

# FAMILY LAWYERING: PAST, PRESENT, AND FUTURE<sup>1</sup>

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## I. INTRODUCTION

In the past fifty years, we have witnessed what political scientist Herbert Jacob calls the “silent revolution” of divorce law.<sup>2</sup> Before this revolution, husbands generally had the legal right to make family decisions in a marriage.<sup>3</sup> To get a divorce, a spouse would have to prove in court that there were grounds for a divorce. Adultery was grounds for divorce, sometimes the only ground.<sup>4</sup> The law discriminated based on the spouses’ gender, giving preferences to husbands in the division of property and, under the “tender years doctrine,” to wives in certain child custody decisions. Wives could sometimes expect to receive alimony for the rest of their lives.<sup>5</sup>

In the past fifty years, divorce law has turned upside down. Marriage is not assumed to be a lifelong commitment. Fault generally is not legally relevant. Gender equality is a fundamental principle. Today, courts regularly handle a much broader range of issues, including disputes about issues such as domestic violence; parental relocation; religious upbringing; payment for children’s college education; grandparent and stepparent visitation rights; rights of same-sex and unmarried couples; alienation of parents and children; and the role of e-mail, the Internet, and cybersex in divorce.<sup>6</sup>

These major legal and social changes have dramatically changed family dispute resolution in the United States. Changes in legal doctrine, such as joint custody, no-fault divorce, and domestic violence laws are generally quite appropriate, though they often require courts to make difficult decisions using legal standards that are more vague than in the past. The cost of divorce has increased along with the number and complexity of legal issues in these cases. Family courts have had to deal with increased caseloads and they have provided or required a broader range of services.<sup>7</sup> Moreover, private professionals in many fields provide a variety of services in these cases.<sup>8</sup>

Family law practice inevitably evolved in response to social and legal changes such as those described above. This article briefly sketches some of the changes in family law practice in the past fifty years. Part II describes some of the factors contributing to these changes, including changes in family law, social norms, dispute resolution processes, and the nature of legal practice. Based on these trends, Part III recommends approaches that family lawyers should use in their practices.

## II. FACTORS CAUSING CHANGES IN FAMILY LAW PRACTICE

This part briefly sketches some of the causes and characteristics of the changes in family law practice in recent decades. Many of the causes are interrelated, rather than constituting a single causal chain reaction.

### A. CHANGES IN FAMILY LAW DOCTRINES AND SOCIAL NORMS

Before the family law revolution, parties and lawyers had to focus on establishing acceptable legal grounds for divorce, such as adultery, as spouses could not get a divorce without proving that one party was at fault for the demise of the marriage. Over time, lawyers and courts sometimes even colluded

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in a charade to establish fictitious legal grounds, occasionally involving the hiring of women to be photographed allegedly *in flagrante delicto* with the husband.<sup>9</sup> Financial and custody issues were often relatively simple. Typically, the wives worked only at home and there was less expectation of women supporting themselves. Decisions about property, child custody, and alimony were determined by fairly clear legal rules and norms.<sup>10</sup>

After the revolution, the no-fault regime largely eliminated fault as a central legal issue (though, for some spouses, it is still a pivotal emotional issue that is injected into legal proceedings). Marital property is divided under laws giving rights to both spouses to receive substantial portions of the property. With both spouses working outside the home in most marriages, the courts generally expect most spouses to support themselves after a short transition period (except for spouses in long marriages who never worked outside the home). Child support is regulated by federal and state statutes to a much greater extent, including mathematical formulas that establish presumptive amounts of support. Courts normally presume that both parents will be involved in major decisions about minor children and have continuing contact with them after divorce. The “best interests of the child” standard creates numerous opportunities for both parents to argue that the courts should rule in their favor. Thus parents use the courts to resolve a wide range of disputes over residential schedules and other child-raising issues.<sup>11</sup>

