH PROFESSIONALS AND FINANCIAL SPECIALISTS ENGAGED IN THE COLLABORATIVE PROCESS

Any coach, child specialist or financial specialist engaged in the collaborative process is disqualified from providing information, responding to discovery requests or appearing as a witness for either party or the court. The notes, work papers, summaries and reports of such collaborative professionals shall be inadmissible as evidence in any proceeding involving the parties. This disqualification may not be waived or modified by subsequent court order or agreement of the parties. This paragraph does not apply to documents that are otherwise available from other sources (for example, tax returns, police reports and documents obtained from third parties obtained through formal discovery in Section III above).

V. EXPERTS

Any necessary experts (e.g. appraisers) will be retained jointly. In the event that the collaborative process terminates, all experts will be disqualified from providing information, responding to discovery requests or appearing as a witness or being subject to discovery for either party or the court. The notes, work papers, summaries and reports of such experts shall be inadmissible as evidence in any proceeding involving the parties. This disqualification may not be waived or modified by subsequent court order, unless agreed in writing by both parties and the expert. This section does not apply to any coach, child specialist or financial specialist whose engagement in the process is governed by Section IV above.

VI. STATEMENTS OF PARTIES, ATTORNEYS AND OTHER PROFESSIONALS ENGAGED IN THE COLLABORATIVE PROCESS

All subsequent documents shall be inadmissible for any purpose in any subsequent proceeding except as otherwise agreed upon between the parties. Statements made by either party during any meeting shall be protected as if the statements were made in mediation, and no such communications shall be deemed a waiver of any privilege by any party. However, statements that indicate an intent or disposition to do any of the following actions are not privileged: to endanger the health or safety of the other party, or of the children of either party; to conceal or change the residence of any child; to commit irreparable economic damage to the property of either party; or to conceal income or assets.

VII. ATTORNEY REPRESENTATION

The parties understand that each attorney represents only his or her client; neither attorney represents his or her client's spouse. While the respective attorneys are parties to this agreement and are committed to negotiation in an atmosphere of honesty and integrity, the parties understand and agree that they cannot rely upon the attorney representing their spouse to provide representation, legal advice, or information. Each party shall rely exclusively upon the legal advice, representation, or information provided to them by their own attorney and shall have no claim against the other party's attorney with respect to any aspect of this process.

VIII. ADDITIONAL RESTRAINING ORDERS

Both parties agree that, in addition to the restraining orders under § 767.117, Wis. Stats., commencing immediately:

(1) Each is restrained from disposing of or transferring property; and borrowing against, canceling, transferring, or disposing of, or changing the beneficiaries or any insurance or any other coverage including life, health, automobile and/or disability held for the benefit of the parties or their minor child or children;

(2) Prior mutual agreement is required for all extraordinary expenditures.

(3) Except for the uninsured healthcare expenses for the parties' children, neither party shall incur any debts or liabilities for which the other may be held responsible without advance agreement.

The foregoing orders may be modified by mutual agreement.

IX. WITHDRAWAL OF ATTORNEY

Either attorney may withdraw from this matter unilaterally by giving written notice of such decision to the other attorney. Notice of withdrawal does not terminate the collaborative process; a party losing his or her attorney may continue in the collaborative process, but must retain an attorney who will agree in writing to be bound by this Stipulation and Order. The withdrawing attorney and the successor attorney will cooperate in filing the necessary court documents to facilitate a substitution of counsel. The withdrawing attorney will promptly cooperate to facilitate the transfer of the client's matter to successor counsel.

X. TERMINATION OF COLLABORATIVE STATUS

Either party may terminate the collaborative process by giving written notice or by filing any contested pleading in this matter. Each party agrees to give at least fifteen days advance notice of intent to terminate, to allow time to discuss the situation prior to termination. If either attorney believes that his or her client is in material breach of his/her obligations under this agreement by withholding or misrepresenting information material to the process, or is otherwise acting or failing to act in such a way that knowingly undermines or takes unfair advantage of the process, and the attorney has made all reasonable efforts to notify the party that his or her conduct violates this agreement, then such attorney may either withdraw or terminate the process by giving written notice. Upon withdrawal or termination of the process, the attorneys will promptly cooperate to facilitate the transfer of the client's file. The parties do not waive their right to seek the assistance of the Circuit Court; however, any resort to litigation results in the automatic termination of the collaborative process and the disqualification of the undersigned attorneys, effective the date any application to the circuit court for its orders is made.

Dated:________________________	Dated:________________________
____________________________	____________________________
Joint Petitioner-Wife	Joint Petitioner-Husband
Approved:	Approved:
By:______________________________	By:______________________________
Attorney for Joint Petitioner-Wife State Bar ID No. Address/Phone	Attorney for Joint Petitioner-Husband State Bar ID No. Address/Phone

ORDER

BASED UPON the Stipulation of the parties and their counsel,

IT IS HEREBY ORDERED that the terms and conditions of the Collaborative Stipulation are approved and made an Order of the Court.

Dated at _______________, WI, this _____ day of ________________, 2007.

BY THE COURT:

____
Circuit Court Judge

THE IMPORTANCE OF DOMESTIC VIOLENCE SCREENING IN THE COLLABORATIVE FAMILY LAW CASE

Domestic violence crosses ethnic, gender, race and economic lines. **Every** client should be screened for domestic violence issues. In Collaborative Family Law cases, where the majority of work is done in face-to-face meetings, and clients may feel **and be** more vulnerable to violence or intimidation, screening is especially critical.

Domestic violence can turn the Collaborative process upside down.

COLLABORATIVE VALUES	DOMESTIC VIOLENCE REALITIES
Win/win, good faith	Win/lose, bad faith
Transparency and accountability	Power and control
Equality and decision-making	Imbalance of power
Constructive conflict	Destructive conflict
Mutual trust	Distrust
Self-determination	Lack of self-esteem
Brainstorming	Naming/blaming
Safe place	Safety planning

A nonjudgmental attitude which conveys the message that you are willing to accept the client's disclosures is essential. An opening statement that normalizes the questions such as "Because abuse and violence are so common, I've begun to ask about it routinely" may be helpful. Both women and men should be questioned about domestic violence. Whether they are victims or perpetrators, the information is important for you to have to competently represent a client.

SCREENING QUESTIONS

- How do you and your partner resolve disagreements? Deal with anger?
- How are decisions made in your relationship? Does one partner control all the major decisions – about finances or child guidance, for example? Or are the decisions shared between the two of you?
- How do you resolve conflict in the relationship or in making decisions?
- Have you ever been afraid of your partner? What are you afraid of? Are your children afraid of your partner? How does your partner discipline?
- Do you have any concerns about the safety of your children
- Who wants to end the relationship? Why?
- Do you have freedom in your relationship? Do you have access to friends, family, free time?
- Is there a history of violence in your family – parents, brothers, sisters? Is there a history of violence in your partner's family?
- Have you or your partner ever hurt or threatened to hurt/kill yourselves?
- Do you ever alter your behavior to protect yourself from your partner's behavior?
- Has there been any other litigation between the two of you? Explain.
- Do you or your partner have a prior record of any criminal or child abuse charges or convictions?
- Have you ever called the police, had a protective order issued on your behalf by the court, or sought help for yourself as a result of abuse by your partner? If so, did the abuser abide by the order?
- Do you or you partner use alcohol or drugs? To what extent?
- Has your partner ever damaged or threatened to damage property or harmed or threatened to harm pets?
- Have you or your partner ever threatened suicide and/or make an attempt?
- Does your partner control all of the money/property/the car or other resources?
- Is your partner jealous or possessive of you and your relationships with other people?
- Does your partner attempt to control your time with friends, family,

community, resources, health professionals, etc.?

- Has your partner ever thrown things/punched the wall or a door?
- Has your partner ever hit, kicked, punched, bitten or pushed you?
- Has your partner ever hurt anyone else – family member or otherwise?
- Has your partner ever forced you to have sex?
- Do you have guns in your house? Why? Has your spouse ever threatened to use them when he was angry?
- Does your spouse constantly belittle or criticize you or embarrass you in front of others?
- Do you or your partner have any history of mental illness? What treatment has been provided? Was there follow-through and was it helpful?
- Is there anything else you think I should know about you, your partner or your families?

**Adapted from the Collaborative Family Law Council of Wisconsin Domestic Violence Committee Screening Tool

COLLABORATIVE REPRESENTATION AGREEMENT

A. Scope and Duties.

I hereby retain Attorney _____________ to represent me in connection with my Collaborative Law divorce. In a Collaborative Law divorce, my spouse and I each have an attorney and all have a shared commitment to avoid litigation. I understand that the process primarily entails informal discussions and conferences for the purpose of settling all issues, and the parties and both attorneys agree to adhere to principles of honesty and mutual respect for the process.

Assuming my spouse agrees to utilize the Collaborative Law process and we sign a Collaborative Stipulation and Order, Attorney ________ will represent my interests through the final settlement and filing of a judgment of divorce. However, Attorney ________ will not represent me in any family law litigation against my spouse should the Collaborative Law process end before settlement. I understand that Attorney ________'s representation is terminated by any party's decision to litigate, whether or not it was my decision. I specifically limit Attorney's ________ representation of me to the Collaborative Law settlement process.

I acknowledge and agree that for so long as I participate in the Collaborative Law process, I give up my right to have my own experts, my access to the court system and the right to formally object to producing any documents or to providing any information to the other side that Attorney ________ determines is appropriate.

I agree to make full disclosure of the nature, extent, value of and all developments affecting my income, assets and liabilities. I authorize Attorney to fully disclose all information which in her discretion must be provided to my spouse and my spouse's attorney.

Attorney ________ and I both retain the right to withdraw from this contract if either of us feels we cannot abide by the principles of Collaborative Law by notifying the other in writing. We each agree to give the other fifteen (15) days notice of intention to withdraw. In addition, Attorney ________ and I each have the right to terminate the Collaborative process upon notice to both parties and attorneys.

If my spouse declines to proceed in a Collaborative Law process, I agree that this retainer agreement will be null and void, and Attorney ________ and I will need to enter into a new retainer agreement for conventional divorce representation before she can proceed to represent me.

B. Financial Provisions

1. The retainer fee is $________ and is due and payable upon signing this agreement. The retainer fee is applied toward the hourly charges and disbursements expended on the matter. If my matter is completed for charges less than my retainer, Attorney ______ will refund any remaining amount within 30 days of completion. Attorney ________ reserves the right to require additional retainer fees and cost advances during the term of representation as the need becomes apparent based upon billing statements setting forth hourly fees and disbursements and a projection of future fees. A final total fee cannot be calculated at this time. I understand I will receive an itemized monthly statement and will have five days from the date of mailing to object to any portion of the bill to be paid from monies held in Attorney ________'s trust account. If no objection is received, trust monies will be disbursed.

2. I agree to pay Attorney ________'s fees at the rate of $______ per hour and legal assistant fees at the rate of $____ per hour. Hourly fees will be assessed for all time expended by Attorney ________. The time spent includes, but is not limited to travel time, telephone conferences (which include listening to and leaving messages on voicemail) and e-mail correspondence.

4. In addition to charges for services, I agree to pay to reimburse Attorney ________ for necessary expenses, including but not limited to filing fees, court costs, long distance telephone calls, photocopy expenses, facsimile expenses, appraisal fees, specialist fees and consultant fees. Bills for disbursements and costs incurred during the course of the proceeding are payable upon receipt of the statement.

5. I acknowledge that Attorney ________ has made no promises or guarantees to me concerning the outcome of this matter. I have the right to discharge ________ at any time. If I do so, I agree that she will be paid or arrangements will be made to pay for any work done, time expended or costs incurred before any file is releasaed.

6. I will pay all bills in excess of the retainer within 5 days of receipt, unless other arrangements are made with the agreement of Attorney ________. If I fail to do so, Attorney ________ may notify me in writing of withdrawal as my attorney unless we make alternate arrangements.

C. Retention/Destruction of File

Our firm will retain your court pleadings for a period of ten (10) years upon closing your matter. Records may be retained off site and may require advance notice and a prepaid retrieval fee to obtain them after one (1) year.

Please contact us to schedule a **final meeting** upon the completion of your action to review documents. We will discuss what additional documents you want returned rather than destroyed, i.e. tax returns, accounts statements, etc.

I HAVE READ THIS REPRESENTATION AGREEMENT AND THOROUGHLY UNDERSTAND AND ACCEPT ITS CONDITIONS. I HAVE RECEIVED A COPY OF THIS AGREEMENT.

Dated this ________ day of ______________________________, 2007.

____

APPROVED:

By: ____________________________________
Attorney

COLLABORATIVE DIVORCE
PARTICIPATION AGREEMENT

Divorce Coach/Child Specialist

GOAL OF THE COLLABORATIVE DIVORCE TEAM

The goal of the Collaborative Divorce Team is to assist the divorcing couple in achieving a successful resolution of issues related to their marriage and family in such a way as to minimize the negative economic, social and emotional consequences that families often experience in the traditional adversarial divorce process and help them focus on healthy outcomes to restructure their family and meet the needs of all family members.

In order to achieve this goal, professionals from several independent disciplines work together as a team to integrate the legal, emotional and financial aspects of a divorce. In addition to you and your family, your divorce coach may work with your attorneys, the financial specialist and the child specialist.

ROLE OF THE DIVORCE COACH

The divorce coaches will work with the couple to:
Identify and prioritize the concerns of each person.
Resolve conflict effectively.
Develop and support effective co-parenting skills.
Enable the family and involved professionals to enhance communication and to reduce misunderstandings.
Keep the collaborative process moving toward resolution.
Refer the client to an appropriate professional if therapy or counseling is warranted or desired.

ROLE OF THE COLLABORATIVE ATTORNEY

Collaborative attorneys will:
Provide legal education and advice.
Represent the interests of his/her respective client while maintaining the overall

goal of a collaborative settlement process.
Work collaboratively with the other attorney and the rest of the team.

ROLE OF THE FINANCIAL SPECIALIST

The financial specialist will:
Provide ongoing practical financial education including planning, support and budgeting throughout the divorce process.
Assist the parties in compiling, documenting and understanding income and expenses, assets and debts, and current and projected tax effects and the future financial ramifications of potential settlement options.

ROLE OF THE CHILD SPECIALIST

The child specialist will:
Provide the child with an opportunity to share feelings, voice concerns and ask questions regarding the divorce.
Provide parents with information and guidance to help their children through the process.
Support an effective co-parenting plan by providing information to the divorce coaches.

ROLE OF THE CLIENT

Each client working with the Collaborative Divorce Team agrees to:
Listen to and look at issues from the other spouse's and children's perspective as well as their own.
Work for the best interests of the family as a whole.
Communicate openly and honestly with all members of the Collaborative Divorce Team.
Support an interest-based communication and decision-making process among members of the team.

Confidentiality

You will be asked to sign a consent form allowing the Collaborative Divorce Team to speak freely with each other. This enables the team to facilitate a satisfactory divorce.

What you talk about will remain confidential within the team. Information will not

be disclosed to others outside the team without your consent. The exceptions to this latter provision are as follows: (a) if your divorce coach believes that you may harm yourself; (b) if you express an intention to harm someone else; (c) if there is reasonable suggestion of child abuse or neglect; (d) if required by a judge.

If you or your spouse choose to end the Collaborative Divorce process and begin a traditional adversarial divorce, all materials from coaching sessions remain confidential and may not be used in any court proceedings.

Fees

All meetings will be billed at $150 per hour. Coaching fees are due at the time of the service. Most sessions will be provided in person; however, if extended telephone coaching sessions are needed, these will be billed at $35 per 15-minute segments. In addition, your divorce coach/child specialist may require a $500 retainer fee.

A 24-hour advance notice of cancellation is required. Appointment times are reserved for your exclusive use, so you will be charged the full fee of $150 for late cancellations or missed appointments.

Election to Terminate

If the client decides that the Collaborative Divorce process is no longer viable and elects to terminate the status of the case as a Collaborative Divorce matter, he/she agrees, in writing, to immediately inform the other party, the Divorce Coaches, and the attorneys.

Under no circumstances will the Divorce Coach testify on behalf or against any party who has been named in this agreement. The client herby waives any right to have the Divorce Coach testify in any Court of Law. The client agrees that he/she will not subpoena the Coach to Court.

Limitations

The collaborative divorce process is a positive method to create a cooperative solution to divorce issues; it is not a guarantee of success and cannot eliminate past disharmony and irreconcilable differences.

The clients must be willing, with the assistance and support of the team, to communicate honestly and participate in direct problem-solving and negotiations to create their parenting plan and settlement agreement.

Collaborative Divorce Participation Agreement:

I HAVE READ THE ABOVE STATEMENT IN ITS ENTIRETY, UNDERSTAND THE CONTENT, AND AGREE TO ITS TERMS.

____

(CLIENT PRINTED NAME AND SIGNATURE)
(DATE)

____

(CLIENT PRINTED NAME AND SIGNATURE)
(DATE)

____

(COACH/CHILD SPECIALIST PRINTED NAME AND SIGNATURE)
(DATE)

Sample Retainer Agreement for Financial Specialist

Date

Mr. and Mrs. John Client
100 Main Street
Anywhere, AS 99999

RE: Marriage of John and Mary Client
Case No. 07-FA-0001

Dear Mr. and Mrs. Client:

This letter confirms our understanding of the terms and objectives of our engagement and the nature and limitation of the services we will provide you in your collaborative family law proceeding.

Attorney Smith and Attorney Jones will direct our services with input and direction from you as needed. To the extent required, we will gather and analyze all financial information and other pertinent data and prepare various schedules and analyses to support the documentation necessary for your divorce action. You and the parties in this matter will use the analyses that we prepare for resolution of this matter.

In performing our services, we will rely on the accuracy of the financial information and other pertinent data provided by you. We will not audit, compile or review any information provided or express any opinion or other form of assurance on the information. It is expressly agreed that we will not be responsible for errors or omissions that may occur resulting from failure to provide accurate, reliable and complete information.

We take no responsibility to update our reports for events and circumstances occurring subsequent to the date of its issuance, nor do we warrant or predict the result of final developments in this matter. The reports are not intended to be used for any purposes other than specified in the report letters.

It is understood that our work in this matter is based on joint agreement of the parties and the terms of the Collaborative Stipulation and Order. As such, we are disqualified from appearing as an expert witness for either party to testify as to any matters related to our work product in this process. All notes, work papers, summaries and reports will be inadmissible as evidence in any contested proceedings involving these parties.

Our fees for this matter are based on the time expended at the standard hourly rates for the individuals assigned to this matter. In this case, my hourly rate will be $___ per hour. In addition to fees, we will be reimbursed for any travel and out-of-pocket expenses. Before we begin our work, we request a retainer of $__________.

Our billing policy requires us to submit progress billings on a monthly basis as the work progresses. Bills are due upon presentation. We will submit invoices to each of you for one-half of the billed fees unless we are directed otherwise. Our policy further requires that interest be charged at the rate of 1.0% on any balances that are outstanding for more than 60 days. We reserve the right to discontinue service if bills remain unpaid for more than 90 days.

If the terms and conditions of this proposal are in accordance with your requirements, please sign one copy of this letter as your authorization to proceed and return it to us in the envelope provided along with your retainer payment.

If you have any questions about any of this information, please contact me. Thank you.

Sincerely,

____
Financial Specialist

______________________________ ________________________
Client Date

______________________________ ________________________
Client Date

Parties' Names:	
Four Way Meeting No. _________	Date:

Homework for Next Meeting		
What needs to be done?	Who will be doing?	Date it needs to be completed by.

