

CHAPTER 1

Expanding Your Practice by Representing Clients in Mediation

On December 4, 2013, in Coffee County, Tennessee, a bitter divorce turned violent when Brenda Bartee shot her husband just before 1 p.m. near the Manchester town square immediately following a divorce mediation session at a nearby law firm. According to authorities, Brenda Bartee fired seven shots with a .40-caliber pistol and hit her husband at least four times. “It appears to have been a serious domestic issue,” said Manchester Police Department Assistant Chief Adam Floied. “They had been meeting with attorneys at [Rogers, Duncan and North] about a divorce. The mediation broke down and Mrs. Bartee left the office and went outside and got the pistol. When the man left the law office, the woman fired . . .” Dr. Harry Bartee was transported to a Chattanooga hospital in critical condition. Brenda Bartee has been charged with attempted murder. They have four children.¹

Emotional tension, intense conflict, tight deadlines, high overhead, unpaid bills, and fear of malpractice—these are only *some* of the pressures that family lawyers encounter every day. It is no wonder that they often become burned out, cynical, or testy. The lawyer “locker room” banter is filled with malaise and dissatisfaction. Instead of waking up eager to get to the office and meet clients, many lawyers live for their vacations—then for their retirement. Fallout from this career dissatisfaction impacts colleagues, office staff, and family members.

Instead of feeling that our efforts contribute meaningfully to our clients’ lives and to society, we often feel like guns hired to play out family pathology, ultimately trying to protect ourselves from the very clients who hired us. We may begin to view our career as one more set of written pleadings, one more court hearing, one more hostile interaction with opposing counsel, one more haggle over the bedroom set or an alternating Wednesday overnight visit. Instead of maintaining an energetic, positive commitment to our vocation, many of us see our offices as prison cells and clients and courts as our perpetual jailers.

Yet, most of us are not ready to take down our shingles. How did we get here? And where are we going?

We enter family law practice for a variety of reasons. For some, a job with a family lawyer may be our first (or only) job offer. Other family lawyers are drawn to the human interest aspect of this work, the emotional intensity, or the ability to gain courtroom experience.

Some of us enjoy the breadth of the substantive issues family law cases pose (we are known, after all, as the last true generalists of the legal world) and the challenge of cutting-edge legal issues such as interstate and federal rights of same-sex marriage. Others are attracted by the varied and complex procedural issues, ranging from jurisdictional disputes to sanctions for discovery abuse. Many of us are interested in the family as a system and the role of the lawyer in the healthy development of children and the emotional recovery of their parents. Others find meaning in helping people in crisis. Still others are drawn to the public policy and political issues, such as family violence, cultural competence, gender power imbalances, and societal responses to evolving concepts of family.

Whatever our motivations were when we first embarked, we are at this moment being challenged by forces inside and outside the legal profession. Most family lawyers are infatuated, albeit unconsciously, with the English solicitor-barrister model of law practice. In that model, solicitors handle client concerns, collect the fees, and pay the barristers to provide the quality courtroom advocacy for which they are recognized worldwide. In the American integrated system, most lawyers perform both the solicitor and barrister roles. We file court documents, examine witnesses, present evidence, and make legal arguments in court. American family lawyers are also responsible for interviewing and advising the client “up close and personal.” In addition to client care responsibilities, we face practice development chores like office design, updating firm blogs and websites, fee collection, and paying suppliers of staples, exhibit tabs, and letterhead. In addition to operating a profitable business, we must make time to attend CLE seminars and read advance copies of court opinions as well as practice development books (such as this one) to deliver a high-quality product to an ever more demanding client population.

Instead of yearning for the good old days, we need to recognize that the days of just practicing traditional family law are gone for good (if they were ever here in the first place) and concentrate on coping with the societal forces that are transforming family law practice in the 21st century.

Consumerism

We are a nation of consumers. People clip coupons (or print Groupons) for groceries or concert tickets, bargain with the car dealer in person or online, choose the credit cards

that offer free airline miles, and access the Internet routinely to learn about products and services. Potential clients do not stop being consumers when they shop for legal services to solve their family problems.

In the good old days (circa 1970), before there was a glut of lawyers, before lawyer advertising and the rise (and fall) of legal clinics, it was harder for people to find lawyers. Clients rarely attempted to negotiate the price, terms, or extent of legal services. Most clients did not know they could negotiate the financial terms of their business relationship with their lawyer—they were so insecure and needy that discussing fees with their lawyer was the last thing on their minds. Lawyers typically rejected clients' infrequent attempts at fee negotiation. It was a seller's market. "If you want my talent, time, and stomach lining, you'll pay my fee" was the message we sent out. To be fair, it was a kinder, gentler world. Lawyers were more ready and able to work on a handshake, would carry unpaid fees for months and years, and rarely sued clients (or each other).