In addition to these changes in legal rules and norms, social conditions have added to the complication of divorce practice. For one thing, the divorce rate—and the total number of divorces—has increased dramatically since the 1960s.<sup>12</sup> In recent decades, women have become more active in the paid workforce than in the past, leading to increased opportunities for disputing about child custody.<sup>13</sup> Divorce causes mobility into new households, sometimes with parents moving a significant distance away from each other, and a decrease in household incomes, factors that can lead to postdivorce parental disputes.<sup>14</sup> Children’s lives have become more complicated, with numerous organized extracurricular activities, like sports, that demand parents’ limited time and energy.<sup>15</sup> As divorce and remarriage have become more common, stepparent relationships are more likely to complicate issues in separation and divorce.<sup>16</sup>

Although the adoption of no-fault divorce laws was intended to decrease the amount of acrimony surrounding divorce, other legal and social changes in the past fifty years have greatly increased opportunities for divorcing spouses to engage in legal disputes.<sup>17</sup> Thus, family law practice expanded, requiring lawyers to handle a larger number and broader range of disputes than in the past.

## **B. CHANGES IN DISPUTE RESOLUTION PROCESSES IN AND OUT OF COURT**

In addition to the changes in legal rules and social norms described in the preceding part, family lawyers have had to deal with a proliferation of dispute resolution processes, both in and out of court. Before the revolution, the dispute resolution processes were generally limited to negotiation between lawyers and court adjudication. Today, lawyers interact with numerous dispute resolution processes and nonlawyer professionals who provide dispute resolution services.

Indeed, the primary role of family courts has shifted from adjudication of disputes to proactive management of family law–related problems of individuals subject to their jurisdiction.<sup>18</sup> Family courts play a major rehabilitative or problem-solving role in which they manage cases, essentially directing the diagnosis and treatment of family disputes and dysfunctions.<sup>19</sup> Some of the more common family court processes include assistance for self-represented litigants, appointment of advocates for children (and/or their interests), parent education, mediation, child custody evaluations, early neutral evaluation, parenting coordination, and services related to domestic violence.<sup>20</sup> Some family courts use a tiered system in which families progress through a series of tiers of service, typically starting with mediation and, if the dispute is not resolved, proceeding to more intrusive and directive processes until the dispute is resolved. Other courts use triage (or differentiated case management) systems, in which they make preliminary assessments and refer cases to different

services based on characteristics of the cases. The case management process may involve screening, development of a plan for family services, appointment of a case manager, development of a parenting plan, and periodic court review.<sup>21</sup> In addition, there has been a movement to unify family courts so that a single judge and professional team deals with all issues of a particular family, including child abuse or neglect, juvenile delinquency, family violence, and divorce.<sup>22</sup>

Many family courts now regularly recommend or require divorcing couples to mediate child custody disputes, and many couples use private mediation services to resolve all the issues in their divorce.<sup>23</sup> In research on an early mandatory divorce mediation program, Craig McEwen and his colleagues found that, after some initial opposition, lawyers increasingly valued mediation as a benefit for themselves and their clients. Lawyers found that mediation encouraged parties to participate directly, voice their feelings, consider both legal and nonlegal issues, develop reasonable expectations, and manage the pace and direction of a case and helped lawyers to assist in negotiation and, if necessary, prepare for trial.<sup>24</sup>

In some cases, divorcing parties use unbundled legal services (or discrete task representation) because they want to keep control by representing themselves and also want to receive a limited amount of legal assistance. This is an intermediate approach between parties representing themselves entirely and retaining lawyers to provide a full range of services. For example, parties may retain lawyers to perform only specific tasks such as providing advice; reviewing or drafting documents; performing factual investigation or legal research; and coaching to prepare for negotiation, mediation, or a court appearance.<sup>25</sup>

All these changes in processes for handling divorce cases reflect the radically different procedural landscape in which family lawyers now operate as compared with fifty years ago. As part of the transformation in dispute processing, family lawyers now operate as part of interdisciplinary professional workgroups solving family problems in addition to acting as advocates of their clients' rights and interests.<sup>26</sup>