Agenda for Next Meeting	
Date(s) for next meeting(s):	Location for next meeting:

Meeting Notes/Tentative Agreements:

In the event the parents have disagreements in the future concerning scheduling or any other parenting issue, they will first attempt to resolve any such issues on their own. In the event they are unable to resolve the issue between themselves, they will jointly employ the services of their child specialist, who may meet with each of them as well as interview their children. The parents may choose to involve their coaches at this stage and will do so at the request of either party or the child specialist. Should they be unable to resolve the issue with the input from the child specialist and/or the coaches, they will participate in mediation and make a good faith effort to resolve the parenting dispute. The child specialist and/or the coaches may participate in the mediation process. If no resolution is agreed upon, the parents will participate in a four way meeting with collaborative attorneys before initiating any court action. Pursuant to the Stipulation and Order RE: Collaborative Law, neither the child specialist nor the coaches used in this paragraph may be called as a witness to any court proceeding.

Appendix 1

Mid-Missouri Collaborative and Cooperative Law Association

PARTICIPATION AGREEMENT IN COOPERATIVE LAW PROCESS

This Agreement ("Agreement") is made between _________________________ and _______________________________________ ("the Parties"). The Parties commit to use our best efforts in a Cooperative Law Process ("the Process") to negotiate and fair and reasonable agreement about _______________________________________ _.

We promise to listen carefully to everyone in this Process, provide all information relevant to this matter, try to understand the interests of both Parties (and their loved ones), seek solutions that satisfy the interests of both Parties and any children involved, and treat everyone in the Process with sincere respect. We understand the Process and how it differs from other dispute resolution processes. Therefore, in consideration of our mutual promises, we agree to use the Process as follows.

I. Focus on Direct Negotiation

By making this Agreement, we agree to work hard to negotiate a reasonable agreement in this matter and to direct our lawyers to do so as well. If we reach agreement in the Process, we will direct our lawyers to file in court the agreement and any other appropriate documents.

II. Lawyers' Duty to Serve Their Own Clients

A. Each party has retained an independent lawyer to provide legal advice. We understand that each lawyer has a professional duty to represent his or her own client with competence and diligence and that our lawyers represent only their own clients and not the other party. There is no lawyer-client relationship between one Party and the other Party's lawyer. There is no legal duty of one Party's lawyer to the other Party.

B. We will each direct our lawyer to listen carefully to other party and lawyer, try to understand their interests, seek solutions that satisfy the interests of both Parties, and treat everyone in the Process with sincere respect. Each of us will ask our lawyer to advise us privately if they believe that it is in our interest to use a different approach than we want. We understand that our lawyers are trying to represent our individual interests when they consider how others' interests may affect us and when they give advice with which we may not agree.

III. Confidentiality

Except as we agree in writing, any and all statements made and information provided by Parties and lawyers during the Process shall be considered as settlement negotiations, with all the

confidentiality protections provided by law. We agree to broaden this confidentiality protection by precluding the use of any statement or information for any purpose to the extent allowed by law except as follows. Statements or information cannot be protected as confidential if they (a) assist a criminal or fraudulent act, or (b) give reasonable cause to suspect that a child has been or may be subjected to abuse or neglect. In addition, evidence of a fact disclosed in negotiation that is independently discoverable outside of negotiations is admissible. We agree to be barred and to refrain from disclosing any statement made by any party and from requesting the testimony of any party with regard to statements made during the Process, except as provided above or as we later agree in writing.

IV. Full Disclosure and Information Exchange

We agree to completely and honestly disclose all relevant documents and information in this matter. At least three days before our first meeting in the Process, we shall each provide to the other the following statements notarized under oath: (1) Statement of Marital and Non-Marital Property and Liabilities, (2) Income and Expense Statement, and (3) copies of any existing documents that substantiate each answer made. After the first meeting, we will give complete responses within agreed upon time deadlines to all requests for other relevant documents and information. Relevant information is information needed to make an informed decision. (In other words, we agree to provide all information that we would want to know if in the other party's position.) We shall not take advantage of each other or of miscalculations or inadvertent mistakes of fact or law. If we or our lawyers discover such miscalculations or other mistakes, we will promptly inform each other and direct our lawyers to do the same.

V. Maintaining a Fair and Reasonable Environment During the Process

At the beginning of the Process, we will negotiate interim arrangements to maintain a fair and reasonable environment while we negotiate in the Process. We may agree to submit temporary agreements to court. We will begin the Process by discussing the need for interim agreements to achieve the following goals:

A. Ensure frequent and meaningful contact between parents and children;

B. Ensure adequate financial support for the care of the children;

C. Refrain from transferring, encumbering, concealing or in any way disposing of any property, except in the usual course of business or for the necessities of life and then with a full accounting, if requested;

D. Refrain from harassing, abusing, molesting or disturbing the peace of each other or of any child; and

E. Maintain without change in coverage or beneficiary designation, all existing contracts of insurance covering the life, health, dental or vision of the children and/or the spouse.

F. Other interim issues: ____.

VI. Dealing with Apparent Impasse; Termination of this Agreement

A. If either of us wants to use litigation or administrative agency action to resolve any issues in this matter, we shall do so only after a ten-day "cooling off" period or in case of an emergency. The cooling off period begins by serving a written notice to the other party (or his or her lawyer). During this period, we will discuss with our lawyers every plausible idea for negotiating an appropriate resolution and we shall discuss the hiring of a mediator to help resolve the problems. Such mediation would be voluntary and take place only by our agreement. We shall share equally the mediator's fee and any administrative costs unless otherwise agreed.

B. If we use the courts or an administrative agency to resolve any issues in this matter, we may litigate in a cooperative spirit under this Agreement or we may terminate this agreement.

C. If we litigate under this Agreement, we will direct our Cooperative lawyers to focus solely on the merits of the issues and avoid tactics that would unnecessarily aggravate the conflict. If we terminate the Cooperative Process, we make no such commitment to litigate in a cooperative spirit.

D. Either of us may discharge a Cooperative lawyer to hire another Cooperative lawyer, who would be bound by all the terms of this Agreement. If we discharge a Cooperative lawyer, we (or our lawyer) shall provide prompt written notice to the other party. The opportunity to retain a new Cooperative lawyer shall be available for a period of thirty days from the date of service of the notice. Failure to retain a substitute Cooperative lawyer within the thirty-day period shall constitute a termination of the Process.

E. We have directed our lawyers to withdraw from the Process if one of them believes that his or her client is withholding or misrepresenting relevant information or otherwise undermining the Process. In this situation, the lawyer will not disclose to the other party or the other party's attorney who decided to terminate the process or the reason for the termination.

F. If the Process is terminated, the provisions of this Agreement related to confidentiality shall continue in effect.

VII. Acknowledgment

We have read this Agreement, understand its terms, and agree to comply with it. We understand that by agreeing to this Process, we may give up certain rights, including formal court

procedure rules for discovery of information. We understand that there is no guarantee that we will reach agreement in this Process. We voluntarily enter into this Agreement.

Dated: _____________ Party: ____

Approved as to Form by His/Her Lawyer: ____

Dated: _____________ Party: _______________________________________

Approved as to Form by His/Her Lawyer: ____

Copyright 2006 Mid-Missouri Collaborative and Cooperative Law Association (4/06)

Appendix 2

Boston Law Collaborative, LLC

COOPERATIVE NEGOTIATION AGREEMENT

I. GOAL

We are committed to negotiating the terms of our divorce cooperatively and avoiding litigation.

In this negotiation we are committed to the principles of honesty, cooperation, integrity and professionalism, geared toward ensuring the future well-being of the participants.

Our goal is to avoid, if at all possible, the negative economic, social, and emotional consequences to the participants of protracted litigation. In addition, the parties wish to avoid the publicity and potential harm to our son that could be caused by litigation.

II. PROCESS

We will make every reasonable effort to settle our case without court intervention.

To discourage either party from seeking court intervention, the parties agree to give each other no less than 60 days notice before filing any complaint, motion, or petition in court, in order to provide a "cooling-off" period that will enable the parties to re-assess whether court involvement is needed. During this "cooling-off period" the parties shall make a good faith effort to resolve the matter through mediation. This paragraph shall not prevent either party from seeking court intervention in the event of exigent circumstances.

We agree to give full, prompt, honest and open disclosure of all information pertinent to our case, whether requested or not, and to exchange Rule 401 Financial Statements in a timely manner.

We agree to engage in informal discussions and conferences with the goal of settling all issues.

We recognize that, while the attorneys share a commitment to the process described in this Agreement, (a) each of the lawyers has an attorney-client relationship solely with, and a professional duty to diligently represent, his or her client and not the other party; (b) as such, each of the lawyers may have confidential and privileged communications with his/her client, and (c) such communications are not inconsistent with a cooperative process.

We agree to direct all attorneys, therapists, appraisers, as well as experts and other consultants retained by us, to work in a cooperative effort to resolve issues, without resort to litigation or any other external decision-making process, except as agreed upon.

We agree that commencing immediately: neither party will borrow against, cancel, transfer, dispose of, or change the beneficiaries of any pension, retirement plan or insurance policy or permit any existing coverage to lapse, including life, health, automobile and/or disability held for the benefit of either party without the prior written consent of the other party.

We agree that commencing immediately, neither party will change any provisions of any existing trust or will or execute a new trust or will without the prior written consent of the other party or an order of the court.

We agree that commencing immediately, neither party will sell, transfer, encumber, conceal, assign, remove or in any way dispose of any property, real or personal, belonging to or acquired by either party, without the prior written consent of the other party or an order of the court, except in the usual course of business or investing, payment of reasonable attorneys fees and costs, or for the necessities of life.

We agree that neither party will incur any further debts that would burden the credit of the other, including but not limited to further borrowing against any credit line secured by the marital residence, or unreasonably using credit cards or cash advances against credit or bank cards or will incur any liabilities for which the other may be responsible, other than in the ordinary course of business or for the necessities of life without the prior written consent of the other.

III. CAUTIONS

The parties understand that there is no guarantee that the process will be successful in resolving our case.

We understand that the process cannot eliminate concerns about the irreconcilable differences that have led to the current conflict.

We understand that we are each still expected to assert our own interests and that our respective attorneys will help each of us to do so.

IV. ATTORNEY'S FEES AND COSTS

We agree that both parties' attorneys are entitled to be paid for their services, and an initial task in this matter is to ensure payment to each of them. We agree to make funds available for this purpose.

V. PARTICIPATION WITH INTEGRITY

We will work to protect the privacy and dignity of all involved, including parties, our children, attorneys and consultants. We will refrain from disparaging each other to colleagues, mutual friends, and acquaintances. We will treat as confidential all information about the other party's

medical, psychiatric, or psychological treatment, and refrain from disclosing any such information (except to our own lawyers, therapists, or others with a need to know).

We shall maintain a high standard of integrity and, specifically, shall not take advantage of each other or of miscalculations or inadvertent mistakes of others, but shall acknowledge and correct them.

VI. EXPERTS AND CONSULTANTS

If experts are needed, the parties will consider retaining them jointly, ensure their payment, and share their work product. In the event that either party wishes to consult an expert separately, s/he shall do so with his or her own resources and not with jointly held funds.

VII. NEGOTIATION IN GOOD FAITH

The parties acknowledge that each of our attorneys is independent from the other and represents only one party in this process.

We understand that the process, even with full and honest disclosure, will involve vigorous good-faith negotiation.

We will take a reasoned position in all disputed issues. We will use our best efforts to create proposals that meet the fundamental needs of both of the parties. We recognize that compromise may be needed in order to reach a settlement of all issues.

Although we may discuss the likely outcome of a litigated result, none of us will use the threat of litigation as a way of forcing settlement.

VIII. THE CHILDREN

The parties agree to make every effort to reach amicable solutions about sharing the enjoyment of and responsibility for the children that promote the children's best interests. The parties agree to act quickly to mediate and resolve differences related to the children to promote a caring, loving, and involved relationship between the children and both parents.

The parties acknowledge that inappropriate communications regarding their divorce can be harmful to their children. They agree that settlement issues will not be discussed in the presence of their children, or that communication with the children regarding these issues will occur only if it is appropriate and done by mutual agreement, or with the advice to both parties of a child specialist. The parties agree not to make any changes to the residence of the children without first obtaining the written agreement of the other party.

IX. CONFIDENTIALITY

All communications exchanged within this process will be confidential and without prejudice. If subsequent litigation occurs, the parties mutually agree that (a) neither party will introduce as evidence in Court information disclosed to each other during this process, offers or proposals for settlement, or other statements by any of the parties to the process or their attorneys; and (b) neither party will subpoena the production at any Court proceedings of any notes, records, or documents in the lawyer's possession or in the possession of one of the consultants. However, non-privileged information which is independently obtained (i.e., not in this process) and admissible shall not be rendered confidential or inadmissible because it is referred to or produced in this process. In addition, neither party will offer as evidence the testimony of either attorney, nor will they subpoena either of the lawyers to testify, in connection with this matter.

X. VOLUNTARY TERMINATION OF THIS PROCESS

Either party may unilaterally and without cause terminate this process by giving written notice of such election to his or her attorney and the other party.

Either attorney may withdraw unilaterally from this process by giving fifteen (15) days written notice to his or her client and the other attorney. Notice of withdrawal of an attorney does not terminate this process; to continue the process, the Party whose attorney withdraws will seek to retain a new attorney who will agree in writing to be bound by this Agreement.

Upon termination of this process or withdrawal of either counsel, the withdrawing attorney will promptly cooperate to facilitate the transfer of the client's file and any information needed for continued representation of the client to successor counsel.

XI. ABUSE OF THE PROCESS

We enter this process with the expectation of honesty and full disclosure in all dealings by all individuals involved in the spirit of collaboration.

Each party understands that his/her attorney will withdraw from our case as soon as possible upon learning that his or her client has failed to uphold this Agreement or acted so as to undermine or take unfair advantage of the process. Such failure or abuse of the process would include the withholding or misrepresentation of information, the secret disposition of marital property, the failure to disclose the existence or the true nature of assets and or obligations, or otherwise acting to undermine or take unfair advantage of this process.

XII. PLEDGE

Both parties and their attorneys hereby pledge to comply with and to promote the spirit and letter of this agreement, unless modified by written agreement signed by both parties and their attorneys.

______________________________	______________________________
Name of Party Date:	Name of Party Date:
______________________________	______________________________
Name of Attorney Attorney for ____________________ Date:	Name of Attorney Attorney for ____________________ Date:

Appendix 3

Divorce Cooperation Institute

Principles of the Process

Both parties and attorneys commit in good faith to do the following:

- Cooperate by acting civilly at all times and by responding promptly to all reasonable requests for information from the other party.
- Cooperate by fully disclosing all relevant financial information.
- Cooperate by obtaining joint appraisals and/or other expert opinions before obtaining individual appraisals or expert opinions.
- Cooperate by obtaining meaningful expert input (e.g., a child specialist) before requesting a custody study or the appointment of a guardian ad litem
- Cooperate in good faith negotiation sessions, including 4-way sessions where appropriate, to reach fair compromises based on valid information.
- Cooperate by conducting themselves at all times in a respectful, civil and professional manner.

©2007 *Divorce Cooperation Institute, Inc. All Rights Reserved.*

Appendix 1: Limited Scope Agreement

LAW & MEDIATION OFFICES OF
FORREST S. MOSTEN

ATTORNEYS AND MEDIATORS
FORREST S MOSTEN*

11661 SAN VICENTE BOULEVARD, SUITE 414
LOS ANGELES, CALIFORNIA 90049
TELEPHONE (310) 473 7611
FACSIMILE (310) 473-7422

LOUIS M. BROWN CLIENT LIBRARY

DISUTE RESOLUTION ASSISTANT

*CERTIFIED FAMILY LAW SPECIALIST
CALIFORNIA BOARD OF LEGAL SPECIALIZATION

E-MAIL – mosten@mediate.com
website www.MostenMediation.Com

PRACTITIONER MEMBER
Association of Conflict Resolution

LIMITED SCOPE CLIENT-LAWYER AGREEMENT

This Agreement is made between Attorney and Client as designated at the end of this agreement.

1. Nature of Agreement. This Agreement describes the relationship between the Attorney and Client.

Specifically, this Agreement defines:

a) The general nature of Client's case:
b) The responsibilities and control that Client agrees to retain over the case;
c) The services that Client seeks from Attorney in his/her capacity as attorney at law;
d) The limits of Attorney's responsibilities:
e) The immunity from civil liability granted to the Attorney for services not provided by Attorney;
f) Methods to resolve disputes between Attorney and Client;
g) The method of payment by Client for services rendered by Attorney.

2. Nature of Case. The Client is requesting services from Attorney in the following matter:
____

____

3. **Client Responsibilities and Control.** The Client intends to handle his/her own case and **understands that** he/she will remain in control of the case and be responsible for all decisions made in the course of the case.

The Client agrees to:

a) Cooperate with Attorney or office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services:
b) Keep Attorney or office advised of Client’s concerns and any information that is pertinent to Client's case:
c) Provide Attorney with copies of all correspondence to and from Client relevant to the case
d) Keep all documents related to the case in a file for review by Attorney.

4. Services Sought by Client. The Client seeks the following services from Attorney:

____ 1. Legal advice office visits. telephone calls, fax, mail, E-mail;
____ 2. Advice about availability of alternative means to resolving the dispute, including mediation and arbitration:
____ 3. Evaluation of Client's self-diagnosis of the case and advising Client about legal rights;
____ 4. Guidance and procedural information for filing or serving documents;
____ 5. Review correspondence and court documents;
____ 6. Prepare and/or suggest documents to be prepared;
____ 7. Factual investigation: contacting witnesses, public record searches, in-depth interview of client;
____ 8. Legal research and analysis;
____ 9. Discovery: interrogatories. depositions, **requests for document production;**
____ 10. Planning for negotiations, including simulated role playing with Client;
____ 11. Planning for court- appearances made by Client, including simulated role playing with Client;
____ 12. Backup and troubleshooting during the trial;
____ 13. Referring Client to other counsel, expert or **professional;**
____ 14. Counseling Client about an appeal;
____ 15. Procedural assistance with an appeal and assisting with substantive legal argumentation in an appeal;
____ 16. Provide preventive planning and/or schedule legal check-ups;
____ 17. Other:

5. **Attorney's Responsibilities** The Attorney shall exercise due **professional care and observe** strict confidentiality in providing the services identified by a check mark in **Paragraph 4 above. In providing those** services, Attorney SHALL NOT

a) Represent, speak for, appear for, or sign papers on the Client's behalf; b) Provide services in Paragraph 4 which are not identified by a check mark; or c) Make decisions for Client about any aspect of the case.