Today, clients have access to all kinds of information about attorneys before they even pick up the phone for an initial consultation. The prevalence of social media makes it easy to confer at the touch of a button with a wide range of friends and acquaintances about attorney referrals. Websites such as LinkedIn and Google searches help clients instantly identify attorneys with whom they believe they will share a personal connection or who have been publicly endorsed by another professional whom the client already knows and trusts. Online attorney evaluation websites such as Avvo, Super Lawyers, and Best Lawyers put ratings, reviews, profiles, and disciplinary records at clients' fingertips, making the search for an attorney as easy as figuring out where to go for frozen yogurt.

Moreover, clients often comparison shop and "kick the tires" in various law offices before plunking down a retainer. Good faith comparison shopping is an accepted consumer practice (in contrast to the outrageous behavior of some people who contact every top lawyer in town for the sole purpose of creating a conflict of interest which will preclude that lawyer from representing their spouse.)

Clients want a friendly, accessible office space. They want professional, complete websites that describe the background of the service providers and the range of services offered by the firm. They want clear explanations of the fees, payment options (e.g., credit cards) and any available financing terms. Just as on a car lot, clients often expect to negotiate the terms of their contracts. Savvy clients want to know about lawyer availability for office visits and telephone conversations when it is convenient for the client, not just the lawyer. Many clients want to know when and how associates and staff members will participate and under what circumstances will the attorney delegate tasks. Clients are vitally interested in reducing their legal costs and retaining control.

Lawyers compete fiercely in the divorce marketplace with one another and with a burgeoning number of nonlawyer providers, including paralegal and document preparation services. Consumers have learned (and are continuing to learn) purchasing techniques

and ways to improve their leverage in the lawyer-client relationship. Clients expect lawyers to understand, react positively, and accommodate these consumer-oriented trends. Consumers have expressed their unequivocal preference for user-friendly, price-sensitive products and services outside the legal services arena. Why should shopping for legal services be any different?

Family law mediation got its jump start from consumers who believed 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 financial or personal needs. Clients did not see resolution through imposed court decision (or coerced by the imminence of a trial) as meeting their consumer concerns of cost; privacy; client control; speed; and self-generated, creative solutions.

Since the birth of modern family law mediation, which is often credited to the 1978 publication of *Structured Mediation in Divorce Settlement* by O. J. Coogler, an Atlanta attorney, the prevailing view has been that mediation has grown and succeeded in spite of, not because of, family lawyers.²

The following quote from Nathan Davidovich from an article on www.mediate.com sums up this view:

Unfortunately, the lawyer sometimes gets caught up in the client's insistence that the lawyer be his/her "mouthpiece," including mimicking the emotions of the client. There then develops a point in the litigation process in which the process becomes self-sustaining (a goal in and of itself), leaving little hope for early peaceful resolution.³

A premise of this book is that family lawyers who are mediation-friendly in their representational work or serve as neutral mediators will find consumer reception positive and profitable. Mediation is a growth industry. Lawyers who embrace it are on the cutting edge and will be less vulnerable to the pro se movement, growth of nonlawyer providers, malpractice, and other economic forces.

Giving Up Litigation Was the Most Profitable Decision of My Career⁴

Well over a decade ago, Woody decided to focus totally on peacemaking and to refuse any further litigation. He reflects:

"While I was afraid that I would eat tuna casserole four times a week, with the support of my wife, I turned down large retainers and referred all potential court clients to competent litigators in my community. Much like Canadian peacemaker Nancy Cameron, I felt that I was a rider of two horses:

I have often thought of this dual role of conflict resolver and courtroom advocate as akin to being asked to ride two horses. . . . At some point to remain riding it will be necessary to commit to one horse or the other. The difference between the skills I bring as a collaborative practitioner and those I used settling within a litigation template is the difference between riding one horse rather than two. NANCY CAMERON, *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE* 66, 97 (2004).

“My practice is now divided roughly into two equal parts. I serve as a neutral mediator 50 percent of the time, and the other half is composed of four representative roles: client representative during mediations presided by other neutrals (often with a litigator co-counsel); collaborative lawyer; unbundled lawyer for self-represented parties; and transaction lawyer building relationship agreements such as premarital, post marital, cohabitation, and other matters involving long-range relationships such as business partnerships, probate disputes, and adoption and surrogacy agreements. Rather than being a financial disaster, my decision to be a non-court family lawyer resulted in rapid growth of my practice beyond my most optimistic expectations. My gross receipts increased by over 33 percent during my first year of practice and uncollectible fees went down from 30 percent of gross billables to 2 percent.”

Growth of the Pro Se Movement

The ultimate consumer reaction today is “No thanks, I will do it myself.” The do-it-yourself movement has been felt by contractors, plumbers, and carpenters in the construction industry. Home Depot, Plumbers, and other havens for the home do-it-yourselfer have flourished at the expense of licensed service providers. Instead of being looked down on or stigmatized, it has become almost glamorous to make things from scratch and rely on oneself instead of professional service providers. The same has been true across industries, including real estate, the securities industry, and medicine.