### C. CHANGES IN THE NATURE OF LEGAL SERVICES

Although research indicates that family lawyers have always negotiated and have been more than courtroom gladiators, recent developments have highlighted their nonadversarial roles. Despite a public image of family lawyers as fomenters of conflict, empirical research indicates that most family lawyers try to be reasonable.<sup>27</sup> Of course, before the revolution, many family lawyers cooperated with each other and now some lawyers are quite adversarial.<sup>28</sup> But social science research indicates that family lawyers are likely to "dampen legal conflict far more than they exacerbate it and generally try to avoid adversarial actions."<sup>29</sup> Reasonable lawyers are not necessarily pushovers, but rather are realistic about which "battles are worth fighting."<sup>30</sup>

During the past fifty years, there have been systematic efforts to encourage family lawyers to act reasonably when representing their clients. In 1991, the American Academy of Matrimonial Lawyers (AAML) first published *Bounds of Advocacy*,<sup>31</sup> advocating that family lawyers should use a "constructive advocacy" approach, including counseling and problem solving.<sup>32</sup> This publication argues that, even when parties litigate, lawyers should do so constructively, "considering with the client what is in the client's best interests and determining the most effective means to achieve that result. The client's best interests include the well being of children, family peace, and economic stability."<sup>33</sup>

The Collaborative Law movement also has promoted greater cooperation in family law cases. This movement was founded in 1990 and started growing rapidly after 2000.<sup>34</sup> The Collaborative process involves an agreement between parties to use interest-based negotiation and make full disclosure of all relevant facts. A disqualification clause in the participation agreement provides that, in the event of contested litigation, the Collaborative lawyers are not permitted to represent their clients in the litigation. Thus, this provision creates incentives to resolve issues without use or threat of litigation. The process sometimes involves an interdisciplinary professional team, including child development specialists, financial specialists, and/or mental health coaches.<sup>35</sup> A smaller Cooperative Practice movement offers an intermediate approach between traditional, litigation-oriented practice and

Collaborative Law. This process is somewhat similar to Collaborative Law in terms of information-sharing and negotiation procedures but does not include the disqualification provision.<sup>36</sup> Many family lawyers often use some of these techniques in their work even if they do not explicitly identify their procedures with these models.

Of course, some lawyers still rely primarily on litigation procedures to manage family cases and sometimes are unnecessarily adversarial. But the trend has been for family lawyers to focus increasingly on clients' interests, avoid unnecessarily aggravating clients' conflicts, and use the courts as a last step in resolving family conflict.

### III. RECOMMENDATIONS FOR FUTURE FAMILY LAW PRACTICE

Considering the increasing complexity of family law and the processes for handling family law issues, lawyers face increasing challenges in working with their clients. Developing a good working relationship with clients is important because clients themselves must manage many of their own issues on a daily basis. As a result, it is especially important for family law clients to participate actively in their cases. Thus, the starting point for family lawyers should always be to help their clients develop the best possible understanding of their situation, their interests, and how different approaches are likely to affect their interests. Clients' interests are much broader than winning or losing a particular issue or hearing because family law cases often involve deeply important personal issues and continuing relationships that produce long-lasting effects on clients and their loved ones. The Model Rules of Professional Conduct authorize consideration of such broader client interests. In particular, the Rules provide that, in counseling clients, it is appropriate for lawyers to refer to "considerations such as moral, economic, social and political factors that may be relevant to the client's situation."<sup>37</sup>

Good family lawyers must be good client educators. Clients need a lot of information to make good decisions, so lawyers should consider various ways to help clients understand their situations.<sup>38</sup> Clients may not be able to absorb all the information that lawyers provide, especially if clients are upset, as family law clients often are.<sup>39</sup> Many people may have an especially hard time absorbing the information if lawyers use legal or dispute resolution terminology instead of plain English.<sup>40</sup> So lawyers should take care to convey information and advice as effectively as possible. Lawyers can provide accurate and easy-to-understand information on Web sites, brochures, and handouts so that people have time to absorb and reflect upon critical information.<sup>41</sup> The Association of Family and Conciliation Courts (AFCC) has produced and disseminated many helpful resources for families.<sup>42</sup> Lawyers can also establish a client library in waiting rooms and other client-access areas, including concise information sheets and a computer to search the Internet.<sup>43</sup>