6 **.Method and Payment for Services**

a) **Hourly fee** The current hourly fee charged by Attorney for services under this agreement is as follows:

Senior Partner:	$________
Junior Partner:	$________
Associate:	$________
Paralegal:	$________
Document Preparer:	$________

Unless a different fee arrangement is specified in clauses (b) or (c) of this Paragraph, the hourly fee shall be payable at the time of the service

b) **Payment from Retainer.** The Client shall have the option of setting up a deposit fund with Attorney, out of which payment for services may be made as they occur. If a retainer is established under this clause, Attorney shall mail Client a billing statement summarizing the

type of services performed. the costs and expenses incurred, and the current balance in the retainer after the appropriate deductions have been made. Client may optionally replenish the retainer or continue to draw the fund down as additional services are delivered. If the retainer becomes depleted, Client shall pay for additional services as provided in clauses (a) or (c) of this Paragraph.

c) **Flat Rate Charges.** The Attorney may optionally agree to provide one or more of the services described in Paragraph 4 at a flat rate. Any such agreement shall be set out in writing, dated, signed by both Attorney and Client and attached to this Agreement.

d) **Attorneys' Fees.** Should it be necessary to institute any legal action for the enforcement of this Agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorneys' fees incurred in such action from the other party. 7. **Resolving Disputes Between Client and Attorney.**

a) Notice and Negotiation. If any dispute between Client and Counselor arises under this Agreement, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purposes of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.

b) Mediation. If the dispute is not resolved through negotiation, Client and Attorney shall attempt, within fifteen (15) days of failed negotiations. to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If Attorney and Client cannot agree on a neutral mediator, they shall request that the Beverly Hills Bar Association select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of mediation, provided that payment or the costs and any Attorneys' fees may also be mediated.

c) **Arbitration.** If mediation fails to produce a full settlement of the **dispute satisfactory to both Client** and Attorney, Client and Attorney agree to submit to binding arbitration under the **rules of the Los Angeles** County Bar Association. This arbitration must take place within sixty (60) days of the failure of mediation. Fees and Attorneys' fees for arbitration and prior mediation may be awarded to the prevailing party.

3. **Amendments and Additional Services.** This written Agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this Agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 4, a photocopy of Paragraph 4 that clearly denotes which extra services are to be provided, signed and dated by both Attorney and Client and attached to this Agreement shall qualify as an amendment.

Civil Immunity for Counsel. Client hereby waives any right to prosecute a claim of professional negligence against Attorney for any service not specifically set forth by a check mark or actually undertaken by lawyer in paragraph 4 of this Agreement. The Client grants to Attorney complete immunity from civil liability arising from all aspects of the case not specifically undertaken by the Attorney. Client acknowledges that many attorneys will not offer limited scope representation due to the fear of malpractice claims by clients who later find **or believe that the** limited scope representation was not sufficient to properly protect the client. The Client acknowledges that retaining an attorney for limited scope representation is a consumer choice by the Client based on Client's desire to lower fees, maintain client control and belief that the Client can competently handle **all issues and tasks not** specifically undertaken by Attorney. Client agrees to bear the full

risk **of any damage caused to the Client** due to the Client handling the matter without specifically requested legal **services from the Attorney.** Such waiver of malpractice claims does not extend to those services which the Attorney undertakes to render on behalf of the Client as instructed by the Client. The Attorney represents that the law firm carries Professional Liability Insurance as required by the State Bar of California.

10. **Statement of Client's Understanding.** I have carefully read this **Agreement and believe that I understand** all of its provisions. I signify my agreement with the following statements **by initialing each one:**

_____ I have accurately described the nature of my case in Paragraph 2;

_____ I will remain in control of my case and assume responsibility for my case as described in Paragraph 3;

_____ The services that I want Attorney to perform in my case are identified by check marks in Paragraph 4. I take responsibility for all other aspects of my case;

I accept the limitations on Attorney's responsibilities identified in Paragraph 5 and understand that if I make mistakes in handling my own case, **I have granted the Attorney** immunity from being sued for professional malpractice. This means that I cannot sue and/or recover from the Attorney regardless of the damage I might suffer;

____ I shall pay Attorney for services rendered as described in Paragraph 6; ~

____ I will resolve any disputes I have with Attorney under this Agreement in the manner |described in Paragraph 7;

____ I understand that any amendments to this Agreement shall be in writing, as described in Paragraph 8;

____ I acknowledge that I have been advised by Attorney that I have the right to consult another independent Attorney to review this Agreement and **to Advise me on my rights as** a Client before I sign this Agreement.

Dated: Signed: ________________________________
CLIENT

Dated: Signed: ________________________________
ATTORNEY

Knowledge and Information Services

Access and Fairness

Self-Representation

Unbundling Rules

State Links

Alaska	Illinois	Minnesota	Oklahoma	Virginia
Arizona	Indiana	Mississippi	Pennsylvania	Washington
California	Kansas	Montana	Rhode Island	West Virginia
Colorado	Kentucky	Nebraska	South Carolina	Wyoming
Delaware	Louisiana	Nevada	South Dakota	
Florida	Maine	New Hampshire	Tennessee	
Georgia	Maryland	New Mexico	Texas	
Hawaii	Massachusetts	North Carolina	Utah	
Idaho	Michigan	North Dakota	Vermont	

Alaska

Alaska Court Rules of Professional Conduct, Rule 1.2, Scope of Representation. Includes limited-scope representation rules and rules about clients that expect out-of-scope representation.

Arizona

17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.2c. "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Note: One must fill out a brief online form to access the rules.

California

California Rules of Court, Rule 5.70. Deals with nondisclosure of attorney assistance in preparation of court documents. Permits a lawyer to draft pleadings in family law matters without disclosure.

California Rules of Court, Rule 5.71, Application to Be Relieved as Counsel upon Completion of Limited Scope Representation. Details the procedure governing limited appearances in family law matters.

Colorado

Colorado Rules of Civil Procedure and Rules of Professional Conduct enabling unbundled services.

a) C.R.C.P. 11, requiring lawyers who prepare pleadings in limited representation to sign them.

b) C.R.C.P. 121, clarifying that the preparation of pleadings does not constitute an appearance.

c) RPC 1.2, clarifying that a lawyer may ethically provide limited services.

d) RPC 4.2 and 4.3, creating a presumption that a party receiving limited services is unrepresented insofar as communications with the party are concerned.

Delaware	**Delaware Lawyer Rules of Professional Conduct, Rule 1.2, Scope of Representation**. Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.
Florida	**Florida Rule of Professional Conduct 4-1.2(c).** Explicitly permits limited representation, but consent must be in writing. **Florida Rule of Professional Conduct 4-4.2(b**). Establishes the presumption that a self-represented party is unrepresented unless notified to the contrary in writing.
Georgia	**Georgia Rules of Professional Conduct, Rule 1.2, Scope of Representation**. An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1: Competence, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue. The agreement should be in writing.
Hawaii	**Hawaii Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Idaho	**Idaho State Bar Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Illinois	**Illinois Supreme Court Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Indiana	**Indiana Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Kansas	**Kansas Supreme Court Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Kentucky	**Kentucky Rules of Court SCR 3.130(1.2), Scope of Representation**
Louisiana	**Louisiana Supreme Court Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Maine	**Maine Bar Rules enabling unbundled legal services** include: a) Maine Bar Rule 3.4(i), explicitly allowing limited representation and allowing a lawyer to file a limited appearance if the client consents in writing; b) Maine Bar Rule 3.5(a)(4) and 3.6(a)(2), clarifying limited representation;

c) Maine Bar Rule 3.6(f), permitting opposing counsel to communicate with assisted pro se client unless unbundling attorney notifies opposing attorney of representation;

d) Maine Bar Rule 3.4(j), for nonprofit and legal service programs, imputed conflicts issue only if attorney knows of conflict;

e) Attachment A to Maine Bar Rule 3.4(i), Limited Representation Agreement.

Maine Rules of Civil Procedure enabling unbundled legal services include:

a) Maine Rule of Civil Procedure 5 governing service;

b) Maine Rule of Civil Procedure 11 governing the signing of pleadings;

c) Maine Rule of Civil Procedure 89(a) governing the withdrawal of attorneys.

Maryland	**Maryland Rules of Professional Conduct, Rule 1.2, Scope of Representation**. Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.
Massachusetts	**Massachusetts Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Michigan	**Michigan Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Minnesota	**Minnesota Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Mississippi	**Mississippi Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Montana	**Montana Rules of Professional Conduct, Rule 1.2, Scope of Representation**. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
Nebraska	**Nebraska Rules of Professional Conduct, Rule 1.2, Scope of Representation**. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
Nevada	**Rules of Practice of the Eighth Judicial District Court of the State of**

	Nevada, Rule 5.28. Requires signed pleadings and a notice of the limited representation to the court and governs the procedure for withdrawal.
New Hampshire	**New Hampshire Rules of Professional Conduct, Rule 1.2, Scope of Representation**
New Mexico	**Rules 16-102 and 16-303 NMRA, Scope of Representation and Candor Toward the Tribunal**
North Carolina	**North Carolina Rules of Professional Conduct, Rule 1.2, Scope of Representation.** Does not require written consent for limited-scope representation.
North Dakota	**North Dakota Supreme Court Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Oklahoma	**Oklahoma Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Pennsylvania	**Pennsylvania Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Rhode Island	**Rhode Island Supreme Court Rules of Professional Conduct, Rule 1.2, Scope of Representation**
South Carolina	**South Carolina Rules of Professional Conduct, Rule 1.2, Scope of Representation**
South Dakota	**South Dakota Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Tennessee	**Tennessee Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Texas	**Texas Rules of Professional Conduct, Rule 1.02, Scope of Representation**. "A lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved. If a lawyer has represented a client over a substantial period in a variety of matters, the client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice to the contrary. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the clients affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter."

Utah	**Utah Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Vermont	**Vermont Rules of Professional Conduct, Rule 1.2, Scope of Representation**
Virginia	**Virginia Rules of Professional Conduct, Rule 1.2, Scope of Representation**

Washington

Washington Rules of Professional Conduct governing unbundling include:

a) **RPC 1.2(c)**, permitting the limited scope of representation with consent;

b) **RPC 4.2(b**), creating a presumption that a person is unrepresented unless opposing party is notified otherwise;

c) **RPC 4.3(b),** creating a presumption that a person is unrepresented unless opposing party is notified otherwise;

d) **RPC 6.5**, governing the responsibility to determine conflicts in nonprofit and court-annexed limited-service programs.

Washington Civil Rules and Washington Civil Rules of Limited Jurisdiction governing unbundling include:

a) **CR 4.2**, expressly permitting limited entry of appearance;

b) **CRLJ 4.2**, governing limited appearances;

c) **CR 11**, permitting a lawyer who assists with drafting to rely on the self-represented party's representation of facts;

d) **CLRJ 11**, permitting a lawyer who assists with drafting to rely on the self-represented party's representation of facts;

e) **CR 70.1**, expressly allowing limited appearances in litigation;

f) **CRLJ 70.1**, expressly allowing limited appearances in litigation.

West Virginia

West Virginia Rules of Professional Conduct, Rule 1.2, Scope of Representation

Wyoming

Wyoming Rules of Professional Conduct 1.1, 1.2(c), and 6.5. Govern unbundled legal services.

Appendix to Rule 1.2, Provides an approved notice to clients and consent form.

State Profiles **Top**

Return to State Links

All or any parts of this Resource Guide may be reproduced and distributed, for nonprofit educational purposes with attribution to the **National Center for State Courts' Knowledge and Information Services**.

Copyright 2008. National Center for State Courts. All Rights Reserved.

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California - 180 Howard Street - San Francisco, CA 94105 - (415) 538-2251- (415) 538-2524/fax

HON. ROSEMARY PFEIFFER
Co-Chair
Superior Court of San Mateo County
San Mateo

GEOFFREY L. ROBINSON
Co-Chair
Bingham McCutchen
Walnut Creek

RAMON ALVAREZ
Alvarez Lincoln/Mercury
Riverside

MARCIA BELL
San Francisco Law Library

ROBIN C. CRAWFORD
Pacifica

KATHRYN EPPRIGHT
Andre Morris & Buttery
San Luis Obispo

DR. HALFORD FAIRCHILD
Los Angeles

STEVEN M. GEVERCER
Legislative Affairs
Office of the Attorney General
Sacramento

LAUREN HALLINAN
San Francisco

HON. TERRY J. HATTER
U.S. District Court
Los Angeles

JAMES E. HERMAN
Reicker, Pfau, Pyle, McRoy & Herman, LLP
Santa Barbara

HON. MARTIN J. JENKINS
U. S. District Court – Northern District
San Francisco

HON. JAMES R. LAMBDEN
Court of Appeal, 1st Appellate District
San Francisco

ROBERT L. LIEFF
Lieff, Cabraser, Heimann & Bernstein
San Francisco

FRED L. MAIN
California Chamber of Commerce
Sacramento

SYLVIA MARTIN-JAMES
Retired, Riverside Unified School District
Riverside

PROFESSOR JAMES MEEKER
University of California-Irvine

DOUGLAS W. OTTO
Law Offices of Douglas W. Otto
Long Beach

JULIE S. PAIK
Child Support Services Department
Commerce

TONY L. RICHARDSON
Kirkland & Ellis
Los Angeles

DAVID ALAN ROSEN
Rose Klein & Marias
Los Angeles

TOBY J. ROTHSCHILD
Legal Aid Foundation of Los Angeles
Long Beach

HON. RONALD L. TAYLOR, RET.
Superior Court of Riverside County
Riverside

MARSHALL WALKER, III
Local 790 SEIU
Oakland

MARY C. VIVIANO
Director, Legal Services Outreach
State Bar of California
San Francisco

January 12, 2004

FAMILY LAW LIMITED SCOPE REPRESENTATION

RISK MANAGEMENT MATERIALS

The Limited Representation Committee of the California Commission on Access to Justice is pleased to send you this Family Law Limited Scope Representation Risk Management packet.

It is important that limited scope representation ("unbundling") be done competently and ethically. These materials are designed to help advocates do just that. Among the documents are suggested guides and standards on best practices, sample fee agreements, checklists, and recently approved Judicial Council forms. Attorneys should modify these materials for use in their own practice.

The committee is very interested in hearing from those who use these materials and have any feedback or suggestions for future additions.

Please contact:

Chris Zupanovich
Legal Services Outreach
Office of Legal Services, Access & Fairness Programs
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
(415) 538-2534 FAX: (415) 538-2524
chris.zupanovich@calbar.ca.gov

FAMILY LAW LIMITED SCOPE REPRESENTATION

RISK MANAGEMENT MATERIALS

Limited Representation Committee
California Commission on Access to Justice

January 12, 2004

Family Law
Limited Scope Representation

Draft Risk Management Materials

Limited Representation Committee
California Commission on Access to Justice

Toby Rothschild, Chair
Limited Representation Committee
Commission on Access to Justice
c/o Legal Aid Foundation of Los Angeles
110 Pine Avenue
Long Beach, CA 90802
(213) 640-3892 FAX (562) 435-7118

M. Sue Talia, Chair
Subcommittee on
Disclosures & Agreements
Limited Representation Committee
Commission on Access to Justice
P. O. Box 2335
Danville, CA 94526-7335
(925) 838-2660 FAX: (925) 743-1614

Mary Viviano, Director
Legal Services Outreach
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
(415) 538-2251 FAX (415) 538-2524

PREAMBLE

These materials are suggested forms, guidelines and handouts which have been developed to use in limited scope representation matters. They offer a variety of suggestions that you should tailor to your particular practice. Each case, each client, and each opportunity for limited scope representation presents its own unique professional and ethical issues and nothing in these materials is intended to be a substitute for your own professional judgment and opinion.

Family Law Limited Scope Representation
Risk Management Package
Table of Contents

		Page
	Introduction: Instructions for Using this Set of Draft Risk Management Materials	5
1.	Limited Scope Representation Description (client handout)	8
2.	Best Practices for Limited Scope/Discrete Task Legal Services Looking at issues of liability and good practice	10
3.	Flow Charts	
	• Limited Scope Representation Flow Chart for Attorneys	16
	• Limited Scope Representation Flow Chart for Clients	17
4.	Initial Interview Checklist	19
5.	Tasks/Issues to be Apportioned (explanation)	21
	Tasks/Issues Lists	
	• Tasks to be Apportioned	22
	• Issues to be Apportioned	24
6.	Sample Fee Agreements	
	Fee Agreement #1 – Single Consultation Agreement	27
	Fee Agreement #2 – Consulting Services Agreement	28
	Fee Agreement #3 – Ongoing Consulting Agreement	33
	Fee Agreement #4 – Limited Representation Agreement including Court Appearance	39
7.	Sample Change in Scope Letter	44
8.	Checklists:	
	• Follow-up Checklist	46
	• Tickler Checklist (to document your file)	47
	• Other suggested client handouts (information being compiled)	48
9.	Sample Closing Letter	50
10.	***Appendices***	
	Appendix 1:	
	Judicial Council Report and Rules, adopted April 15, 2003, effective July 1, 2003	53
	• Report	
	• Rule 5.170: Nondisclosure of attorney assistance in preparation of court documents (Now Rule 5.70)	
	• Rule 5.171: Application to be relieved as counsel upon completion of limited scope representation (Now Rule 5.71)	
	Appendix 2:	
	a. Judicial Council Forms, adopted April 15, 2003, effective July 1, 2003	64
	• FL-950: Notice of Limited Scope Representation	
	• FL-955: Application to be Relieved as Counsel Upon Completion of Limited Scope Representation	
	• FL-956: Objection to Application to be Relieved as Counsel Upon Completion of Limited Scope Representation	
	• FL-958: Order on Application to be Relieved as Counsel Upon Completion of limited Scope Representation	
	b. Flow Chart: How to Withdraw from Limited Scope Representation after a Court Appearance	73
	Appendix 3:	
	20 Things Judicial Officers Can Do to Encourage Attorneys to Provide Limited Scope Representation	75
	Appendix 4:	
	Limited Scope Legal Assistance List of Resources	78

INSTRUCTIONS FOR USING THIS SET OF DRAFT RISK MANAGEMENT MATERIALS

Attached is a package of family law risk management materials designed to help you document your file and ensure that you and the client are in agreement on the limitations on the scope of your representation, which tasks you are going to perform and, more importantly, which ones you are NOT going to perform. They are designed as templates which should be tailored to your needs. Since limited scope arrangements can be fluid, it is essential that you document not only the limitations in scope, but ALL changes to the scope and the representation's ultimate conclusion. They include a number of checklists to document the limitations, and note any changes, which are designed to allow you and your staff to easily track these issues so nothing is overlooked.

Use your judgment in tailoring the forms. You may use some or all of them, modify others, and select which ones best suit a given limited scope arrangement. A brief overview of the materials and their intended use follows:

1. **Limited Scope Representation Description (Client Handout)**. This form was designed to educate the client about the options available for limited scope representation. Modify it to reflect your practice. Many clients will initially be unfamiliar with the many ways in which they can participate in their own representation. This form, or a variation, will help you educate them on the ways you can assist them in a limited scope context. Use it as a basis for discussion as you do your intake and evaluate their legal needs. Give them a copy and note on the tickler checklist the date on which you did so.

2. **Best Practices Tips**. These are designed to assist you in flagging the areas of special concern in limited scope representation. Read them carefully and add to them as new issues arise in your practice. Check for updates at http://www.unbundledlaw.org/.

3. **Flow Charts**. There are two flow charts designed to visually set forth the steps from both the client's and the attorney's perspective. Use the client flow chart as a handout as part of educating your client on the options for limited scope. Use the attorney one as a tool to document your own file.

4. **Sample Intake Sheet.** Tailor this form for use as an intake tool for every new limited scope family law client. Note the topics discussed, included related topics about which you advised them, and use it to document your discussions about the nature and scope of your representation. Before the client leaves, you should each initial it, and then give the client a copy. Do a new one each time a new issue comes up.

5. **Sample Tasks to be Apportioned/Issues to be Apportioned Checklists.** Use these forms to document the issues you discussed with the client, the apportionment of responsibility, and to identify the areas where the client agrees you are not to assume responsibility. You should each initial it and the client should take a copy. ***Do a new one each time the scope changes***, initial and date it, give a copy to the client and note on the Tickler Checklist the date on which you did this. If you're defining the limited scope in an attachment to your fee agreement rather than in the body, use these as attachments and modify them as needed. Attach these forms as the exhibits to Fee Agreement #4 at page 39, or any other fee agreement where the limitation on scope is in an attachment rather than the body of the agreement.