The legal profession has already experienced this phenomenon in the field of real estate closings. Not too many years ago, the transfer of title and negotiation of contract terms were seen as so complex and important that the common practice was to go to a lawyer for a home sale. Consumers saw the lawyer’s fees (a customary 1 percent of the sales price) for these services as necessary, nonnegotiable, and appropriate. Today, primarily in the western United States, the title insurance and escrow industries have virtually replaced lawyers in residential home closings.

The same trend is influencing traditional adversarial representation in divorce cases, and the transition has been rough. Litigants are voting with their feet and demonstrating their consumer preference by using paralegal document services or online services at a fraction of the cost or self-representing with the assistance of commercial self-help

books and materials (LegalZoom and Nolo are major self-help providers.) The rate of pro se representation is at least 50 percent of all litigants in many jurisdictions. Some judges and court staff treat self-represented litigants with resignation at best and callous hostility at worst. Because self-represented litigants are not familiar faces, do not wear the right uniforms, and generally do not know what to do or how to do it correctly, they get little help and can be made to feel like unwelcome intruders in the courthouse. Court clerks are generally forbidden by statute or court rules from providing help in filling out court forms (It is not atypical to encounter posted signs in courtrooms reading “Clerk Cannot Give Legal Advice” or words to that effect.)⁵ Judges often caution struggling self-represented litigants by telling them that they are hurting themselves and that they will be held to the same standards as lawyer-represented parties. Such lectures are rarely followed by any assistance that helps solve the litigant’s problems. Judges who are former family lawyers may view self-represented litigants as taking income away from their friends and colleagues. These litigants often have unsophisticated or abrasive communication styles that only make matters worse. It is little wonder that unrepresented litigants feel abused by the court system that is ironically supported by their tax dollars.⁶

Litigants without lawyers are, however, effecting changes in the court system. In Maricopa County, Arizona, an American Bar Association report (1993)⁷ found that 88 percent of divorce cases were filed with only one party represented by a lawyer and 62 percent of the cases progressed through the court system with no lawyers at all. Reacting to consumer demand and going further due to bold and innovative court leadership supported by state and local government, Maricopa initiated consumer-oriented reforms that include less complex procedures, uniform support guidelines, model pleadings, and courthouse assistance, which includes paid facilitators to help people fill out forms. Unlike most jurisdictions, Maricopa offers night court, child care, client libraries in the courthouse and in community public libraries, and a large court referral list of lawyers trained in unbundled services (see Chapter 5) who are willing to help self-represented litigants.

Now, approximately 20 years later, many jurisdictions have picked up the gauntlet thrown by Maricopa County and have gone to great lengths to accommodate self-represented parties by providing a wide range of support and resources. In August 2014, the American Bar Association Standing Committee on the Delivery of Legal Services published “The Self-Help Center Census: A National Survey.” The ABA identified approximately 500 self-help centers around the country, 222 of which responded to an online survey. The Census, based on the results of that survey, sheds light on the structure and operation of self-help centers around the country, including details on staffing, funding, consumers, and types of services provided. It illustrates the extent to which self-help centers are a vibrant and effective resource nationwide.⁸

Nonlawyer Providers

Despite the plethora of books, online information, and available forms, some litigants still want the help and advice of a human being. Many of them, however, are not going to lawyers. A major 1994 Legal Needs Study conducted by the ABA⁹ found that 12 percent of identified legal needs were handled by nonlegal helpers. Combined with 23 percent of needs that were handled on a citizen's own initiative and 26 percent of legal needs that were not remedied at all, 61 percent of identified legal needs never reached a lawyer's office.

With the loosening of restrictions on unauthorized practice, the proliferation of independent paralegal and document preparation services is staggering. In 1995, the ABA Commission on Nonlawyer Practice recognized this consumer preference and recommended that the legal profession take an open-access approach—rather than punish paralegals through prosecution for unauthorized practice. This report, in addition to a long line of U.S. Supreme Court decisions opening up legal service access and competition, sends a strong message to us: develop new competitive service products or continue to lose a share of the divorce market.¹⁰

Fear of Discontented Clients

Ironically, the growing protection for clients against lawyer professional negligence has caused an increase in legal fees. We are increasingly afraid of our own clients. The more we operate out of fear of clients, the less motivation we have to give our clients options for saving costs. Many lawyers believe it poses less risk to get an adverse judicial decision than to be blamed by the client for the compromise inherent in any settlement. Malpractice is harder to prove in second-guessing a lawyer's litigation strategy, especially when the case is over-lawyered to protect against later client claims that the lawyer did not do enough. This type of defensive lawyering causes lawyer bills to go up—with a concurrent downward slide of the public's view of our profession. The recent buzz around the 2014 film exposé *Divorce Corp* demonstrates just some of the discontent with the family law profession.