6. **Sample Fee Agreements.** Four sample fee agreements are contained in Section 6, each tailored to a different form of limited scope representation, from a single appointment/single task to coaching, ongoing consulting, document preparation, and making court appearances. ***Do not perform services until you have a signed agreement limiting the scope of your involvement. If the scope changes, do a new agreement***. If the form of agreement you use includes a checklist to define the scope, do a new checklist to document the changed scope, sign and date (both attorney and client). Don't just send a confirming letter to the client. If the scope changes, attach the tasks/issues checklists. Check for others at the following web site: http://www.unbundledlaw.org.

7. **Sample Change of Scope Letter**. This is a sample letter to send the client when the scope changes. The change in scope usually occurs either when a new issue arises which was unanticipated in the initial allocation of tasks, or the client finds s/he is unable to competently perform the tasks s/he has undertaken and asks the attorney to take it back.

8. **Sample Follow Up Checklist**. This form is designed to keep track of who is responsible for performing which tasks in an ongoing limited scope representation. Fill it out as you talk to your client about responsibilities, give a copy to the client and retain one for your records. Use it as often as necessary.

9. **Sample Tickler Checklist**. This is the key to keeping track of all of the above. Tailor it to your specific needs, photocopy it on brightly colored paper and keep it on top of your file. Note the dates on which you obtained each of the checklists, retainer letters, documentation of changes in scope, and file closing. Add other tasks and forms which you find recur in your practice and train your staff to keep the checklist current.

10. **California Judicial Council Forms.** These forms became effective July 1, 2003. File and serve a Notice of Limited Scope only if you are going to go of record or make a court appearance in California, and serve the client and opposing counsel with copies. If you went of record or appeared in court, and if the client does not sign a substitution of attorney, use the Application to be Relieved and Order to document the end of your involvement. Instructions for use of the forms are included.

11. **Other Handouts**. You will do your clients a service if you collect or create other handouts which will assist them in performing their agreed-upon tasks. A list of suggested additional client handouts is included. Consider gathering these materials and making them available to your clients. They augment others which you may have developed for internal use, such as descriptions of how to obtain a *pro per* restraining order, divide personal property, and other similar issues which recur frequently. When creating them, include mapquest directions to your local court and family law facilitator, Family Court Services, DCSS (child support collection), and information on self-help web sites, and programs (*pro bono*, legal aid, modest means panels and the like). If you offer services in a language other than English, provide these materials in the primary language of the client.

12. **Sample Closing Letter.** It is equally important to document your exit from the case as it is your entry into the case. When you have performed all the tasks for which you were engaged, tailor the Sample Closing Letter to clearly communicate that fact to the client. Invite the client to advise you immediately if s/he disagrees that all tasks for which you were engaged are completed. If you have made an appearance as part of your representation, file either a Substitution of Attorney or use the Judicial Council Forms (#10 above).

SECTION 1

Limited Scope Representation Description
(Client Handout)

LIMITED SCOPE REPRESENTATION DESCRIPTION

What is limited scope representation?

Limited scope representation (sometimes called "unbundling") is a way that an attorney can help you with part of your case while you do the rest of your case. For example:

1. You can consult with an attorney to prepare or review your paperwork, but attend the hearing yourself;
2. You can represent yourself through the whole case, and periodically consult with an attorney who can coach you on the law, procedures and strategy;
3. You can do the preparation yourself and hire an attorney just to make the court appearance for you;
4. You may want to do your own investigation of the facts ("discovery") and ask the attorney to assist you in putting the information in a format which is useful to the court;
5. You may ask the attorney to be on "standby" while you attend the settlement conference yourself.

With limited scope assistance, you may be able to handle the whole case yourself, except for a few technical areas, such as pension rights, where the attorney can help you. It really is between you and the attorney how much of your case you hire them to do. If you do this, it is important to keep returning to the same attorney. Otherwise, you're paying a new person to get up to speed on your case each time that you consult.

Some areas of the law are *extremely technical* and it is rare for non-attorneys to effectively handle them. Among these are pension rights, stock options, and business interests. You will almost certainly need the assistance of an attorney if your case involves any of these issues.

Why it is important to discuss your case thoroughly with your attorney

It is important to thoroughly discuss **all aspects** of your case (even those which **you** think are simple) with your attorney before deciding which parts you want to do yourself and which ones the attorney will assist you with. It is equally important to realize that there may be important issues presented by your case that you aren't even aware of. You could be at serious legal risk about an issue you don't even realize exists. If you don't discuss them with your attorney, how will you know?

Never make assumptions about the law which applies to your case. **The law shows you've seen on TV are rarely accurate,** and just because you've "seen it on TV," doesn't mean it is correct, or even "legal." The **only** way you know this is to talk it over with a qualified attorney.

Sometimes new issues will pop up after your case is started. If they do, it is important to advise your attorney and discuss them, so that you know the potential legal consequences to you. Remember that your attorney can only advise you on matters you tell him/her about, so it is essential that you provide complete information about your case.

Remember, you and your attorney are working as a team. That means good communication and a clear understanding of each person's assignments is essential.

SECTION 2

Best Practices for
Limited Scope/Discrete Task Legal Services
Looking at Issues of Liability and Good Practice

Best Practices for Limited Scope/Discrete Task Legal Services: Looking at issues of liability and good practice

Limited Scope/Discrete Task Legal Services (sometimes called “unbundling”) refers to matters in which a client hires an attorney to assist with specific elements of a matter such as legal advice, document preparation or document review, and/or limited appearances. The client and attorney agree on the specific discrete tasks to be performed by the client and the attorney. Depending on the nature of the attorney's involvement, the attorney may or may not enter an appearance with the court. The client represents him/herself in all other aspects of the case.

The special issues governing limited scope fall into three general categories:

1. **The limitations on scope must be informed and in writing;**
2. **Changes in scope must be documented;**
3. **An attorney has an affirmative duty to advise the client on related matters, even if not asked.**

The following guidelines are designed to assist attorneys in addressing and avoiding malpractice liability in a limited scope/discrete task representation. Limited scope representation does not differ substantially from the rest of your practice, and most of the suggestions which follow are equally applicable to full scope service. However, there are some specialized issues which require consideration.

It is important to note that limiting the scope of your representation does not limit your ethical obligations to the client, including the duty to maintain confidentiality, the duty to act competently, the duty not to communicate with another person known by you to be represented by legal counsel in the matter (absent written permission from counsel to do so), and the duty to avoid conflicts of interest. It is also important to note that limiting the scope of your representation does not limit your exposure to liability for work you have agreed to perform, nor is such a limitation permissible.

Deciding on whether to take the case

1. **Work within your expertise.** As with full scope service, strongly consider rejecting a limited scope matter in areas of law in which you or your firm have little or no experience. Taking a case for the “learning experience” is unwise in limited representation, or any representation. It takes significant expertise in family law to be able to anticipate what issues will arise in a matter, and it is necessary to give good counsel and avoid liability. **Even where your representation is limited to particular tasks, you may still owe a duty to alert the client to legal problems outside the scope of your representation that are reasonably apparent and that may require legal assistance. Therefore, you should inform the client not only of the limitation of your representation, of the possible need for other counsel regarding issues you have not agreed to handle.**

2. **Don't be pressured by emergencies.** Pay particular attention to prospective clients who have last-minute emergencies and seek limited scope representation. Limited scope representation does not mean that you do not have to provide competent assistance or zealous advocacy. Being pressured to conduct a "quick document review" because of an upcoming deadline is much riskier if you will only be involved in that brief transaction. Consider advice on ways to move the deadline, if possible, to allow adequate time for review or representation.

3. **Be wary of clients who take a "musical chairs" approach to finding legal help.** Consider carefully the requests from prospective limited scope clients who have involved multiple attorneys in the same case. Bouncing around may be an indicator that the client is searching for the "right" answer after being given what they believe are unsatisfactory responses to previous analyses of their situation. You should avoid helping to facilitate situations in which a client may blame you for his/her discontent with the outcome. *On the other hand*, you may find that previous attorneys were uncomfortable with taking a "piece" of the case and that your prospective client simply had trouble finding an attorney like yourself who was willing to work effectively with them on a limited scope basis. The client may have been viewed as "difficult" because s/he was seeking more of a partnership relationship than the traditional full scope representation envisions.

4. **Be careful of clients who have unrealistic expectations.** A prospective client may be unrealistic about what s/he can achieve alone or about the nature of your limited scope representation. Part of your obligation in offering limited scope services is to teach the client about the legal system and the available remedies. Few non-attorneys will arrive on your doorstep with totally realistic expectations. Their beliefs are likely to have been shaped by what they have seen on TV, what they believe is fair, or what they have been told by neighbors or friends. You bring your knowledge and experience with the legal system to the relationship. If you believe that you will not be successful at reining in a client's unrealistic expectations, you should decline the representation. It is important that the *pro se* litigants "hear" your advice in order to partner successfully with you in the representation and carry out a plan with your guidance. Not every client is temperamentally suited to representing him/herself.

5. **Clients with limited capacity or language barriers may not be good candidates.** Since limitations on scope by definition must be informed and in writing. Clients who lack the capacity to give informed consent or assist in their own representation should be avoided. If the limitation is mental, the client is probably not a good candidate. If the limitation is one of language (and many potential limited scope clients have limited English skills) special issues are presented. If you are not bilingual yourself, you should insist on a translator. It is your responsibility to ensure that the client understands the limitations on scope and has the capacity to assist in their representation. This is an individualized assessment. Be creative in your fees or look for sources of *pro bono* or low cost assistance for these people.

6. **Identify those with hidden motives.** Be wary if the prospective client has trouble focussing on the legal outcome even after you have carefully explained the possible remedies available to them. Emotional needs may be driving the request for assistance. While many cases involve an emotional component, *pro per* litigants who seek revenge are likely to be unhappy with the limited results that the legal system provides and even unhappier with limited scope services. Clients who require a lot of hand holding are also unsuited to limited scope representation.

7. **Make sure the limited scope of your services is reasonable.** Although you and your client have substantial latitude in limiting the scope of your representation, the limitation must be reasonable under the circumstances and the client must give you informed consent. If you conclude that a short-term limited representation would not be reasonable under the circumstances, you may offer advice to the client but must also advise the client of the need for further assistance of legal counsel.

8. **Identify those with a history of domestic violence seeking limited scope legal assistance in cases involving the batterer.** Survivors of domestic violence face special issues when considering self-representation. The power inequities and intimidation present in an abusive situation must be considered. They may raise serious questions about her/his ability to maintain the balance necessary to pursue an action against the batterer. On the other hand, coaching the domestic violence survivor to successfully confront the batterer for the first time may be the best service you can render. The client may not be seeking limited scope services solely for financial reasons; they may be looking specifically for someone who can give them the tools to successfully enforce their own rights. Discuss these issues openly with the client.

9. **Clearly address the fee structure and its relation to services.** If during your initial interview you find that the prospective client is reluctant to discuss or agree on fees, be cautious. It is critical that the client understands that limited scope services not only limit your fees but *also* limit the services that you will perform for them. If anything, your fee arrangement must be clearer in limited scope representation than in full service. You must ensure that there is no misunderstanding about what limited services you have agreed to perform. In limited scope representation, it is crucial to be on a "pay as you go" basis, as you may never see the client again.

10. **A good diagnostic interview is critical.** It is critical to perform a good diagnostic interview to pick up all the critical issues in the case. Both experienced and inexperienced attorneys will find a checklist of issues in the relevant practice area to be extremely helpful in conducting a good diagnostic interview.

11. **Develop and use an intake form.** A good form should list the key issues and allow room to insert unusual ones. Give a completed copy to the client. It is a contemporaneous record which documents your file, reminds you to ask about related issues, memorializes the limitations on scope, and educates the client. Use and tailor the forms which appear in these materials to make them work for you.

12. **Advise the client of their right to seek advice on issues outside the scope of the limited assignment.** It is probably a good idea to include in your intake sheet or handouts a statement that the client has been advised of the right to seek counsel on other issues.

After you take the case

13. **Use checklists.** This documents who is going to do what before the next meeting. Give a copy to the client. Sample checklists have been included in these materials. Tailor them to your specific practice, fill them out while the client is present, and make sure that you and your client each have an initialed copy.

14. **Use a clear fee agreement detailing the scope of representation.** A good limited services fee agreement will spell out exactly what you are doing for the client, and even more importantly, what you are *not* doing, and will detail what responsibilities the client will assume. There should be no confusion about the scope of the representation. Look at the www.unbundledlaw.org website for sample fee agreements. Four sample fee agreements are included, for situations in which you consult on a single occasion, ongoing consulting, drafting and assistance with strategy and paperwork, and making an appearance for part of the case. Tailor them to each case and to your individual practice. A fee agreement which puts the limitations and checklist in an attachment is probably better suited to a case where you anticipate a change in scope.

15. **Create a support group of experienced colleagues.** Limited experience with handling limited scope representation poses special challenges for newer attorneys or those new to a particular practice area. An experienced practitioner can confirm your analysis, suggest additional issues to explore or divert you from a particular proposed course of action. You might want to locate colleagues who are experienced with offering limited scope representation, and consider creating a study group, referral sources, or general references for each other. Meet with them periodically to discuss common problems and solutions. Most of the issues which will come up in a limited scope practice are practical rather than ethical, and it can be immensely helpful to talk to other practitioners who have faced the issues and developed solutions.

16. **Practice defensively and document all decisions.** This is good advice in any type of legal work. It is particularly essential to document instances in which you offer advice on a particular path for the *pro per* litigant to take. Use the "Follow Up Checklist" in the materials to document your file and educate the client easily and efficiently.

17. **Memorialize any changes in the scope of your limited representation as they occur**. ***Never*** do work outside the scope of the original retention without a new limitation signed by the client. Checklists that attach to the fee agreement are a simple and reliable way to do this. A confirming letter that the client doesn't sign will probably be insufficient to effectively document the new limit in scope. Be sure that you and the client both sign off on any changes in scope. Use the "Tickler Checklist" in the materials to make sure you've done this. Adapt it for your full service cases as an additional risk management device.

18. **Use prepared handouts.** Many of you will already have prepared handouts on common questions which arise in your practice. It is helpful to have one which describes limited scope representation and details the specific options available. Note on your intake sheet which handouts you gave to the client and on what date. A sample client handout on limited scope representation is included in the materials.

19. **Explain the "why."** Limited scope matters are pursued in partnership with the client. A client who understands the "big picture" and the tradeoffs will not only be more successful in self-representation but also less likely to blame you for unwanted outcomes.

20. **Making non-client laypersons part of your team is hazardous.** Limited scope representation may create an informal feeling to the attorney-client relationship. Remember that, despite the apparent informality, this is an attorney-client relationship. It is between you and your client, not you, your client, Aunt Mary, and others the client may want to have involved. Allowing third parties to participate may destroy the attorney-client privilege. If the client insists on utilizing non-clients, clearly advise them, in writing, in advance, of the risks involved.

21. **Refrain from providing forms with no assistance or review.** Some of the forms which will be required are simply too complicated for a *pro per* litigant to complete without assistance. Your expert assistance in the completion of these forms is not only a best practice but will also reduce any potential liability.

22. **Do not encourage a *pro per* litigant to handle a matter that is too technical or difficult.** A prime example of this problem is preparation of a QDRO. Part of your responsibility as an attorney is to counsel a person *against* handling such a matter in *pro per* and to help them understand the cost/benefit analysis of using their litigation budget wisely to acquire the expert assistance in the areas where they most need it. This is an individualized assessment.

23. **Do not expose a client to possible Rule 11 or CCP §128.7 sanctions.** A best practice is to satisfy yourself that the pleading you assist the client to prepare would withstand §128.7 scrutiny if your name were on it; or if not, at least advise the client about his/her responsibilities under §128.7

Ending the relationship

24. **Let the client know when your involvement has ended.** There should be no surprises either to you or the client about when your involvement in the matter has ended, and no unstated expectations of continued participation on your part. Send out a notice at the end of your involvement in a matter that involves a series of steps. See the sample "closing letter" in the materials. Notify the client that you believe you have completed your part and advise him/her to get in touch with you immediately if s/he disagrees.

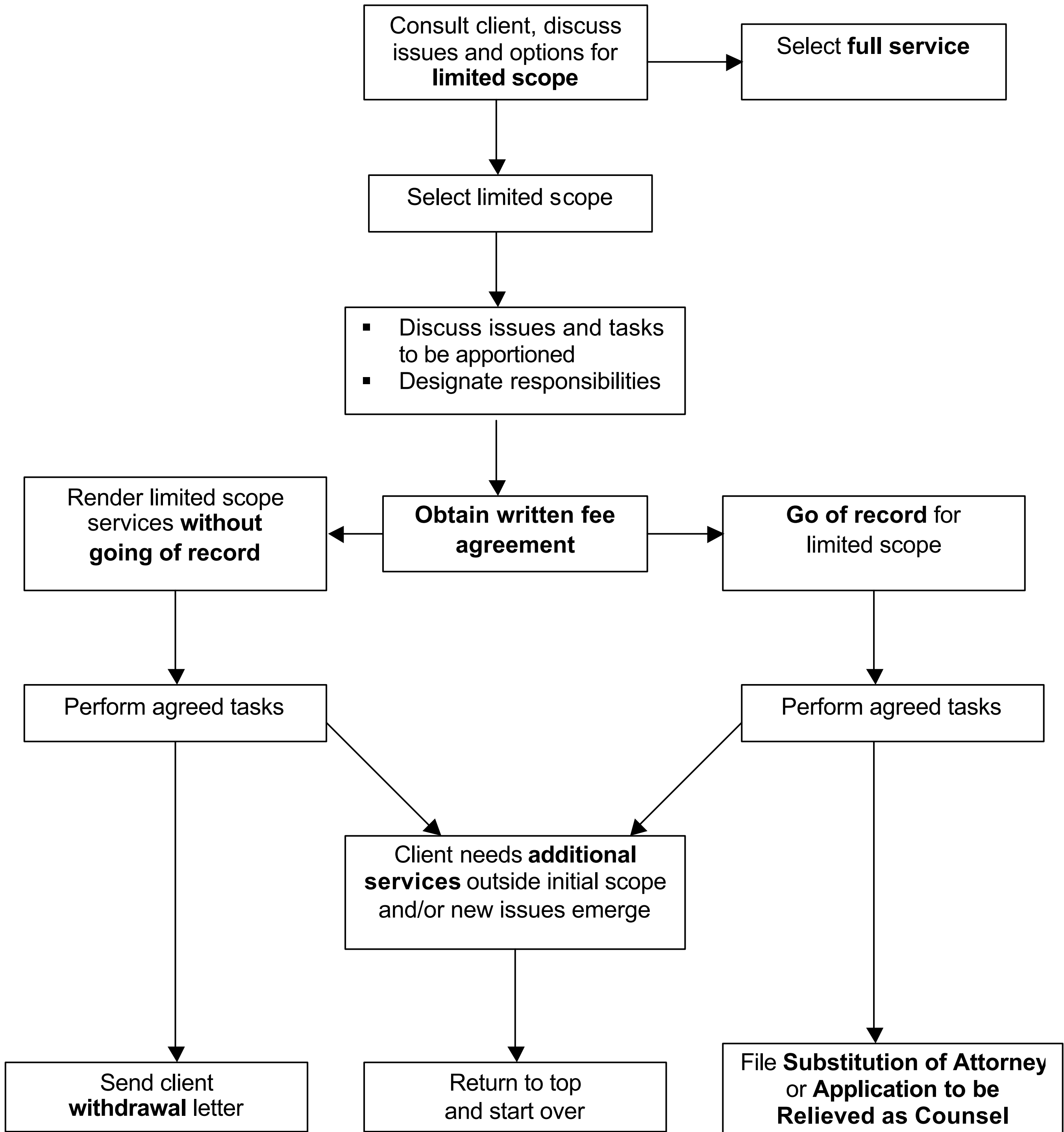
25. **If you have entered an appearance, let the court know about ending the relationship as well.** Use a substitution of attorney or application to be relieved as counsel (see Judicial Council forms enclosed). Don't attach your limited scope representation agreement to your application to be relieved, since that is a confidential communication.

Use good judgment. Many of these suggestions apply equally to full service representation. Your limited scope clients are likely to be more satisfied than your full service clients if you follow these simple practices. They don't take much effort and will document your file and educate your clients in ways which substantially increase the likelihood of a satisfactory relationship for each of you.

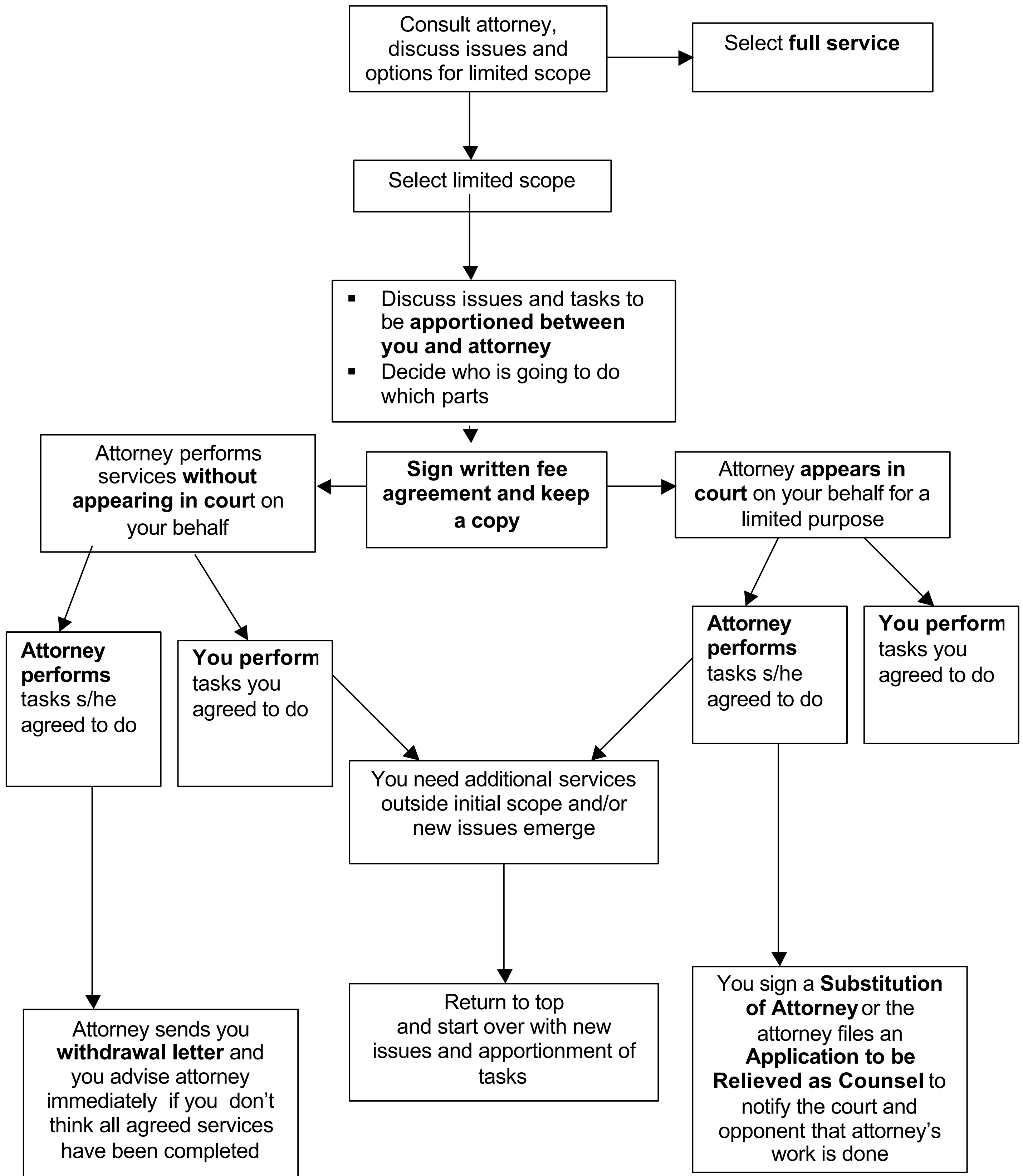
SECTION 3

Flow Charts

LIMITED SCOPE REPRESENTATION FLOW CHART FOR ATTORNEYS



LIMITED SCOPE REPRESENTATION FLOW CHART FOR CLIENTS



SECTION 4

Initial Interview Checklist

INITIAL INTERVIEW CHECKLIST		
I met with ______________________________ on ______________________, 200___ regarding____ I performed a conflicts check on:		
We discussed the following issues:		
Date of Separation		
Custody	Visitation	Move Away
Child Support	I did / did not run Dissomasters	
Spousal Support	Amount	Duration
Restraining orders re		
Division of real property	Valuation of real property	
Characterization of real property		
Business Interests	Bank Accounts	Personal Property
Employee Benefits	Medical Insurance	
Collection of past due support	Wage Assignment	
Stock Options	Stocks and bonds	
Advised client of right to seek counsel on issues outside the scope:		
Other:		
We discussed the following coaching options:		
I gave the client the following materials:		
Issues checklist	Tasks checklist	Fee agreement #
Client's Guide to Limited Legal Services		
Handout re restraining orders	Handout re personal property division	
Blank court forms:		
Other:		
Attorney initials:	Client initials:	

SECTION 5

Tasks/Issues to be Apportioned

Tasks/Issues to be Apportioned

Two checklists follow. They address the two ways in which limited scope representation arrangements break down. In the first, the client and attorney agree which tasks are to be performed by each of them. This is by far the most common arrangement. In the other model, the attorney handles one or more discrete issues from start to finish, with the client assuming responsibility for the other issues.

The checklists should be tailored to your practice and to each case and may be used in two ways:

1. Use them as part of your intake to memorialize your discussions with the client regarding the limitations on scope, and do a new one each time the scope changes (as it frequently does).
2. Use them as exhibits to the fee agreement of your choice, and replace them each time the scope changes.

Tasks to Be Apportioned May Look Like This:

Client instructs attorney not to do discovery, and undertakes the information gathering role;
Client asks attorney to draft moving or responsive pleadings for a hearing the client attends in *pro per;*
Client consults with attorney on strategy and tactics;
Client appears at the hearing and asks the attorney to draft the order;
Client asks attorney to review correspondence or pleadings which the client has drafted;
Client asks attorney to prepare subpoenas;
Client asks attorney to write a brief to be filed in *pro per*;
Client asks attorney to run computer support programs on her, or review and analyze computer support calculations proposed by the opposing party;

Issues to Be Apportioned May Look Like This:

Attorney represents client in connection with custody and visitation issues (maybe including support); client is in *pro per* on property issues.
Attorney collects past due child support which client enforces the order to sell the house;
Attorney obtains supervised visitation and drug testing orders, and client is in *pro per* on support issues;
Attorney prepares QDRO dividing pension or order apportioning stock options, while client self-represents on other issues;

Note: Each limited scope arrangement is different, and *must* be tailored to the client, case and issues presented. These checklists are designed to be flexible and should be tailored to each case.

ATTACHMENT TO LIMITED SCOPE FEE AGREEMENT
TASKS TO BE APPORTIONED

Use this form to allocate tasks between attorney and client. Attach this form to your revised fee agreement if the scope of representation changes.

TASK	ATTORNEY TO DO:	DATE COMPLETED	CLIENT TO DO:
Draft papers to start divorce			
File and serve papers			
Draft Motions			
Draft affidavits and declarations			
Analyze case and advise of legal rights			
Procedural advice			
Formulating strategy and tactics			
Investigate facts; which issues?			
Obtain documents; which ones?			
Draft correspondence			
Review correspondence and pleadings			
Appear in court			
Run computer support programs			
Prepare subpoenas for documents			
Take depositions			
Review depositions and documents obtained from others			

Attorney Initials ___________ **Client Initials ___________**

TASKS TO BE APPORTIONED, cont'd

TASK	ATTORNEY TO DO:	DATE COMPLETED	CLIENT TO DO:
Legal research and analysis			
Contact witnesses			
Draft or analyze settlement proposals			
Contact expert witnesses			
Draft orders and judgments			
Outline testimony			
Trial or negotiation preparation			
Review orders and judgments that client drafts			
Draft orders			
Draft disclosure documents			
Advise regarding appeal			
Enforce orders			
Draft other papers as necessary			
Other:			
Other:			
Other:			

Dated:	**Dated:**
Attorney signature	**Client signature**

ATTACHMENT TO LIMITED SCOPE FEE AGREEMENT
ISSUES TO BE APPORTIONED

ISSUE	ATTORNEY TO DO:	DATE COMPLETED	CLIENT TO DO:
Custody/Visitation dispute			
Set or modify child support			
Collect past due child support			
Collect past due spousal support			
Real property valuation and division			
Personal property division[1]			
Business interests			
Bank accounts			
Investments			
Pension rights[2]			
Stocks and bonds			
Stock options[3]			
Value and divide employee benefits			
Health insurance			
Life insurance			
Value or divide other assets/debts			

Attorney Initials __________ **Client Initials __________**

[1] This means furniture and pots and pans. Think twice before you pay someone to do this for you. It rarely justifies the cost of the professional fees.
[2] This is extremely technical. Most attorneys farm this out to specialists because it is so easy to make a mistake.
[3] See comments on pension rights; this is extremely technical and should be handled by a professional.

ISSUES TO BE APPORTIONED, cont'd

ISSUE	ATTORNEY TO DO:	DATE COMPLETED	CLIENT TO DO:
Enforce orders (describe)			
Pursue an appeal			
Other issues:			
Other issues:			
Other Issues:			

Dated:	**Dated:**
Attorney signature	**Client signature**

SECTION 6

Sample Fee Agreements

FEE AGREEMENT #1 **SINGLE CONSULTATION AGREEMENT**	
On___________________, 200_, ______________________________(Client) consulted with ___________________________ (Attorney), who performed a conflicts check on _____ for limited scope assistance and advice. At that time, attorney provided the following services:	
	Review of court documents (describe)
	Information about document preparation:
	Assistance with document preparation:
	Advice regarding client's rights and responsibilities
	Advice about the law and strategy relevant to issues as identified by Client
	Preparing computer support guideline calculations
	Information about fact gathering and discovery
	Guidance about procedural information, filing and service of documents
	Advice about negotiation and the preparation and presentation of evidence
	Advice about law and strategy related to an ongoing mediation/negotiation or litigation
	Legal Research
	Advising on trial or negotiating techniques
	Advising regarding property rights
	Review and analysis of Client's case or trial strategy
	Other (specify):
	Client has paid Attorney for her/his time. All tasks which Client requested of Attorney have been completed and no further services are requested or expected from Attorney. Neither Client nor Attorney contemplates or expects a further professional relationship. Client acknowledges that he/she has been advised of the Client's right to seek separate legal advice from other counsel of the client's choice with regard to all legal matters that are outside the scope of the specific limited services provided by Attorney under this agreement. Dated: ____
Client signature	Attorney signature

FEE AGREEMENT #2
CONSULTING SERVICES AGREEMENT

Identification of Parties: This agreement, executed in duplicate with each party receiving an executed original, is made between ____, hereafter referred to as "Attorney," and ____, hereafter referred to as "Client."

Nature of Case: Client consulted Attorney in the following matter:

____

____

____

____

1. **Client Responsibilities and Control:** Client will remain responsible for and in control of his/her own case at all times. This means that Client will be responsible for understanding the issues, resolution options and potential consequences of those resolution options. In addition, Client agrees to:
    a. Cooperate with Attorney or his/her office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services.
    b. Inform Attorney of the specific parts of the case that Client requests Attorney's assistance with.
    c. Review and evaluate all information provided by Attorney.
    d. Keep Attorney or his/her office advised of Client's concerns and any information pertinent to Client's case.
    e. Provide Attorney with copies of all correspondence to and from Client relevant to the case.
    f. Notify Attorney of any pending negotiations, hearings, contractual deadlines or litigation.
    g. Keep all documents related to the case in a file for review by Attorney.
    h. Sign all relevant papers, agreements or findings relative to the case.
    i. Immediately notify Attorney of any changes of work or home addresses or telephone numbers of the Client.
    j. Immediately notify Attorney if the Client receives any new pleading, motion, letter, or other documents from the other party, the other party's lawyer, any expert, appraiser, or evaluator hired by either party or appointed by the Court, or any Special Master, or any documents from the Court, and provide the Attorney with a copy of the item received, as well as the date it was received by the Client.

2. **Scope of Services:** Client requests Attorney to perform or *not to perform* the following services related to the family law issues identified here or on the following page or attachment hereto:

____

____

____

____

(Indicate *Yes* or *No* in box)

a.		Advice about law and strategy related to an ongoing mediation, negotiation or litigation
b.		Information about document preparation
c.		Assistance with document preparation
d.		Information about fact gathering and discovery
e.		Assistance with drafting discovery requests
f.		Assistance with computer support programs
g.		Guidance and procedural information regarding filing and serving documents
h.		Advice about negotiations and the preparation and presentation of evidence
i.		Legal research
j.		Coaching on trial or negotiating techniques
k.		Review and analysis of Client’s trial strategy
l.		Advice about an appeal
m.		Procedural assistance with an appeal
n.		Assistance with substantive legal argument
o.		Other:

3. **Limitation of Attorney's Responsibilities:** Attorney will perform the specific legal tasks identified by the word "***Yes"*** in paragraph 2 above consistent with Attorney's ethical and professional responsibilities, including observing strict confidentiality, and based on the information available to Attorney. In providing those services, Attorney *will not*:

   a. Represent, speak for, appear for, or sign papers on Client's behalf.
   b. Provide services in paragraph 2 which are identified with the word "No."
   c. Make decisions for Client about any aspect of the case.
   d. Determine the assets and obligations of Client's marriage, their character, or their value.
   e. Determine an appropriate division of the assets and obligations of Client's marriage
   f. Litigate Client's case on Client's behalf
   g. Protect Client's property by means of restraining orders while discovery and/or negotiations are in progress.

   Attorney will NOT perform any services identified by the word "NO" in paragraph 2 above. The Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services will be specifically listed in an amendment to this Agreement, and initiated and dated by both parties. The date that both the Attorney and the Client initial any such list of additional services to be provided will be the date on which the Attorney becomes responsible for providing those additional services. If the Client decides to retain the Attorney as the Client's Attorney of record for handling the entire case on the Client's behalf, the Client and the Attorney will enter into a new written Agreement setting forth that fact, and the Attorney's additional responsibilities in the Client's case.

   Right to Seek Advice of Other Counsel: Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in paragraph 2 which are identified with the word ***"no"*** at any time during or following this limited consulting services agreement.

4. **Method of Payment for Services:**

   a. **Hourly Fee:** The current hourly fee charged by Attorney for services under this agreement is $__________. Unless a different fee arrangement is established in clause 4b of this Paragraph, the hourly fee will be payable at the time of service. Attorney will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest tenth of an hour. The hourly fee will be payable at the time of the service.

b. **Payment from Deposit:** For a continuing consulting role, Client will pay to Attorney a deposit of $__________, to be received by Attorney on or before _________________, and to be applied against Attorney's fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

c. **Costs:** All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees and the like shall be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

5. **Discharge of Attorney:** Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services after receipt of the notice. Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services provided prior to such discharge.

6. **Withdrawal of Attorney:** Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following:
   a. The Client consents,
   b. The Client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively, and
   c. The Client fails to pay Attorney's fees or costs as required by his or her agreement with the Attorney.

   Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided. At the termination of services under this agreement, Attorney will release promptly to Client on request all of Client's papers and property.

7. **Disclaimer of Guarantee:** Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guarantee.

8. **Arbitration of Fee Dispute:** If a dispute arises between Attorney and Client regarding Attorney's fees or costs under this agreement and Attorney files suit in any court other than small claims court, Client will have the right to stay that suit by timely electing to arbitrate the dispute under Business and Professions Code sections 6200-6206, in which event Attorney must submit the matter for such arbitration.

9. **Entire Agreement:** This Agreement is the complete Agreement between the Client and the Attorney. If the Client and the Attorney decide to change or amend this Agreement in any way, the change must be in writing and attached to this Agreement.

10. **Effective Date of Agreement:** The effective date of this agreement will be the date when, having been executed by Client, one copy of the agreement is received by Attorney and Attorney receives the deposit required by Paragraph 4b. Once effective, this agreement will, however, apply to services provided by Attorney on this matter before its effective date.

The foregoing is agreed to by:

______________________________	______________________________
(Client)	(Attorney)
______________________________	______________________________
(Date)	(Date)

FEE AGREEMENT #3
ONGOING CONSULTING AGREEMENT

Identification of Parties: This agreement, executed in duplicate with each party receiving an executed original, is made between ___________________________, hereafter referred to as "Attorney," and _________________________, hereafter referred to as "Client."

1. **Nature of Case:** The Client is requesting ongoing consulting services from Attorney in the following matter:

____

____

2. **Client Responsibilities and Control.** Client shall remain responsible for the conduct of the case and understands that he/she will remain in control of and be responsible for all decisions made in the course of the case. Client agrees to:
   - **a.** Cooperate with Attorney or office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
   - **b.** Keep attorney or office advised of Client's concerns and any information that is pertinent to Client's case;
   - **c.** Provide Attorney with copies of all pleadings and correspondence to and from Client regarding the case;
   - **d.** Immediately provide Attorney with any new pleadings or motions received from the other party;
   - **e.** Keep all documents related to the case in a file for review by Attorney.