Instead of synergy and collaboration, clients and family lawyers seem to be in a no-win war against each other. Citizens' groups, the plaintiff bar, and state legislatures are engaged in efforts to increase the protections for clients by beefing up lawyer discipline, expanding rights to sue for malpractice, cutting back or eliminating malpractice immunity, and increasing client rights in the attorney-client relationship. We are faced with requirements of written agreements, disclosure to clients of the existence of malpractice insurance, limitations on use of arbitration in malpractice claims, and one-way mandatory use of arbitration by clients in fee disputes.

As availability of malpractice coverage is reduced and rates for coverage increase (as well as the ever-growing deductibles), we feel unprotected from and fearful of our own clients. With increased flexibility of courts to extend statutes of limitations for client claims of professional negligence, in addition to an increasing anti-lawyer sentiment in civil juries, family lawyers are motivated to withdraw as counsel of record quickly to start the statute of limitations period running and to limit their advice and representation to the matter presented by the client.¹¹ Fearful of being sued for wrong advice or failure to investigate or engage experts properly, many family lawyers are increasingly recommending (or insisting) that their clients engage a growing stable of experts (e.g., CPAs, real estate and business appraisers, tax lawyers, financial planners), who may improve client information but whose primary function may be to protect the lawyer.

The result of this unfortunate trend is to increase the transaction costs of getting a divorce. Lawyers are charging higher initial deposits, and the overall bills claim a larger and larger percentage of the average marital estate. Even when the case is over, a second piece of litigation is often commenced against the client for the collection of unpaid fees or against the lawyer for client claims of professional negligence, ethical violations, or other transgressions. We become more selective in taking on clients, particularly those with difficult legal and financial issues or troublesome personal dynamics, when these are often the clients who need us the most. One basis for client selection is the ability or willingness of the client to pay higher fees, which is seen by many of us as a fair trade-off for taking on increased risk and client hassle. The result is that fewer potential clients can afford us to provide needed legal services. People who can't or won't pay higher fees still have problems involving custody, support, or property division. They still want to adopt children or terminate parental rights. If lawyers are not economically available, consumers will be forced to make other choices to meet their needs.

Lawyer Bashing, Stress of Law Practice, Resultant Lawyer Malaise

In a preemptive (and some would say overtly political) strike against a marked increase in lawyer jokes and client violence against lawyers, a former California State Bar president received national press by calling for lawyer jokes to be banned as hate speech. Following the despicable carnage, death, and destruction at the San Francisco law firm of Petit and Martin by a disgruntled client, that bar leader chose to appeal to the basest self-interested motives in lawyers to attack societal antipathy by self-protective (and perhaps constitutionally deficient) lawyer-sponsored legislation and an intensification of the us-versus-them mentality on the part of the nearly 1 million U.S. lawyers. To our profession's credit, the hate-speech trial balloon burst—but the underlying safety concerns about disgruntled clients remain.

We family lawyers fear the public's wrath at the highest level. With the rise in domestic violence being reported and handled in the courts, security has become a major concern. Office security is a frequent topic at family law conferences. Some police forces have developed special units for judges' protection against litigants. Such a unit was involved recently when a lawyer in our community, as well as the judge and the other family lawyer, was threatened by a former client.

Lawyer stress is also a major problem. Lawyers are 3.6 times more likely to suffer from the effects of stress and depression than are members of other professions.¹² This stress is aggravated by conflict generated within families, between lawyers, and by an unwelcoming and underbudgeted court system. The most intense pressure comes from our clients; it also comes from the clients' parents, children, employees, accountants, and therapists. We may expect hassles from a client's estranged spouse, opposing counsel, court-appointed experts, or creditors or even from the clerks and judges at the courthouse. However, when pressure, threats, neediness, and emotion come at us from the client's new spouse, significant other, or parents, our stress can reach crisis levels.

It is amazing that, despite these pressures, virtually every Comprehensive Legal Needs Study reports high levels of client satisfaction with and trust in lawyers' problem resolution. This satisfaction drops off considerably when we steer our clients into the adversarial court system. In fact, much less satisfaction was experienced with the courts than with lawyers.¹³ Clients report high satisfaction with lawyers' honesty and explanation of the process, with their keeping clients informed of the progress of the case, and with their promptness in carrying out document work and returning phone calls. The lesson for us is that the public can maintain high confidence in and satisfaction with our professional services if we help them solve their problems by minimizing their contact with the court system.

Economic Pressures of Operating a Family Law Practice

Family law offices traditionally have been operated and managed like litigation firms. Most of us generally require a deposit or retainer to be applied against fees earned and make arrangements to have additional fees paid on a monthly basis, upon certain events (e.g., income tax refund or house sale), or at the end of the case. The deposit is calibrated to balance two competing goals: it should be high enough to cover anticipated costs of service but low enough not to scare away the client and to compete successfully with other service providers bidding for the client's work. However, unlike large corporate or personal injury defense offices, which also bill by the hour (often at lower rates and generally with more secure sources of payment), we often represent clients with limited resources (even more limited at the time of divorce). The financial "hit" for our clients is even greater when they are supporting two households on one income. There are also

other nonrecurring divorce-related expenses, such as child custody evaluators, vocational counselors, and start-up expenses for new residences.