3. **Services to be performed by Attorney.** Client and Attorney have agreed that Attorney will provide the following services, indicated by writing YES or NO (**Attorney will not perform any services indicated by the word NO)**:

   a. _________ Legal advice: office visits, telephone calls, fax, mail, email;

   b. _________ Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;

   c. _________ Evaluation of Client's self-diagnosis of the case and advising Client about legal rights and responsibilities;

   d. _________ Guidance and procedural information for filing or serving documents;

   e. _________ Review pleadings and other documents prepared by Client;

f. _________ Suggest documents to be prepared;

g. _________ Draft pleadings, motions and other documents;

h. _________ Factual investigation: contacting witnesses, public record searches, in-depth interview of Client;

i. _________ Assistance with computer support programs;

j. _________ Legal research and analysis;

k. _________ Evaluate settlement options;

l. _________ Discovery: interrogatories, depositions, requests for document production;

m. _________ Planning for negotiations, including simulated role-playing with Client;

n. _________ Planning for court appearances, including simulated role-playing with Client;

o. _________ Standby telephone assistance during negotiations or settlement conferences;

p. _________ Backup and troubleshooting during the hearing or trial;

q. _________ Referring Client to expert witnesses, special masters or other counsel;

r. _________ Counseling Client about an appeal;

s. _________ Procedural assistance with an appeal and assisting with substantive legal argument in an appeal;

t. _________ Provide preventive planning and/or schedule legal check-ups;

u. _________ Other: ____

____

4. **Attorney's Responsibilities:** Attorney will exercise due professional care and observe strict confidentiality in providing the services identified by the word "YES" in Paragraph 4 above. In providing those services, Attorney WILL NOT:

a. Represent, speak for, appear for, or sign papers on the Client's behalf;

b. Become attorney of record on any court papers or litigate on Client's behalf;

c. Provide services which are not identified by the word "YES" in Paragraph 4;

d. Make decisions for Client about any aspect of the case;

e. Protect Client's property by means of restraining orders while discovery and/or negotiations are in progress.

f. The Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services will be specifically listed in an amendment to this Agreement, and initialed and dated by both parties. The date that both the Attorney and the Client initial any such list of additional services to be provided will be the date on which the Attorney becomes responsible for providing those additional services. If the Client decides to retain the Attorney as the Client's Attorney of record for handling the entire case on the Client's behalf, the Client and the Attorney will enter into a new written Agreement setting forth that fact, and the Attorney's additional responsibilities in the Client's case.

g. **Right to Seek Advice of Other Counsel:** Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in paragraph 3 which are identified with the word ***"no"*** at any time during or following this Ongoing Consulting Agreement.

5. Method of Payment for Services:

a. Hourly Fee:

The current hourly fee charged by Attorney for services under this agreement is $__________. Unless a different fee arrangement is established in clause b) of this Paragraph, the hourly fee shall be payable at the time of the service. Attorney will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest one tenth of an hour.

If, while this agreement is in effect, Attorney increases the hourly rate(s) being charged to clients generally for Attorney's fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided thirty days or more after written notice of the increase is mailed to Client. If Client chooses not to consent to the increased rate(s), Client may terminate Attorney's services under this agreement by written notice effective when received by Attorney.

b. Payment from Deposit:

For a continuing consulting role, Client will pay to Attorney a deposit of $________, to be received by Attorney on or before ______________, and to be applied against Attorney's fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

Costs: Client will pay Attorney's out of pocket costs incurred in connection with this agreement, including long distance telephone and fax costs, photocopy expense and postage. All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees and the like will be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

c. Should it be necessary to institute any legal action for the enforcement of this agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorney fees incurred in such action from the other party.

6. **Discharge of Attorney:** Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services provided and to reimburse Attorney for all costs incurred prior to such discharge.

7. **Withdrawal of Attorney:** Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: a) The client consents, b) the client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively, and c) the client fails to pay Attorney's fees or costs as required by his or her agreement with the Attorney.

   Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided, and to reimburse Attorney for all costs incurred before the withdrawal.

   At the termination of services under this agreement, Attorney will promptly release all of Client's papers and property to Client on request.

8. **Resolving Disputes between Client and Attorney**

   a. Notice and Negotiation. If any dispute between Client and Attorney arises under this agreement regarding the payment of fees, Attorney's professional services rendered to or for Client, and any other disagreement, regardless of the nature of the facts or legal theories involved, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.

b. **Mediation.** If the dispute is not resolved through negotiation, Client and Attorney will attempt, within fifteen (15) days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If the Attorney and Client cannot agree on a neutral mediator, they will request that the Contra Costa County Bar Association select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of the mediation, provided that the payment of costs and any attorney's fees may be mediated. Nothing in this provision shall constitute a waiver of Client's rights to State Bar fee arbitration or a trial *de novo* after a State Bar fee arbitration.

9. **Amendments and Additional Services.** This written Agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 4, a photocopy of Paragraph 4 which clearly denotes which extra services are to be provided, signed and dated by both Attorney and Client and attached to this Agreement, shall qualify as an amendment.

10. **Severability in Event of Partial Invalidity.** If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

11. **Statement of Client's Understanding.** I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

a. _________ I have accurately described the nature of my case in Paragraph 1.

b. _________ I will be responsible for the conduct of my case and will be in control of my case at all times as described in Paragraph 2.

c. _________ The services Attorney has agreed to perform in my case are identified by the word "YES" in Paragraph 3. I take responsibility for all other aspects of my case.

d. _________ I understand and agree to the limitations on the scope of Attorney's responsibilities identified in Paragraph 4 and understand Attorney will not be responsible for my conduct in handling my case.

e. _________ I will pay Attorney for services as described in Paragraph 5.

f. _________ I will resolve any disputes I may have with Attorney under this Agreement in the manner described in Paragraph 8.

g. _________ I understand that any amendments to this Agreement shall be in writing, as described in Paragraph 9.

h. _________ I acknowledge that I have been advised by Attorney that I have the right to consult with another independent attorney to review this Agreement and to advise me on my rights as a client *before* I sign this Agreement.

_______________________________	_______________________________
(Client)	(Attorney)
_______________________________	_______________________________
(Date)	(Date)

FEE AGREEMENT #4*
LIMITED REPRESENTATION AGREEMENT INCLUDING COURT APPEARANCE

Identification of Parties: This agreement, executed in duplicate with each party receiving an executed original, is made between ___________________________, hereafter referred to as "Attorney," and __________________________, hereafter referred to as "Client."

1. **Nature of Case:** The Client is requesting ongoing consulting services from Attorney in the following matter:

____

____

These services are likely to require Attorney to appear of record for a limited issue.

2. **Client Responsibilities and Control.** Client intends to retain control over all aspects of the case except those specifically assigned to Attorney, and understands that he/she will remain in control of the case and be responsible for all decisions made in the course of the case. Client agrees to:
   - **a.** Cooperate with Attorney or office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
   - **b.** Keep attorney or office advised of Client's concerns and any information that is pertinent to Client's case;
   - **c.** Provide Attorney with copies of all pleadings and correspondence to and from Client regarding the case;
   - **d.** Immediately provide Attorney with any new pleadings or motions received from the other party;
   - **e.** Keep all documents related to the case in a file for review by Attorney.

3. **Services to be performed by Attorney**
   - **a.** Client seeks the services from Attorney as set forth in the Tasks and Issues to be Apportioned checklist attached as Exhibit A. Client and Attorney shall designate the services to be rendered by Attorney by writing the word **"Yes"** in the column labeled **"Attorney Shall Do"** next to the services they agree Attorney will do, and shall designate the services Client shall undertake him/herself by writing the word **"Yes"** under the column labeled **"Client to Do"** next to those services. If a service is to be rendered by another attorney or some other third person, the word **"Other Attorney"** or other similar designation shall be written in the blank opposite the service. Attorney and Client shall each retain an original of this agreement and the designation of services in Exhibit A attached.

*Use in conjunction with the Tasks/Issues checklists at pages 22-25.

b. The Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services will be specifically listed in an amendment to this Agreement, and initialed and dated by both parties. The date that both the Attorney and the Client initial any such list of additional services to be provided will be the date on which the Attorney becomes responsible for providing those additional services. If the Client decides to retain the Attorney as the Client's Attorney of record for handling the entire case on the Client's behalf, the Client and the Attorney will enter into a new written Agreement setting forth that fact, and the Attorney's additional responsibilities in the Client's case.

c. **Right to Seek Advice of Other Counsel:** Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in paragraph 2 and Exhibit A and successor exhibits detailing the scope of representation which are identified with the words ***"no"*** or ***"client to do"*** at any time during or following this Limited Representation Agreement.

4. **Attorney of Record.** It is the intention of Attorney and Client that Attorney shall only perform those services specifically requested of Attorney. Some of those services may require Attorney to become attorney of record or make a court appearance in Client's case in order to perform the service requested. Attorney and Client specifically agree that Attorney's becoming attorney of record for such purposes shall not authorize or require Attorney to expand the scope of representation beyond the specific services designated. In the event that any court requires Attorney, as attorney of record for one or more authorized issues or tasks, to assume the responsibility for other tasks or issues reserved to client or a third party professional, Attorney may, at his/her option, elect to withdraw from representation, and Client agrees to execute any Substitution of Attorney forms reasonably requested by Attorney.

5. **Method of Payment for Services:**

a. **Hourly Fee**

The current hourly fee charged by Attorney for services under this agreement is as follows:

1) Attorney ___________

2) Associate ___________

3) Paralegal ___________

4) Law Clerk ___________

Unless a different fee arrangement is established in clause b) of this paragraph, the hourly fee shall be payable at the time of the service. Attorney will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest one tenth of an hour.

If, while this agreement is in effect, Attorney increases the hourly rate(s) being charged to clients generally for Attorney's fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided thirty days or more after written notice of the increase is mailed to Client. If Client chooses not to consent to the increased rate(s), Client may terminate Attorney's services under this agreement by written notice effective when received by Attorney.

b. **Payment from Deposit.** For a continuing consulting role, Client will pay to Attorney a deposit of $____________, to be received by Attorney on or before ________________, and to be applied against Attorney's fees and costs incurred by Client. This amount will deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client.

   Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

Costs: Client will pay Attorney's out of pocket costs incurred in connection with this agreement, including long distance telephone and fax costs, photocopy expense and postage. All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees and the like will be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

6. **Resolving Disputes between Client and Attorney**

   a. **Notice and Negotiation.** If any dispute between Client and Attorney arises under this agreement, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.

   b. **Mediation.** If the dispute is not resolved through negotiation, Client and Attorney shall attempt, within fifteen (15) days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If the Attorney and Client cannot agree on a neutral mediator, they shall request that the Contra Costa County Bar Association select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of the mediation, provided that the payment of costs and any attorney's fees may be mediated. Nothing in this provision shall constitute a waiver of Client's rights to State Bar fee arbitration or a trial *de novo* after a State Bar fee arbitration.

7. **Amendments and Additional Services.** This written Agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 3b, a photocopy of Paragraph 3b which clearly denotes which extra services are to be provided, signed and dated by both Attorney and Client and attached to this Agreement, shall qualify as an amendment.

8. **Severability in Event of Partial Invalidity:** If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

9. I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

   a. ________ I have accurately described the nature of my case in Paragraph 1.

   b. ________ I will be responsible for the conduct of my case and will be in control of my case at all times as described in Paragraph 2.

   c. ________ The services that I want Attorney to perform in my case are identified by the word "YES" in Paragraph 3. I take responsibility for all other aspects of my case.

   d. ________ I understand and accept the limitations on the scope of Attorney's responsibilities identified in Paragraph 4 and understand that Attorney will not be responsible for my conduct in handling my own case.

   e. ________ I will pay Attorney for services as described in Paragraph 5.

   f. ________ I will resolve any disputes I may have with Attorney under this Agreement in the manner described in Paragraph 6.

   g. ________ I understand that any amendments to this Agreement will be in writing, as described in Paragraph 7.

   h. ________ I acknowledge that I have been advised by Attorney that I have the right to consult with another independent attorney to review this Agreement and to advise me on my rights as a client *before* I sign this Agreement.

______________________________	______________________________
(Client)	(Attorney)
______________________________	______________________________
(Date)	(Date)

SECTION 7

Sample Change in Scope Letter

Sample Change in Scope Letter

Re: Limited Scope Representation
Dear _________:

Per our [telephone] conversation of ___________, 200_, you have asked me to perform additional tasks for you that are not included in our original Agreement for Limited Scope Representation dated ____________________ [and modified ___________________] (copies enclosed).

You have requested and I have agreed to do the following:

[**Enumerate the specific tasks/issues that you have agreed to undertake for the client.]**

(e.g. to prepare _________________________ in response to the motion recently filed.)

I understand that you wish to continue handling all other matters yourself as set forth in our original Agreement.

It is essential that we both have the same understanding of our respective responsibilities in connection with your case. **I am unable to begin to work on the new task[s] until one copy of the signed revised checklist has been returned to me. [If applicable]** Some of the tasks you want me to undertake have significant time constraints which could seriously impact your legal rights. It is therefore **extremely important** that you complete and initial a new Tasks/Issues checklist to memorialize the new scope of my involvement in your case. I've prepared and enclosed two copies of a new checklist, which I believe covers the changes to the prior Agreement for Limited Scope Representation. If time is of the essence in taking the necessary steps to protect your rights in this new area, you should consider either coming to my office to sign the checklist, or fax me a signed copy so I can start.

Please review it carefully and, if you agree, initial BOTH copies, and return one to me in the envelope provided. The other copy is for your records and should be attached to your copy of our Agreement for Limited Scope Representation.

I encourage you to seek the advice of other counsel in connection with tasks which I have not undertaken. Also, please feel free to consult with another attorney of your choice regarding this revised Agreement before signing and returning it to me.

I look forward to working with you on this new matter.

Very truly yours,

Enclosures:

Two copies of Revised Task/Issues Checklist
Return envelope for your convenience

SECTION 8

Checklists

FOLLOW-UP CHECKLIST	
Client:	
Attorney and Client consulted on	
By (fill in date) Client will:	
Obtain the following documents:	
Contact the following witnesses:	
Complete the following forms:	
Prepare the following information for coach:	
By (fill in date) Attorney will:	
Draft the following documents:	
Prepare the following forms:	
Contact the following witnesses:	
Research the law/procedure on:	
Review the following documents:	
Other:	
Other assignments:	
Attorney initials:	Client initials:

TICKLER CHECKLIST (***Keep on top of file***)						
Client:				**Case opened:**		
Initial Intake Checklist completed and copy given to client on						
Revised dated:						

Materials given to Client	**Date**
Unbundling Description	
Brochure	
Referral information	
Directions to court	
Family Court Services	
Facilitator	
DCSS	
Other	

Worksheet re scope of services and services NOT performed __________ **Modified** and signed by attorney and client (new form for each change in scope)						
Dated:						
Notice of Limited Scope Representation served and filed (if going of record)						

Documents in hand signed by Client	**Date**	**Modified on**
Intake Checklist		
Issues to be Apportioned		
Tasks to be Apportioned		
Retainer Agreement No.		
Other:		
Other:		
Other:		

Case Conclusion
Closing letter sent:
Substitution of attorney sent to client _______ (date), signed by client _____ (date) filed __________.
Application to be Relieved as Counsel served and filed __________. Order granting application filed __________.
Case Closed:
Other Comments:

SUGGESTED CLIENT HANDOUTS

LIMITED SCOPE FAMILY LAW REPRESENTATION

There are lots of handouts which you can have available to assist your limited scope clients. Consider having some or all of the following available:

1. MapQuest directions to the local courts, Family Court Services, law library, Family Law Facilitators, etc.

2. A list of web sites with information for self-represented litigants, such as online forms and information sources, Judicial Council self-help sites and the like.

3. Referral information for legal assistance programs for which they may qualify, including Modest Means Programs, Pro Bono and other similar low fee panels.

4. Handouts with suggested methods for dividing personal property, severing joint tenancies and the like.

Note: Always note on the Tickler Checklist what handouts you gave them and when.

SECTION 9

Sample Closing Letter

Sample Closing Letter

Re: Limited Scope Representation

Dear __________:

I have now completed all of the tasks which we agreed I would do in our agreement dated __________ [and modified on ___________]. I know of no other matters on which you have requested my assistance. **If you believe that I am incorrect, and you are relying on my assistance for some additional task, please contact me *immediately.***

[Use only if attorney has appeared of record with the court]. [Option 1] If I do not hear from you within the next week, I will file the enclosed Notice of Completion with the court notifying the court that my representation of you is concluded. **[Option 2]** I am enclosing a substitution of attorney for you to sign and return indicating that I am no longer serving as your attorney. If you don't sign this substitution and return it within the week, I will be required to file a motion with the court asking to be relieved of your attorney.

[**If applicable.]** Don't forget that there is still a hearing on ________ at which time you will be representing yourself. **Your opposition paperwork must be served and filed on ____________.**
You also agreed to contact ________ at (   )___-____ to prepare the order transferring your pension benefits.]

The following issues, on which you have declined my assistance, are still pending:

1.
2.

I am enclosing the following original documents. Please be sure to keep them in a safe place in the event you need to refer to them in the future.

1.
2.

I would like to take this opportunity to thank you for allowing me to assist you in this matter. If you need further assistance in the future, I hope you will not hesitate to contact me.

Very truly yours,

Enclosures

SECTION 10

APPENDICES

APPENDIX 1

Judicial Council Report and Rules
adopted April 15, 2003, effective July 1, 2003

NOTE: Rules 5.170 and 5.171 were renumbered 5.70 and 5.71 respectively as of January 1, 2004 to conform to the new Judicial Council rules numbering system.

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Family and Juvenile Law Advisory Committee
Hon. Mary Ann Grilli and Hon. Michael Nash, Co-chairs
Michael A. Fischer, Committee Co-counsel
Bonnie Hough, Supervising Attorney, 415-865-7668,
bonnie.hough@jud.ca.gov

DATE: March 14, 2003

SUBJECT: Family Law: Limited Scope Representation (adopt Cal. Rules of Court, rules 5.170 and 5.171; adopt form FL-950 and approve forms FL-955, FL-956 and FL-958) (Action Required)

Issue Statement
Family law courts serve increasing numbers of litigants who represent themselves in court. Many of these litigants would like the assistance of an attorney for parts of their cases even if they cannot afford full representation. At the request of the State Bar, the California Commission on Access to Justice prepared the *Report on Limited Scope Legal Assistance with Initial Recommendations*, which made a number of recommendations aimed at encouraging attorneys to provide limited scope representation. The Board of Governors of the State Bar has adopted these recommendations, which include asking the Judicial Council to develop rules and forms to enable limited scope representation so that attorneys can assist self-represented litigants, thereby increasing access to justice and encouraging court efficiency.

Recommendation
The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective July 1, 2003, adopt rules 5.170 and 5.171 of the California Rules of Court; adopt form FL-950; and approve forms FL-955, FL-956 and FL-958 to facilitate attorneys providing limited scope representation in family law courts.

Rationale for Recommendation
Limited scope representation is a relationship between an attorney and a person seeking legal services in which it is agreed that the scope of the legal services will be limited to specific tasks that the person asks the attorney to perform. This is also called "unbundling" and "discrete task representation." This issue is of concern to the judiciary as it faces increasing numbers of self-represented litigants at a time of reduced funding. Reports from courts indicate that as many as 80 percent of the litigants in family law matters are self-represented.

At the request of the president of the State Bar of California, the Commission on Access to Justice established a Limited Representation Committee. The committee was composed of representatives from the private bar and the judiciary, legal ethics specialists, and legal services representatives. Their work was informed by legal research and discussion as well as by a series of focus groups that included private attorneys, judicial officers, legal services representatives, insurance company representatives, lawyer referral service representatives, litigants, family law facilitators, and legal ethics specialists. Focus groups and individual interviews were also conducted with current and potential users of limited scope services.

In October 2001 the committee issued a *Report on Limited Scope Legal Assistance With Initial Recommendations*. The Board of Governors of the State Bar of California approved those initial recommendations on July 28, 2001. Some of the recommendations, categorized by the committee as "court-related," called for the committee to work with the Judicial Council to adopt rules and forms.

Limited scope representation helps self-represented litigants:

- Prepare their documents legibly, completely, and accurately;
- Prepare their cases based on a better understanding of the law and court procedures than they would if left on their own;
- Obtain representation for portions of their cases, such as court hearings, even if they cannot afford full representation; and
- Obtain assistance in preparing, understanding, and enforcing court orders.

This assistance can reduce the number of errors in documents; limit the time wasted by the court, litigants, and opposing attorneys because of the procedural difficulties and mistakes of self-represented litigants; and decrease docket congestion and demands on court personnel. In focus groups on this topic, judges indicated a strong interest in having self-represented litigants obtain as much information and assistance from attorneys as possible. They pointed to the California courts' positive experience with self-help programs such as the family law facilitator program, which educates litigants and assists them with paperwork. These programs, however, cannot meet the needs of all self-represented litigants and, because of existing regulations, must limit the services they can offer.

The proposed forms and rules are designed to help facilitate attorneys providing this assistance as called for in the report of the Limited Representation Committee:

- A rule of court that would allow attorneys to help litigants prepare pleadings without disclosing that they assisted the litigants (unless they appear as attorneys of record or seek the award of attorney fees based on such work);
- A form to be filed with the court clarifying the scope of representation when the attorney and client have contracted for limited-scope legal assistance; and
- A simplified notice of withdrawal for cases when an attorney is providing limited scope assistance.

Rule 5.170, Nondisclosure of attorney assistance in preparation of court documents

The proposed rule provides that an attorney may assist in the preparation of family law pleadings without disclosure if he or she is not the attorney of record. Limiting the scope of representation to the preparation of family law pleadings is a widespread practice in California. Currently, there is no California statute or rule that expressly permits or prohibits attorneys' assistance of clients in the preparation of pleadings or other documents to be filed without disclosing their role to the court.

Some courts in other jurisdictions have expressed concern that providing anonymous assistance to a self-represented litigant defrauds the court by implying that the litigant has had no attorney assistance. The concern is that this might lead to special treatment for the litigant or allow the attorney to evade the court's authority. However, California's family law courts have allowed ghostwriting for many years. Family law facilitators, domestic violence advocates, family law clinics, law school clinics, and other programs and private attorneys serving low-income persons often draft pleadings on behalf of litigants.

Judicial officers in the focus groups reported that it is generally possible to determine from the appearance of a pleading whether an attorney was involved in drafting it. They also reported that the benefits of having documents prepared by an attorney are substantial.

In focus groups, private attorneys who draft pleadings on behalf of their clients revealed that they would be much less willing to provide this service if they had to put their names on the pleadings. Their reasons included:

- Fear of increased liability;
- Worry that a judicial officer might make them appear in court despite a contractual arrangement with the client limiting the scope of representation;
- Belief that they are helping the client tell his or her story, and that the client has a right to say things that attorneys would not include if they were directing the case;
- Concern that the client might change the pleading between leaving the attorney's office and filing the pleading in court;
- Apprehension that their reputation might be damaged by a client's inartful or inappropriate arguing of a motion;
- Concern that they would be violating the client's right to a confidential relationship with his or her attorney; and
- Worry that they may not be able to verify the accuracy of all the statements in the pleading, given the short time available with the client.

It does not appear that the filing of ghostwritten documents deprives the court of the ability to hold a party responsible for filing frivolous, misleading, or deceptive pleadings. A self-represented litigant makes representations to the court by filing a pleading or other document about the accuracy and appropriateness of those pleadings. (Code Civ. Proc., §128.7(b).) In the event that a court finds that section 128.7(b) of the Code of Civil Procedure has been violated, the court may sanction the self-represented litigant. The court could also inquire of the litigant who assisted in preparation of the pleading and lodge a complaint with the State Bar about the attorney's participation in the preparation of a frivolous or misleading document, whether or not his or her name is on the pleading. (See Los Angeles County Bar Association, Formal Opinion 502, November 4, 1999.) Given that the current practice is to not require ghostwriters to disclose their participation in a case and no widespread problems have been noted, there seems to be no reason to adopt a rule requiring disclosure of the drafter's identity in every case. Such a rule would likely discourage access to the courts, leave more litigants without attorney assistance in the drafting of pleadings, require more courts to decipher pleadings by unassisted self-represented litigants, and cause continuances to allow time for filing and service of correct and complete pleadings.

Under the proposed rule, an attorney providing limited scope representation must disclose his or her involvement if the litigant is requesting attorney fees to pay for those services, so that the court and opposing counsel can determine the appropriate fees. Awarding attorney fees when a litigant receives assistance with paperwork or preparations for a hearing may also help encourage attorneys to provide this service. Family Code section 2032 states that the court "shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately." The only counsel many litigants can afford, even with attorney fees awards, is counsel willing to provide limited scope legal services. If a litigant were able to present a case "adequately" through coaching or assistance with preparation of a pleading, an award of fees might also be appropriate.

Rule 5.171, Application to be relieved as counsel upon completion of limited scope representation

This new rule clarifies that attorneys who have completed the tasks specified in an agreement with a client for limited scope representation may use either the procedure set forth in rule 376 or forms FL-955, FL-956, and FL-958 to request that they be relieved as counsel in cases where they have appeared before the court as attorney of record and the client has not signed a *Substitution of Attorney–Civil* (form MC-050).

Notice of Limited Scope Representation (new form FL-950)

One of the key attorney services desired by the self-represented litigants in focus groups was the argument of a motion or trial in court. This service is generally in the best interest of the judiciary, since attorneys are aware of local rules and procedures, rules of evidence, and the scope of legally relevant issues. Counsel can give judicial officers a clear presentation of the case, saving significant court resources.

However, this is an area in which attorneys often are cautious about providing limited scope services. Lawyers need certainty that the courts will abide by the limitations contained in the retainer agreement. In general, while the court may prefer that an attorney represent a litigant for the entire case, the court's desire for more litigants to be represented in court proceedings can effectively be fulfilled by allowing limited scope services.

Form FL-950 is intended to clarify to the court and other parties that an attorney is making an appearance for a limited issue or for only one hearing. The form would provide notice to the court and the other party and would ensure a clear understanding between the client and lawyer regarding the scope of the service. It would also inform clerks and opposing counsel who the attorney of record is and to whom notice should be sent for various stages of a case.

Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation (new form FL-955)

This form is designed to provide the court and opposing party notice when the limited scope of the representation has been terminated if form MC-050 *Substitution of Attorney–Civil* is not completed. It also provides notice to a ltigant that the attorney believes that the representation is completed so that the litigant has the ability to respond if he or she believes that the representation is not completed.

This form is designed to meet the requirements of Code of Civil Procedure section 284, which requires that if the consent of the client and attorney is not filed with the clerk or entered upon the minutes then application must be made to the court by either the attorney or the client, after notice from one to the other, and the court must make an order.

This proposed form and procedure to be relieved as counsel upon completion of limited scope representation are somewhat simpler than those procedures set forth in rule 376 of the California Rules of Court due to the different nature of the relationship between the attorney and client in a limited scope representation arrangement. Warning language contained in the forms for limited scope representation has been simplified and designed to be more reflective of family law proceedings.

Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation (new form FL-956)

This new form has been developed to allow a party who does not believe that his or her attorney has completed the tasks contracted for to file an objection with the court and request that the attorney not be relieved as counsel. This form provides space for a hearing date to be set by the clerk.

Order On Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation (new form FL-958)

This new form was developed to meet the requirements of Code of Civil Procedure section 284 and provide a clear record for the court and all parties to the litigation that the attorney providing limited scope representation is relieved as counsel in cases where a *Substitution of Attorney–Civil* (form MC-050) has not been filed.

Alternative Actions Considered

The Judicial Council could choose not to take any action. Ghostwritten pleadings would still be allowed, since there is no prohibition by statute or rule. However, it appears that many reputable attorneys would be reluctant to assist litigants in preparing pleadings without the council's clarification of this established practice. Attorneys might make appearances on limited issues before the court, but there would be no form or mechanism to alert the court that the appearance was for a limited purpose and no way to ascertain the clients' awareness of the limited scope of representation. Fewer attorneys would be likely to provide limited representation to clients, precluding clients from receiving much-needed assistance and the courts from receiving the benefit of an attorney-argued motion.

Comments From Interested Parties

A version of these proposed rules and forms was circulated in spring 2002. The comments were generally very positive, but a number of suggestions were made to improve the forms. Given the significance of the changes and the importance of this initiative, this proposal was recirculated for comment. Two additional forms and an additional rule regarding withdrawal of counsel have been developed based upon the comments received.

This new invitation to comment was circulated to the Administrative Office of the Courts' main mailing list of presiding judges and executive officers, the State Bar, and other groups interested in the administration of justice. In addition, it was circulated to all family law facilitators, family law information centers, child support commissioners, and legal services programs, as well as the Family and Juvenile Law Advisory Committee's list of family law practitioners. Thirty-two written comments were received. The comment chart is attached at pages 21–45.

Ten of the 32 commenters approved of the proposed rules and forms as circulated, with no changes required. Many applauded the Judicial Council on its commitment to increasing meaningful access to the court for litigants who are generally unrepresented.

Twenty commenters approved of the proposal and suggested ways to make the forms clearer, including adding a proof of service to the objection, allowing multiple parties to be listed on a proof of service, and putting some warnings to the client in bold to help them stand out.

One commenter took no position. Another commenter, the Orange County Bar Association, opposed the entire proposal, stating that it does not support the concept of limited scope representation. However, the rules and forms committee of the Superior Court of Orange County suggested that the forms and rules be approved as they would "formalize procedures our court has put into place."

Five commenters responded specifically to the question of whether the court should retain the authority to require attorneys to remain attorneys of record beyond the scope of the agreement for limited scope representation. All of them responded negatively to that suggestion. The committee agrees that it is not appropriate for the court to violate the express agreement between the attorney and client regarding the scope of representation and that clients and courts would not receive the benefit of attorneys arguing parts of the case if the attorneys were uncertain whether they would be relieved as counsel.

There were a number of concerns raised about the proposed procedure for withdrawal by attorneys upon completion of limited scope representation if the client has not signed a substitution of attorney form as agreed. Those issues included how to track the request in the clerk's office, who sends the notice of hearing, and concerns by attorneys that the process was too cumbersome. The committee recommends that the proposed process be amended to eliminate the clerk's responsibility of calendaring the request for withdrawal and instead, require the attorney to resubmit the *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-955) after the waiting period. As the attorney is primarily interested in being relieved as counsel and this procedure can be accomplished by mail, this seemed a better option than placing the responsibility on the court clerk.

As previously noted, the Board of Governors of the State Bar of California approved the recommendations to develop these rules and forms. The State Bar's Standing Committee on the Delivery of Legal Services supported the proposal as submitted. The State Bar's Committee on Professional Responsibility provided significant support and informal comments prior to circulation of the proposal.

Some courts have included in their local strategic plans the development of panels of attorneys willing to provide limited scope representation. Some are already piloting the proposed forms.

Implementation Requirements and Costs

The use of the new forms would involve printing costs. Training on issues such as courtroom management in cases when attorneys are providing limited scope representation is already contemplated in the training for family law judicial officers. The State Bar is developing trainings for attorneys regarding ethical and effective limited scope representation. A workshop on limited scope representation will be offered at its annual meeting in September.

Attachments

Rules 5.170 and 5.171 of the California Rules of Court are adopted, effective July 1, 2003, to read:

***Rule 5.170. Nondisclosure of attorney assistance in preparation of court documents**

(a) **[Nondisclosure]** In a family law proceeding, an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the document that he or she was involved in preparing the documents.

(b) **[Attorney fees]** If a litigant seeks a court order for attorney fees incurred as a result of document preparation, the litigant must disclose to the court information required for a proper determination of attorney fees—including the name of the attorney who assisted in the preparation of the documents, the time involved or other basis for billing, the tasks performed, and the amount billed.

(c) **[Applicability]** This rule does not apply to an attorney who has made a general appearance or has contracted with his or her client to make an appearance on any issue that is the subject of the pleadings.

***Rule 5.171. Application to be relieved as counsel upon completion of limited scope representation**

(a) **[Applicability of this rule]** Notwithstanding rule 376, an attorney who has completed the tasks specified in the *Notice of Limited Scope Representation* (form FL-950) may use the procedure in this rule to request that the attorney be relieved as counsel in cases in which the attorney has appeared before the court as attorney of record and the client has not signed a *Substitution of Attorney–Civil* (form MC-050).

(b) **[Notice]** An application to be relieved as counsel upon completion of limited scope representation under Code of Civil Procedure section 284(2) must be directed to the client and made on the *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-955).

(c) **[Service]** The application must be filed with the court and served on the client and on all other parties and counsel who are of record in the case. The client must also be served with form FL-956, *Objection to Application to be Relieved as Counsel Upon Completion of Limited Scope Representation*.

(d) **[No Objection]** If no objection is filed within 15 days from the date that the *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-955) is served upon the client, the attorney making

(e) the application must file an updated form FL-955 indicating the lack of objection, along with a proposed *Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-958). The clerk will then forward the file with the proposed order for judicial signature.

(f) **[Objection]** If an objection is filed within 15 days, the clerk must set a hearing date on the *Objection to Application to be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-956). The hearing must be scheduled no later than 25 days from the date the objection is filed. The clerk must send the notice of the hearing to the parties and counsel.

(g) **[Service of the order]** After the order is signed, a copy of the signed order must be served by the attorney who has filed the *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-955) on the client and on all parties who have appeared in the case. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court.

***NOTE: Rules 5.170 and 5.171 were renumbered 5.70 and 5.71 respectively as of January 1, 2004 to conform to the new Judicial Council rules numbering system.**

APPENDIX 2

a. Judicial Council Forms
Adopted April 15, 2003, effective July 1, 2003

b. Flow Chart
How to Withdraw from Limited Scope Representation after a Court Appearance

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO. *(Optional):*	
E–MAIL ADDRESS *(Optional):*	
ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
STREET ADDRESS:	
MAILING ADDRESS:	
CITY AND ZIP CODE:	
BRANCH NAME:	
PETITIONER/PLAINTIFF:	
RESPONDENT/DEFENDANT:	
OTHER PARENT/CLAIMANT:	
NOTICE OF LIMITED SCOPE REPRESENTATION ☐ Amended	CASE NUMBER:

1. Attorney *(name):*
   and party *(name):*
   have a written agreement that attorney will provide limited scope representation to the party.

2. Attorney will represent the party
   - ☐ at the hearing on: ☐ and for any continuance of that hearing
   - ☐ until submission of the order after hearing
   - ☐ until resolution of the issues checked on page 1 by trial or settlement
   - ☐ other *(specify duration of representation):*

3. Attorney will serve as "attorney of record" for the party **only** for the following issues in this case:
   a. ☐ Child support: (1) ☐ Establish (2) ☐ Enforce (3) ☐ Modify *(describe in detail):*

   b. ☐ Spousal support: (1) ☐ Establish (2) ☐ Enforce (3) ☐ Modify *(describe in detail):*

   c. ☐ Restraining order: (1) ☐ Establish (2) ☐ Enforce (3) ☐ Modify *(describe in detail):*

   d. ☐ Child custody and visitation: (1) ☐ Establish (2) ☐ Enforce (3) ☐ Modify *(describe in detail):*

   e. ☐ Division of property *(describe in detail):*

   f. ☐ Pension issues *(describe in detail):*

Form Adopted for Mandatory Use
Judicial Council of California
FL-950 [New July 1, 2003]

PETITIONER/PLAINTIFF:	CASE NUMBER:
RESPONDENT/DEFENDANT:	
OTHER PARENT/CLAIMANT:	

g. ☐ Contempt *(describe in detail):*

h. ☐ Other *(describe in detail):*

i. ☐ See attachment 3i.

4. By signing this form, the party agrees to sign form MC-050, *Substitution of Attorney–Civil* at the completion of the representation as set forth above.

5. The attorney named above is "attorney of record" and available for service of documents only for those issues specifically checked on pages 1 and 2. For all other matters, the party must be served directly. The party's name, address, and phone number are listed below for that purpose.

   Name:

   Address *(for the purpose of service):*

   Phone: Fax:

This notice accurately sets forth all current matters on which the attorney has agreed to serve as "attorney of record" for the party in this case. The information provided herein is not intended to set forth all of the terms and conditions of the agreement between the party and the attorney for limited scope representation.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY)

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF ATTORNEY)

__ PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/CLAIMANT:	CASE NUMBER:

PROOF OF SERVICE BY ☐ PERSONAL SERVICE ☐ MAIL

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. I served a copy of the *Notice of Limited Scope Representation* as follows *(check either a. or b. below):*
   a. ☐ **Personal service.** The *Notice of Limited Scope Representation* was given to:
      (1) Name of person served:
      (2) Address where served:

      (3) Date served:
      (4) Time served:

   b. ☐ **Mail.** I placed a copy of the *Notice of Limited Scope Representation* in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as follows:
      (1) Name of person served:
      (2) Address:

      (3) Date of mailing:
      (4) Place of mailing *(city and state):*
      (5) I live in or work in the county where the *Notice* was mailed.

3. Server's information:
   a. Name:
   b. Home or work address:

   c. Telephone number:

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PERSON SERVING NOTICE)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO. *(Optional):*	
ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
STREET ADDRESS:	
MAILING ADDRESS:	
CITY AND ZIP CODE:	
BRANCH NAME:	
PETITIONER/PLAINTIFF:	
RESPONDENT/DEFENDANT:	
OTHER PARENT/CLAIMANT:	
APPLICATION TO BE RELIEVED AS COUNSEL UPON COMPLETION OF LIMITED SCOPE REPRESENTATION	CASE NUMBER:

1. I request an order to be relieved as counsel in this matter.
2. In accordance with the terms of an agreement between *(name):* ☐ petitioner ☐ respondent ☐ other parent/claimant and myself, I agreed to provide limited scope representation.
3. I was retained as attorney of record for the following limited scope services *(describe in detail):*

   ☐ see *Notice of Limited Scope Representation* (form FL-950).
4. I have completed all services within the scope of my representation and have completed all acts ordered by the court.
5. The last known address for the ☐ petitioner ☐ respondent ☐ other parent/claimant is:
6. The last known telephone number for the ☐ petitioner ☐ respondent ☐ other parent/claimant is:

NOTICE TO PARTY/CLIENT: Your attorney has filed this *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* with the court stating that he or she no longer represents you in this action because the tasks that you agreed the attorney would perform for you have been completed.

If you do not agree that these tasks have been completed and you want the attorney to continue to represent you until the tasks are completed, you must file an *Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-956) with the court within 15 calendar days of the date that this notice was served on you, asking the court to require the attorney to remain your attorney in the action until these tasks are completed. You must also serve this *Objection* on your attorney and the other party. If you do not file a form FL-956, the court will grant your attorney's request.

Please refer to the *Proof of Service* on page 2 of this form to determine the date that this notice was served on you (if this form was served by mail, the date of service is 5 days after the date of mailing).

This procedure may be used ONLY if you believe that the attorney has not completed the tasks that he or she agreed to perform for you. It is NOT to be used to resolve other disagreements you may have with the attorney, such as disagreements concerning fees.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
FL-955 [New July 1, 2003]

Cal. Rules of Court, rule 5.171
www.courtinfo.ca.gov

PETITIONER/PLAINTIFF:	CASE NUMBER:
RESPONDENT/DEFENDANT:	
OTHER PARENT/CLAIMANT:	

PROOF OF SERVICE BY ☐ PERSONAL SERVICE ☐ MAIL

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. I served a copy of the completed *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* and all attachments as well as a blank *Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* as follows *(check either a. or b. below):*

   a. ☐ **Personal service.** I personally delivered the forms listed above and any attachments as follows:
   (1) Name of person served:
   (2) Address where served:

   (3) Date served:
   (4) Time served:

   b. ☐ **Mail.** I placed copies of the forms listed above in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as follows:
   (1) Name of person served:
   (2) Address:

   (3) Date of mailing:
   (4) Place of mailing *(city and state):*
   (5) I live in or work in the county where the forms were mailed.