Several other factors exacerbate the limited ability of family law clients to pay legal fees. First, it is difficult to estimate the amount of work needed in any litigation, particularly in family law matters. Assessments of the degree of conflict or complexity of the issues involved are often distorted. Clients invariably hope for a quick and simple resolution and often color their initial presentations with that hope. Even when both spouses start high in their desire to be amicable and conciliatory, the role, style, and chemistry of the lawyers affect the time, cost, and manner of resolution. Fees can escalate because of a personality conflict between lawyers or between a spouse and the other spouse's new significant other. These variables may not be anticipated at the outset, and fees often end up much higher than originally anticipated.

In addition to resource limitations and unexpected developments, the nature of divorce litigation makes fee payment problematic. Satisfied clients pay their bills faster and more fully. Family law clients finishing litigation are rarely satisfied. In the rare instance when a client "wins" in court, the fees expended and/or problems with compliance or modification often nullify the victory in the client's mind. The result is that the client is faced with a large outstanding bill with little or no money to pay it. Monday morning quarterbacking, remorse, and general dissatisfaction further reduce otherwise low motivation to pay the bill. Add in any lawyer mistake or poor communication and even a winning client may be resistant to the idea of full payment. We are considered the last in line for payment—long after rent, food, car maintenance, child and spousal support, credit card payments, and even an occasional vacation.

These problems intensify when a client has been on the short end of a court result or feels unfairly treated in a negotiated settlement. A look at the economics of a family law litigation practice might be helpful. Assuming that you currently have an uncollectible rate in the 30 percent range, it means that you are working 30 percent of the time for free. From another perspective, you must work about 130 percent of your normal schedule to be paid for every hour you are currently billing.

Therefore, if providing litigation services is not fulfilling some of your financial goals, you might consider offering other family law service products with higher rates of collection. Because you either write off unpaid bills with attendant loss of income or try collecting and risk being sued for malpractice, alternative income sources, such as representing clients in mediation and unbundled legal services, may be attractive.

Despite the pressures discussed in this chapter, think about why you choose to devote so much of your life dealing with family conflict. Also think about what it is like to be a client going through a family crisis. Many of these consumers are choosing a different way—the path of mediation.

Lawyer Benefits of Mediation

Higher consumer satisfaction with mediation over court litigation (or even lawyer-lawyer negotiation) has been found in study after study. This doesn't mean that it is necessary to close your law office and open a mediation practice, although that is an option to consider. Just as bypass surgery might motivate a person to follow a low-fat diet, we must accept the fact that many clients who face catastrophic family law conflict prefer mediation. With this acceptance, family lawyers have a few options:

1. Assess the current market and service offerings and continue to offer traditional representational services with the hope that demand for such current service offerings holds steady.
2. Modify existing service products (adversarial representation) to meet consumer demand.
3. Offer new service products (mediation, client coaching, collaborative law, preventive checkups) to supplement the current full-service product.

The first step in the market assessment process is to understand that clients prefer mediation for working out family problems and seek family lawyers who are mediation-friendly. Also, if we understand that embracing mediation is in our own best interests as a profession, acceptance of mediation will be accelerated. Benefits to attorneys include:

- Retaining or increasing your share of the divorce market.
- Increasing profits.
- Achieving higher rates of payment.
- Reducing malpractice exposure.
- Increasing control.
- Having a better quality of life.

Family Lawyers Retain or Increase Their Share of the Divorce Market

Just as they go to the dentist or pay 6 percent to a real estate broker to sell the family home, divorce clients pay for lawyers because they believe they have no other choice. Apparently, however, clients now believe that they do have other choices. Clients are doing the work themselves; turning to nonlawyer providers; or, when they do use lawyers, trying to unbundle and limit the lawyer's work and attendant costs. See Chapter 5 for discussion on unbundling, also called *limited scope representation*. Family law consumers are also demanding mediation, so lawyers should represent parties in mediation for no other reason than to stay in business. As Woody told a *Wall Street Journal* reporter long ago: "Lawyers may see the difference as being between a \$10,000 fee for full-service representation and a \$1,000 fee for serving as an unbundled lawyer consultant during a mediation.

Actually, the true difference may be between the \$1,000 fee as mediation consultant or receiving no fee at all.”¹⁴

In the areas of commercial and business litigation, corporate counsel are more closely monitoring the activities and billings of outside law firms conducting the litigation. More law firms are being selected on the strength of their alternative dispute resolution (ADR) orientation, their conduct, and the training of their lawyers. Companies are fed up with receiving high bills for legal work that doesn't solve their problems, is protracted, and is costly to them in terms of their reputation in the industry. The same consumer revolution is taking place in family law. The high attendance of family lawyers in mediation training courses indicates that we are truly hearing this message.

Mediation Increases Profits

While maintaining a steady flow of clients is the lifeblood of any professional practice, being paid for work performed does not hurt either.

Performing professional services and not getting paid causes defensive and self-destructive business practices by family lawyers that only worsen our standing in the marketplace. Due to sad experiences of client nonpayment, lawyer locker-room banter includes wisdom such as “If you don't get it up front, you'll never get it!” Yet, the practice of demanding retainers reduces consumer access to qualified family lawyers, and clients go elsewhere—or do without lawyers altogether.

A second consequence of client nonpayment is self-destructive retaliation toward family lawyers by lawyers in other fields who charge less. For example, insurance defense lawyers often charge less than 50 percent the rate of family lawyers due to the dependability of payment and the expectation of repeat business (perhaps also due to the economic bargaining leverage and sophistication of insurance companies). Commercial litigators also generally charge less than their family law colleagues. We justify our rates in part by invoking uncollectibility and the increased emotional burdens that we face. It is also true that we have increased leverage in fee setting due to our clients' vulnerability. Our clients who have used lawyers in other fields of law may find the family lawyer rates confusing and off-putting.

Higher retainers and hourly rates may also turn off referral sources that have been traditional feeders for the family law bar. Hardworking estate planners and civil litigators may refer clients to family lawyers even if their hourly fees are higher than their own. But just as escrow companies and title companies became replacement referrals for real estate lawyers in residential home closings, lawyers in other fields have fiduciary duties to their clients to help them make informed decisions regarding cost.

Given a choice between a family lawyer who is limited to full-package adversarial representation and a second lawyer who supplements the adversarial model with a meditative

approach, many nonlawyers such as therapists and accountants may recommend the more client-friendly alternative.

In sum, family lawyers who represent parties in mediation enjoy greater profitability in their practices in a few ways:

- Clients are increasingly selecting family lawyers who support mediation and are skilled in guiding them through the mediation process.
- Referral sources, lawyers, related professionals (e.g., accountants and therapists), and the general public are also preferring lawyers who supplement trial orientation with an emphasis on dispute resolution.
- Because overall fees incurred during a mediated divorce are lower, family lawyers using mediation can reduce the amount of upfront retainer, making their services more affordable and less of an economic barrier for prospective clients.

Clients selecting mediation and unbundled use of lawyers' discrete services do not incur such runaway bills, pay more timely and in full, and have lower uncollectible fees at the end of the attorney-client relationship. Satisfied clients are the best marketing tool available to help lawyers reduce future client acquisition costs, thereby increasing profits.

Higher Collection Rates and Lower Malpractice Exposure

Many malpractice claims are filed in the form of cross-complaints for malpractice in response to lawyers' lawsuits for nonpayment of fees. To protect ourselves, many family lawyers make a management practice never to sue clients for unpaid fees. We simply eat the loss. This approach does reduce malpractice actions, but it costs both us and future clients, who may pay higher fees, set as a response to uncollectibility.

If you represent clients in mediation, you can decrease your malpractice exposure in several ways. Satisfied clients more often pay their bills. Smaller bills are more often paid or are less costly to write off. Decreased motivation to sue for fees reduces malpractice exposure. Many clients are willing to "let sleeping dogs lie," provided they are not sued to pay up. When those dogs awake, malpractice cross-complaints are not far behind.

Control

Just like our clients, we want greater empowerment and predictability in our lives. Just as for Alice in her journey through Wonderland, our long-held beliefs about the levers of control may not hold true. Let's look at trial work. Young lawyers fantasize about the ability to hold a courtroom spellbound with their silver-tongued eloquence. The truth is that regardless of how heady it might feel to deliver a well-planned cross-examination or final argument, we lose total control when the matter is submitted. When the judge renders a decision, even the best courtroom advocate is rendered virtually powerless.

True, there are appellate courts. However, if the cost, time, and odds against success are not daunting enough, the best result possible after an appeal is a decision to reverse that obliges the parties to pay for yet another trial. Most experienced family lawyers know that although the appellate process is a safeguard against naked abuse, it is rarely used and even more rarely successful.

Seasoned litigators often say that a bad settlement is generally better than a good court verdict. This wisdom is based on sad experience with how clients view the litigation process. If the case is won, it's because the client deserved the win. If the case is lost, it's the lawyer's fault. In addition to client retaliation of nonpayment, bad-mouthing to referral sources, or worse, losing often makes the lawyer feel empty and worthless. All the work, late nights, and emotional investment didn't pay off. In fact, the client may be hostile, vindictive, or even dangerous. In those situations, an estate-planning practice or even barista work may seem like a better career option.