3. Server's information:
   a. Name:
   b. Home or work address:

   c. Telephone number:

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

(TYPE OR PRINT SERVER'S NAME) ▶ (SERVER TO SIGN HERE)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. *(Optional):*	
ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
STREET ADDRESS:	
MAILING ADDRESS:	
CITY AND ZIP CODE:	
BRANCH NAME:	
PETITIONER/PLAINTIFF:	
RESPONDENT/DEFENDANT:	
OTHER PARENT/CLAIMANT:	
OBJECTION TO APPLICATION TO BE RELIEVED AS COUNSEL UPON COMPLETION OF LIMITED SCOPE REPRESENTATION	CASE NUMBER:

Hearing Date: Time: Dept.: Room:

1. I am the ☐ petitioner/plaintiff ☐ respondent/defendant ☐ other parent/claimant in this case.

2. I do not believe that all the services that my attorney agreed to do for me are completed.

3. I request that the court not allow my attorney to withdraw from representation until those services have been completed. The services that were agreed upon that remain to be completed are *(specify):*

   The reason that I think these tasks are supposed to be completed is *(specify):*

NOTICE

If you object to your attorney's *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-955), you must file this notice with the clerk of the court where the *Application* was filed within 20 days of the day that the form was put in the mail to you. If you were personally served, you have to file this form 15 days from the day you were served. That date is on the proof of service on the third page of the *Application* (form FL-955). You must have the attorney and the other party served with this *Objection* form (FL-956) as well. A blank proof of service is on the back of this form.

I declare under penalty of perjury under the laws of the State of California that the above information is true and correct.

Date:

(SIGNATURE)

Form Approved for Optional Use
Judicial Council of California
FL-956 [New July 1, 2003]

Cal. Rules of Court, rule 5.171
www.courtinfo.gov

PETITIONER/PLAINTIFF:	CASE NUMBER:
RESPONDENT/DEFENDANT:	
OTHER PARENT/CLAIMANT:	

PROOF OF SERVICE BY ☐ PERSONAL SERVICE ☐ MAIL

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. I served a copy of the completed *Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* as follows *(check either a. or b. below):*

   a. ☐ **Personal service.** I personally delivered the forms and any attachments as follows:
   (1) Name of person served:
   (2) Address where served:

   (3) Date served:
   (4) Time served:

   b. ☐ **Mail.** I deposited the forms and any attachments in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as follows:
   (1) Name of person served:
   (2) Address:

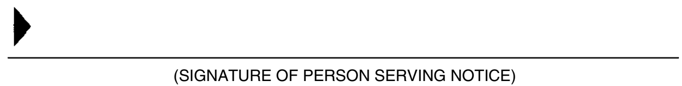
   (3) Date of mailing:
   (4) Place of mailing *(city and state):*
   (5) I am a resident of or employed in the county where the forms were mailed.

   c. My residence or business address is *(specify):*

   d. My phone number is *(specify):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:



(TYPE OR PRINT NAME) (SIGNATURE OF PERSON SERVING NOTICE)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*

TELEPHONE NO.: FAX NO. *(Optional):*

ATTORNEY FOR *(Name):*

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

PETITIONER/PLANTIFF:

RESPONDENT/DEFENDANT:

OTHER PARENT/CLAIMAINT:

FOR COURT USE ONLY

CASE NUMBER(S):

ORDER ON APPLICATION TO BE RELIEVED AS COUNSEL UPON COMPLETION OF LIMITED SCOPE REPRESENTATION

1. The application of *(name of attorney):*
   to be relieved as counsel of record for *(name of client):*
   a party to this action or proceeding, was filed on *(specify date):*

2. ☐ **UNCONTESTED**
   a. Fifteen calendar days have elapsed since the *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-955) and any attachments were served on the party.
   b. The client was
      (1) ☐ personally served with the papers.
      (2) ☐ served by mail.
   c. No *Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-956) has been received from the client.
   d. It appears from the application to be relieved as counsel and any attached documents that the attorney has completed the tasks that the client and attorney agreed that the attorney would perform as well as any acts ordered by the court.

3. ☐ **CONTESTED**
   a. The party filed an *Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-956) on *(date):*
   b. The proceeding was heard on *(date):* at *(time):* in Dept.: Room:
      by Judge *(name):* ☐ Temporary Judge
   c. The following persons were present at the hearing:
      ☐ Petitioner/plaintiff ☐ Attorney for petitioner/plaintiff
      ☐ Respondent/defendant ☐ Attorney for respondent/defendant
      ☐ Other parent/claimant ☐ Attorney for other parent/claimant
   d. ☐ Attorney demonstrated that he or she has completed the service that the party and attorney agreed that the attorney would perform on the *Notice of Limited Scope Representation* (form FL-950) as well as any acts ordered by the court.

Form Approved for Optional Use
Judicial Council of California
FL-958 [New July 1, 2003]

Code of Civil Procedure, § 284
Cal. Rules of Court, rule 5.171
www.courtinfo.ca.gov

PETITIONER/PLANTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/CLAIMAINT:	CASE NUMBER(S):

ORDER

4. ☐ Attorney is relieved as attorney of record for client:
   a. ☐ effective immediately
   b. ☐ effective upon the filing of the proof of service of this signed order upon the client
   c. ☐ effective on *(specify date):*
   d. **NOTICE TO CLIENT/PARTY:** You now represent yourself in all aspects of your case. You may wish to seek other legal counsel regarding your case.

   The court needs to know how to contact you. It is your responsibility to keep the court informed of your address. If the address below is wrong, you need to let the court and the other parties of the case know your correct mailing address as soon as possible. You can use form MC-040, *Notice of Change of Address and Telephone Number,* for this notification.

   If you do not let the court and the other parties to the case know where to send you copies of papers, you may not get notices of hearings or orders in your case. Decisions may be made without your participation, and your case could be ended.

   e. Current mailing address for client/party:

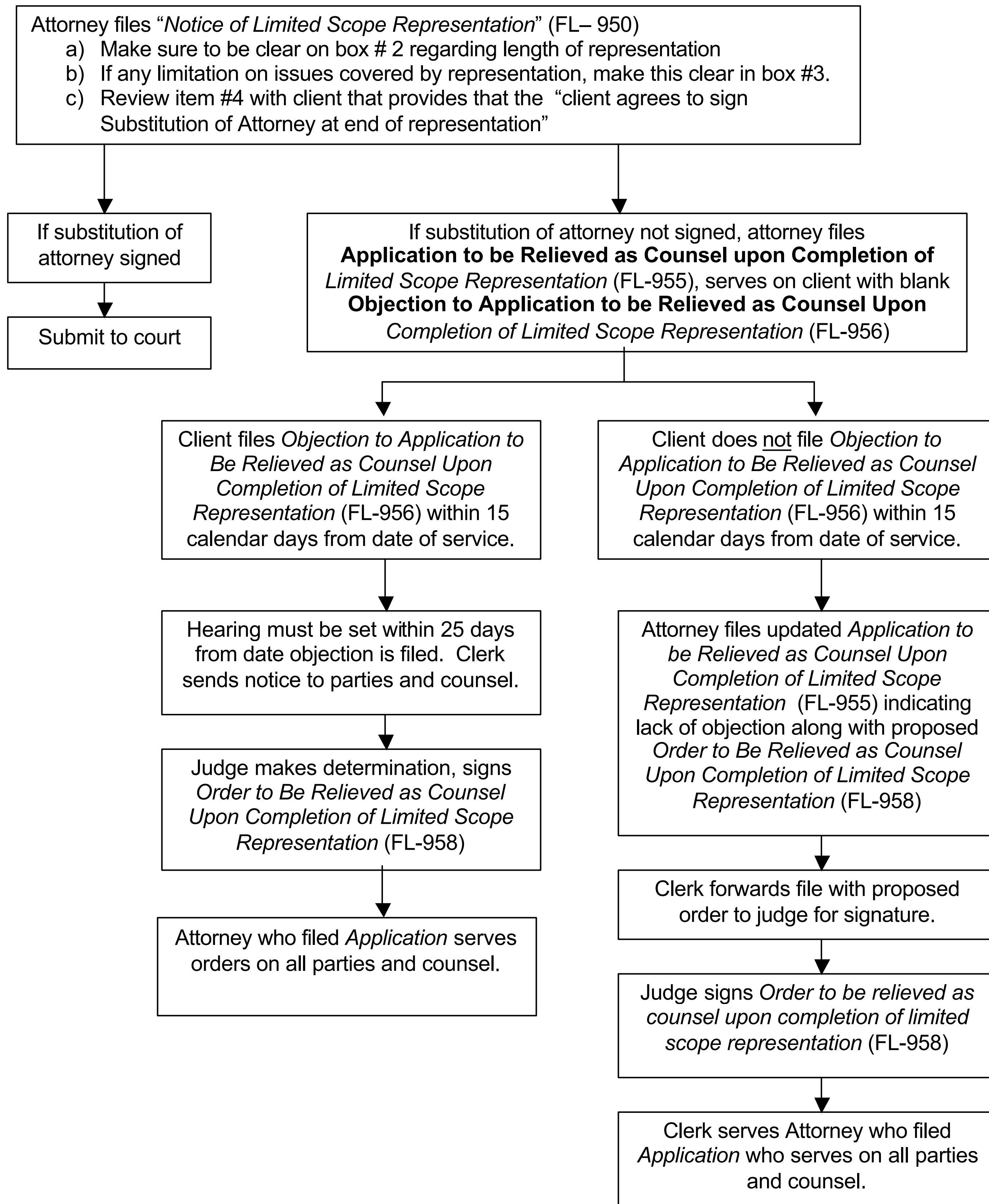
5. ☐ The application of counsel to be relieved upon completion of limited scope representation is denied for the following reasons:

6. ☐ The court further orders *(specify):*

NOTICE TO ATTORNEY WHO FILED APPLICATION FOR RELIEF: You must serve copies of the order on the parties and opposing counsel. Proof of service must be filed with the court.

Date: ▶ ______________________________
(JUDGE/JUDICIAL OFFICER)

HOW TO WITHDRAW FROM LIMITED SCOPE REPRESENTATION AFTER A COURT APPEARANCE



APPENDIX 3

20 Things Judicial Officers can do to Encourage Attorneys to Provide Limited Scope Representation

*A**s many as 80% of litigants in family law courts** represent themselves. Many would like the assistance of an attorney for parts of their cases even if they cannot afford full representation. The Board of Governors of the State Bar recently adopted recommendations made by the California Commission on Access to Justice aimed at encouraging attorneys to provide limited scope representation of pro per litigants. The Judicial Council also adopted new rules and forms to enable limited scope representation, effective July 1, 2003.*

20 things judicial officers can do to encourage attorneys to provide **Limited Scope Representation**

How judges can get more attorneys to draft intelligible declarations and enforceable orders for self-represented litigants.

Limited Scope Representation Committee of the California Commission on Access to Justice

Support the General Idea

1) **Make positive comments** about limited scope representation and how it's great to have attorneys involved in self-represented cases—you appreciate getting forms you can understand, orders you can enforce, and having attorneys for appearances. Let it be known that you think it is not only okay, but beneficial for attorneys to provide limited scope representation. Let litigants know that they may get limited scope assistance if they are unable to afford (or choose not to have) full representation.

This is a win/win/win (court, litigant and attorney) and it helps everyone if done correctly.

2) **Hold a training for other judicial officers** on the issue of limited scope representation. Offer similar sessions to the local bar.

Consider an annual training in limited scope representation put on by the local bar in each county so that new forms, procedures and "bugs" can be addressed. This can also serve as a vehicle to address concerns that arise between bench and bar and train new lawyers.

3) **Mention 'unbundling'** as you also mention pro bono when doing public speaking to lawyers or the public.

4) **Encourage the Bar Association** to set up a limited representation panel and have at least a listing of persons who will help with preparing and negotiating judgments, especially in low asset cases.

5) **Get the local Bar Board of Directors** to pass a resolution in favor of Limited Scope of Representation and have it publicized in their newsletter. Having it come from the Bench will add credibility to the resolution. Consider a joint resolution.

6) **Educate.** Rather than complaining of problems with the narrow scope of the work, make suggestions to help counsel improve the quality of the "package" of services they supply in certain areas.

7) **Show that you understand** and believe that partial representation is helpful to the court. (Tell the lawyers that the years they spent sweating through law school do make a difference.)

Modify Courtroom Conduct

8) **If the client has agreed to limited** representation, you've got to let the attorney out once the scope of the representation is completed. If the word gets out that you are not honoring these agreements, attorneys will feel they're being held hostage for their good intentions and attempts to help, and won't want to make limited appearances in the future. That means you won't be able to get attorneys to assist when you need them to.

9) **If an attorney is appearing on only one** issue in a matter, try to bifurcate that in the hearing so that the attorney isn't either sitting through issues he or she is not authorized to address (and not getting paid for) or being tempted to expand the scope of representation beyond that which the attorney and client have negotiated. If the attorney decides that he or she can't keep quiet on the other issues, consider taking a break in the hearing and giving the attorney the opportunity to revise the scope of the representation with his or her client.

10) **Recognize that clients** who have consulted with an attorney may not present that attorney's advice fully or even accurately. Trust that it is unlikely that the attorney told them "not to bother with service" or similar misconceptions. If there appear to be consistent problems, consider addressing them as general issues with the local bar.

11) Resist attempts by opposing counsel to broaden the scope of the representation.

12) Be open to discussing with counsel, when necessary, clarification of the issues so that opposing counsel will know which issues require contact through counsel and which issues permit contact with the client..

Review Forms, Papers and Processes

13) Review your local rules to modify any that may contradict limited scope of representation rules.

14) Work out procedures with the court clerk's office to make sure they know how to reflect the representational status of the litigant in their case management system. They are on the front line in dealing with many of the issues surrounding limited scope representation and need to be aware of the issues and techniques for dealing with them.

15) Use the Judicial Council form or a similar draft while that form is in the comment process. Have a copy provided to the other side. Get a clear understanding of the limitations on scope from the attorney.

16) Send comments on the proposed Judicial Council form so that it can be made as useful as possible. Let the Administrative Office of the Courts staff attorneys know as issues and problems come up so that they can be considered and addressed with the State Bar.

17) When problems arise, work with the local bar to develop practical solutions. For example, if you want to be sure that settlement conferences don't have to be continued so the self-represented litigants can consult with their advisory counsel, let them know that they are responsible for notifying their consulting/advisory counsel and making arrangements for them to be available on standby or otherwise as appropriate. It is most effective if you meet periodically with the bar to discuss these issues and work out solutions which work for both of you.

Monitor Quality

18) Convene meetings of the family law bar and legal service programs to discuss limited scope representation and suggest that they continue a working group to develop standards of care (as in Contra Costa), informational materials for litigants, fee agreements and office tools, and develop working relationships, referral systems and protocols.

Financial Issues

19) Award attorneys fees for limited scope services when otherwise appropriate and let attorneys know what forms or information they need to provide to substantiate the claim for fees. This is especially important if the attorney is not appearing of record, but assisting in the preparation of forms, declarations and the like.

20) Be sensitive to the economic issues. For example, if an attorney is in court for limited scope, even a routine continuance can impose a real hardship by pricing the service outside the client's reach. If there's only money for one appearance, and it is wasted, no net benefit is acquired and the funds which might have been properly applied to a limited appearance are wasted. Likewise, be sensitive when opposing counsel is delaying or otherwise obstructing for tactical reasons.

Lawyers and litigants are looking to you for guidance and approval, and they will pick up on subtle signals. By letting them know that you are aware of the practical problems they face, you are creating a climate of creative innovation and mutual problem solving. ■

Reprinted from *The Bench*, news journal of the California Judges Association, Summer 2003.

APPENDIX 4

Limited Scope Legal Assistance
List of Resources

Limited Scope Legal Assistance ("Unbundling") List of Resources
January 12, 2004

http://www.unbundledlaw.org
This website came out of the first national conference on unbundling in October 2000. It includes the conference program and recommendations, and is continually updated with the latest activities and reports from around the country. They have a section on sample retainer agreements and are working on one on Malpractice Avoidance Tips. If you're doing this work, check it regularly for recent postings.

http://www.selfhelpsupport.org
This is another national web site, funded by the State Justice Institute, with invaluable information on unbundling.

http://www.cobar.org
This is the Colorado Bar Association web site. Look for Ethics Opinion 101 for a comprehensive discussion of the ethical issues, and citations to opinions in other states.

http://www.lacba.org
This is the Los Angeles County Bar web site. Look for Ethics opinion 502. It is the only California opinion, and was very thoughtfully written by some ethics and malpractice experts.

http://www.calbar.ca.gov/calbar/pdfs/unbundlingreport01.pdf
This is the California State Bar web site, where you can read the Report on Limited Scope Legal Assistance with Preliminary Recommendations by the Limited Representation Committee of the Commission on Access to Justice. It's very thorough and supportive, and the recommendations were unanimously approved by the Board of Governors in 2001. Don't miss the appendix, which has lots of other cross links and resources.

http://www.abanet.org/genpractice/magazine/octnov2001/mosten.html
This is Woody Mosten's unbundling article in the GP Solo magazine of the ABA which appeared in the October-November 2001 issue.

http://www.abalegalservices.org/delivery
Report on the Public Hearing on Access to Justice, conducted by the ABA Standing Committee on the Delivery of Legal Services, August 10, 2002. This report suggests that the legal profession change the way it provides personal civil legal services to potential clients by broadening the types of services available, particularly to low- to moderate-income people.

http://www.divorceinfo.com/unbundlingbiblio.htm

http://www.zorza.net/resources/Ethics/mosten-borden.htm

http://www.equaljustice.org/ethics/unbund.htm

http://www.digital-lawyer.com/copy_of_justice/prose/proseresource.htm

http://www.pro-selaw.org

http://www.courtinfo.ca.gov/selfhelp/

http://www.lawhelpcalifornia.org/

http://www.peoples-law.org

Appendix 4

	LEGAL CHECK-UP QUESTIONS	**YES**	**NO**
1.	Do you have a will that has been revised within the past 3 years?		
2.	Are there any estate planning changes that should be considered?		
3.	Is your contract of employment, partnership (PC, etc.) agreement both current and adequate for your current needs?		
4.	Are you adequately covered by policies of life, vehicle, liability (both personal and professional) disability, umbrella, and other insurance?		
5.	Do you have any financial or liability exposures that are insurable but presently uninsured (e.g., disability insurance, umbrella policy)?		
6.	Have the liability policy limits changed within the past three years?		
7.	Are there any potential claims that could be asserted against you?		
8.	Do you presently have a written and current listing of all important future dates, such as expiration, option, maturity and due dates?		
9.	Have you within the past 5 years checked whether the Social Security Administration has properly accounted for your future benefits?		
10.	Do you have a file, stored in a secure and fireproof location, containing all important documents (wills, securities, contracts, Marriage/divorce papers, deeds, pension/profit sharing plans etc.)?		
11.	Have you within the past 3 years reviewed the beneficiary designation on all documents that require such information?		
12.	Do you have a complete and current personal financial statement that lists in detail all of your personal assets and liabilities?		
13.	Do you have a complete and current inventory of all of your physical possessions, sufficient to support a claim in the event of a loss?		
14.	To the extent the foregoing questions are relevant to your spouse (if any) and minor children (if any) are there any matters or issues that should be updated, reconsidered or changed?		
15.	To the extent there are persons other than spouse or children for whom you may have some responsibilities (e.g., aging parents) are there items or issues which should be updated or changed?		