Judicial decisions that are too one-sided, even in your client's favor, can intensify and perpetuate family conflict. When the losing client feels disenfranchised (and as though he or she has nothing further to lose), any incentive to modify behavior or comply with court edicts may drop away. All experienced litigators have encountered situations in which they won the battle triumphantly, only to watch their client lose the war.

Clients like mediation because it empowers them and restores their control. The same advantages inure to us when we advance the client's position through creative proposals and persuade the opposing party and counsel. This is quality lawyering at its best—not subject to being stymied by the start of a hearing or a judge's order. Lawyers who represent mediation parties report a high level of satisfaction by clients and control for lawyers in this process.

Following Your Heart Pays Off in the Long Run

A highly respected peacemaking lawyer learned the long and hard way to follow her heart.

Betty¹⁵ was a university professor who yearned for more. She heard about mediation-centered lawyering and gave up her tenured position to attend a well-ranked law school. Her sole motivation was to be a family mediator and lawyer coach for mediation upon graduation.

Betty's talent and success got in her way. First, there was the invitation to law review and then to be a law review editor. Upon graduation, she was offered a highly paid job in a large corporate firm in a city where she did not want to live. While she was seduced by the money, she was even more drawn by the fact that such a prestigious firm had made her an offer.

Two horrible years passed and Betty landed in the hospital with a permanent disability due to the stress and competition of the firm. On the advice of her doctor, she quit

the firm, took a year off from work, and moved to a small town in a bucolic setting. She opened a bakery and spent five years blissfully baking and hiking.

Throughout this hiatus in her active legal career, Betty maintained her law license by attending Continuing Legal Education programs. During a program on legal ethics, Betty learned that mediation was taking off. With her apron still on, Betty started attending local bar association meetings and met a renegade lawyer who was offering unbundled and mediation services to the unrepresented. Betty teamed up with her and quickly had so many clients that she sold her bakery (for a handsome profit).

Betty is now the happiest lawyer we know. She is doing fulfilling work, can support herself, and has control over her life such that her stress is reduced and her culinary creativity has expanded—but as an avocation for her friends and family!

Better Lives for Lawyers

Representing clients in mediation also gives us flexibility in our careers and personal time. Litigators are subject to time pressures (many artificially self-created) imposed by opposing counsel, court rules, and the presiding judicial officer. While any job has time constraints, few can expose you to lockup or monetary sanctions for coming 30 minutes late or turning papers in late. It is true that bosses yell and there are hurtful political intrigues in academia and business, but few careers rival the abuse lawyers absorb. Hurtful, public *ad hominem* comments by opposing counsel and humiliation at the hands of impatient judges are not uncommon. We must develop thick hides, but even with that armor, it is difficult to accept the cancellation of a family vacation or the inability to attend a child's piano recital dictated by the mood of a judge or the petty vindictiveness of opposing counsel. It is true that professional codes of courtesy and civility are emerging, as is the use of punitive sanctions for outrageously discourteous conduct. However, such sanctions are rarely imposed so as not to deter lawyers from being zealous advocates. Adding mediation representation to the mix of professional activities may ameliorate some of this pressure. Mediation scheduling does require some personal compromise on the lawyer's part to meet the demands of the client, the opposing counsel and party, and the mediator. However, neither of us can recall a lawyer ever canceling a vacation to attend a mediation session. Also, if lawyers have family responsibilities, medical appointments, car repairs, or personal exercise or enrichment, consensual appointments give more flexibility than does an 8:30 a.m. court calendar call.

Those of us who regularly represent mediation parties appreciate the reduced stress in our lives stemming from more control and less naked conflict. Client demands are every bit as rigorous when mediation is utilized; some would say demands even increase because the responsibility for results remains with us rather than being relinquished to the judge. However, as client empowerment and informed decision making become the shared values of both the lawyer and client, we become less a shaman and more a coach. It is true

that coaches in professional sports get blamed and fired with steady regularity. Still, the player who misses the free throw rarely blames the coach. In contrast, family law litigators are often blamed by ungrateful clients for the disappointments of a judge's decision. The occasional thank-you card or even fully paid bill is often not enough to compensate for the frustrations and unhappiness of handling family conflict in the courtroom. Burn-out is common, and even the most lauded litigators lament, "The practice of law would be great if it wasn't for the clients. They are a pain in the foot."¹⁶

Part of lawyer stress is having to live up to the white knight image that we ourselves have cultivated. By surrendering this omniscient role and becoming more of a partner in the lawyer-client team, we get the monkey partly off our backs. Most lawyers know that it is the clients who created their own problems long before we were called to the rescue. Instead of taking on the mission of "making everything better," mediation helps us concentrate on giving the client the tools and resources for making the best decisions themselves. The distinction may not be apparent at first glance, but it is meaningful in the attempt to be a helper, not a principal, in the conflict.

Mediation is not a panacea. Still, mediation-friendly lawyers have increased career and life satisfaction. By sparing a family the ravages of court battle and ending strife more quickly, we can reduce that family's pain. Many mediations catalyze communication, awareness of parenting needs, and the transformation of the spouses from fiery foes to collaborative colleagues as described in *The Good Divorce* by Dr. Constance Ahrons.¹⁷ Guiding a family into mediation and modeling effective problem solving can provide profound personal satisfaction. Clients frequently express their appreciation, and you can be a major contributor to positive systemic family transition. Increased awareness of how to solve problems without threats or tantrums and increased understanding of our own underlying interests improves our decision making and personal relationships outside the office.

Such total turnabout in professional and personal orientation is not mandatory, of course. However, we believe you will find value if you are open to enjoying this new approach, whether it generates new career and personal directions or simply makes your current family law practice more satisfying.

Notes

1. <http://www.manchestertimes.com/?p=14886>.

2. Some critiques of mediation include Richard E. Crouch, *The Dark Side of Mediation: Still Unexplored*, in *ALTERNATIVE MEANS OF DISPUTE RESOLUTION* 39 (Howard Davidson et al. eds., 1982); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441 (1992); Diana Richmond, *Torture by ADR*, *FAM. L. MONTHLY* 66 (April 1994).

3. David Dolovich “Mediation: A Process to Regain Control of Your Life,” Mediate.com.
4. The following is adapted from Forrest S. Mosten, Lawyer as Peacemaker, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAMILY LAW QUARTERLY, Fall 2009.
5. <https://nacmnet.org/sites/default/files/images/StaffCannotGiveLegalAdvice.pdf>. See, e.g., California Court Form MC800, which details what court clerks can and cannot do for litigants. <http://www.courts.ca.gov/documents/mc800.pdf>.
6. CALIFORNIA STATE BAR COMMITTEE ON DELIVERY OF LEGAL SERVICES FOR MIDDLE INCOME PERSONS, LAWYER’S GUIDE TO BEING A CLIENT COACH (Steven Elias ed., 1994); Donald King, *Save the Courts—Save the Family*, CAL. LAW., Jan. 1992. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421 (1994). Forrest S. Mosten, *Unbundled Legal Services Today and Predictions for the Future*, ABA FAMILY LAW ADVOCATE, Fall 2012, 14.
7. BRUCE D. SALES ET AL., SELF-REPRESENTATION IN DIVORCE CASES, ABA STANDING COMMITTEE ON DELIVERY OF LEGAL SERVICES (1993); Julie Macfarlane. *Identifying and Meeting the Needs of Self-Represented Litigants* (May 2013) RESPONDING TO THE NEEDS OF THE SELF REPRESENTED DIVORCE LITIGANT, ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES (1994).
8. www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_self_help_center_census.authcheckdam.pdf.
9. ABA CONSORTIUM ON LEGAL NEEDS AND THE PUBLIC, COMPREHENSIVE LEGAL NEEDS STUDY (1994).
10. The trend among U.S. Supreme Court cases is to support entrepreneurial and consumer-oriented marketing of professional services. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding blanket bans on lawyer advertising unconstitutional); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (permitting a Florida certified public accountant to personally solicit clients).
11. See ABA STANDING COMMITTEE ON PROFESSIONAL LIABILITY, LAWYER’S DESK GUIDE TO MALPRACTICE (1992); *Miller v. Metzinger*, 154 Cal. Rptr. 22, 27 (Ct. App. 1979) (“When a party seeking legal advice consults an attorney at law and secures that advice, the relationship of attorney and client is established prima facie.”); see also Forrest S. Mosten, *Unbundling Legal Services in 2014: Recommendations for the Courts*, 53 ABA JUDGE’S JOURNAL 10 (January 2014).
12. Nancy Neal Yeend, *How ADR Benefits Law Firm Management*, in CALIFORNIA ADR PRACTICE GUIDE § 31.04 (1992).
13. COMPREHENSIVE LEGAL NEEDS STUDY, *supra* note 5, at 32–35 (High satisfaction was generated with respect to the lawyer’s honesty and explanation of the process and for keeping the client informed of the progress of the case and promptness in carrying out document work and returning phone calls. Much less satisfaction was experienced with courts than with lawyers). In Australia, a longitudinal study of 723 divorcing people found high satisfaction with lawyer services until and unless the dispute was decided by a court. P. McDONALD, *SETTLING* (1986).
14. Junda Woo, *Entrepreneurial Lawyers Coach Clients to Represent Themselves*, WALL ST. J., Oct. 13, 1993, at B1, B6.

15. Name withheld on request. Facts modified to protect identity.
16. Noted antitrust lawyer Maxwell Blecker in Katrina M. Dewey, *Meet Them in Court: What California Top Litigators Have in Common: Guts and Glory*, CAL. BUS. L. REV., July 10, 1995, at 10.
17. CONSTANCE AHRONS, *THE GOOD DIVORCE*, 57-58 (1994).

<http://www.pbookshop.com>