In recent decades, there has been an increased diversity of family issues needing legal resolution and thus it is particularly important to match legal (other professional) intervention to clients' individual needs. In general, in each case, lawyers should carefully consider their clients' interests and value preferences and tailor the lawyers' approach to that client. Under the Model Rules, lawyers must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client."<sup>44</sup> As this language indicates, "zeal" refers to focusing on clients' interests, and sometimes it is important for lawyers to advocate vigorously in court as the best way to protect their clients' interests when the other side persists in taking unreasonable positions. However, in most situations, family lawyers should use court procedures as the last resort. Family law clients often have strong interests in maintaining constructive family relationships that would be harmed by overzealous advocacy in seeking every possible partisan advantage.<sup>45</sup> Indeed, sometimes family law clients take adversarial approaches that are likely to harm their own interests. In these situations, the lawyers should act with "commitment and dedication" to *reduce* the level of partisanship.<sup>46</sup> There are many ways that lawyers might try to accomplish this objective, including counseling by the lawyer and/or mental health professionals. Lawyers should also consider using procedures that are likely to advance

clients' interests through cooperation, such as mediation, Collaborative Practice, or Cooperative Practice.<sup>47</sup> In some cases, clients would benefit by arranging for confidential mini-evaluations by experts. These might be done solely on behalf of the client or jointly with the other side by hiring a neutral expert.<sup>48</sup>

Families are forever and thus divorce transforms, rather than ends, family relationships. So, in addition to providing legal services for issues that clients initially present, lawyers should offer clients services to prevent unnecessary and unproductive legal conflicts and affirmatively promote clients' goals. After family lawyers have helped clients settle a dispute, they should ask clients if they want help to avoid possible future conflicts. Lawyers can prevent future trouble with both symptomatic and asymptomatic preventive planning. Symptomatic prevention is using the experience of recent legal trouble to motivate clients to consider ways to avoid similar problems in the future. Asymptomatic prevention involves preventive procedures when the parties are not facing a conflict after the resolution of a legal dispute.<sup>49</sup> Some preventive processes can be used in both symptomatic and asymptomatic situations. For example, lawyers can help parties develop a procedure to handle possible future disputes when advising clients about a premarital agreement in the glow of harmony anticipating a wedding or when advising clients who have just resolved a bitter dispute over parenting. When lawyers are about to close a file, they should ask the clients if they would like to schedule a follow-up phone call or meeting to ask about implementation of an agreement or to discuss life-cycle events such as when the family residence is scheduled to be sold, when children reach the age when they would change schools or begin driving, or when spousal support is scheduled to end. Lawyers should also ask clients if they would like a general legal and conflict wellness checkup to help clients assess the current state of their legal health.<sup>50</sup>

Considering that the revolution in family law doctrine and dispute resolution is still underway, the duty to maintain professional competence<sup>51</sup> is especially significant for family lawyers. For the past fifty years, the AFCC has played a significant role in the advancement of family practice through publications, educational programs, conferences, promotion of professional collaboration, practice guidelines and standards, and public policy initiatives. Family lawyers (and their clients) would benefit if the lawyers take advantage of AFCC's resources to provide the best possible legal services for their clients.

#### IV. CONCLUSION

As noted earlier, Herbert Jacob used the term "silent revolution" referring to the changes in family law in recent decades.<sup>52</sup> This is paradoxical considering the common conception of revolutions as brief dramatic events punctuating very different circumstances before and afterward. As described above, the legal and social changes during this time reflect a fundamental transformation, even though the changes have developed incrementally and occurred over an extended period. As the changes unfolded, they may have seemed dramatic and uncertain. Looking back, many people would probably agree that the changes were appropriate and they might be surprised that the issues were ever controversial. The family law revolution is not over and major change continues.

We believe that the vast majority of family lawyers are sincerely committed to promoting the welfare of their clients and their families. Given these concerns, family lawyers will need to keep up with the ongoing revolution in family law and family law dispute resolution and apply these developments in advising and representing their clients.

#### NOTES

1. This article is adapted from John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIMONIAL LAW. 411 (2012) and Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489 (2009).

2. HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988). In this article, references to “revolution” refer to the revolution in divorce law unfolding in the past five decades. This article specifically focuses on divorce practice in the United States, though there have been similar changes in other areas of family law practice.

3. *Id.* at 3–4.

4. *Id.* at 1–2, 4–5.

5. *Id.* at 2–3.

6. See Lande, *supra* note 1, at 412–15. For further discussion, see *infra* Part II.A.

7. See ANDREW I. SCHEPARD, *CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES* 38–40, 58–60, 68–78, 90–95, 100–24 (2004); Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 *FAM. L.Q.* 659, 669–70 (2008).

8. SCHEPARD, *supra* note 7, at 50–67, 100–12, 152–61. This article uses the term “family law professional” to include a wide range of mental health, financial, and other professionals, as well as lawyers who provide services in family law matters.

9. See Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 *J. L. & FAM. STUD.* 57, 61 (2010) (describing accounts of a “cottage industry” creating phony evidence of adultery, choreographed with women who met men in hotels, got undressed, and had photographers document the scene).

10. See Lande, *supra* note 1, at 412–15.

11. *Id.*

12. See J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 *J. AM. ACAD. MATRIMONIAL LAW.* 1, 23–24 (2008). The divorce rate peaked after sharp increases in the 1970s and 1980s and then declined, though not back to the level in 1960.

13. See Maureen Perry-Jenkins et al., *Work and Family in the 1990s*, 62 *J. MARRIAGE & FAM.* 981, 981–82 (2000).

14. See Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 *SUFFOLK U. L. REV.* 31, 34–36 (2002); Scott J. South et al., *Children’s Residential Mobility and Neighborhood Environment Following Parental Divorce and Remarriage*, 77 *SOC. FORCES* 667, 668, 676–77 (1998).

15. See Patricia A. Adler & Peter Adler, *Social Reproduction and the Corporate Other: The Institutionalization of Afterschool Activities*, 35 *SOC. Q.* 309, 309–10 (1994).

16. See Susan L. Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Laws Regarding Stepparent Rights and Obligations*, 48 *FAM. CT. REV.* 528, 529 (2010).

17. See Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 *WAKE FOREST L. REV.* 441, 462–68 (2008).

18. SCHEPARD, *supra* note 7, at 2.

19. *Id.* at 5.

20. See Lande, *supra* note 1, at 416–20, 431–42.

21. SCHEPARD, *supra* note 7, at 7; Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 *FAM. CT. REV.* 371, 372–84 (2009).

22. SCHEPARD, *supra* note 7, at 4.

23. Ann L. Milne et al., *The Evolution of Divorce and Family Mediation: An Overview*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 9–13 (Ann L. Milne et al. eds., 2004).

24. Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 *LAW & SOC’Y REV.* 149, 182 (1994). For a compilation of research on family mediation, see CONNIE. J.A. BECK & BRUCE D. SALES, *FAMILY MEDIATION: FACTS, MYTHS AND FUTURE PROSPECTS* (2001).

25. See generally Standing Comm. on Delivery of Legal Serv., Am. Bar. Ass’n, *Unbundled Resources*, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html) (collecting listings of articles, books, reports, cases, court rules, ethics opinions, and information about self-service centers); STEPHANIE L. KIMBRO, *LIMITED SCOPE LEGAL SERVICES: UNBUNDLING AND THE SELF-HELP CLIENT* (2012); FORREST S. MOSTEN, *UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE* (2000); *Unbundled Legal Services and Unrepresented Family Court Litigants*, 40 *FAM. CT. REV. (SPECIAL ISSUE)* 10 (2002); *MO. SUP. CT. R. 4-1.2 cmt 2*.

26. SCHEPARD, *supra* note 7, at 7.

27. See LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 48–56, 87–109 (2001); HUBERT J. O’GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 132–43 (1963); AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53–58 (1995); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 *LAW & SOC’Y REV.* 585, 593, 601 (1987).

28. When there are high stakes or people’s adversarial motivations take precedence, some modern lawyers act in a very adversarial manner. Moreover, researchers have found that lawyers “who violate the norm of the reasonable divorce lawyer may do so because they are outsiders to that community, sharing neither its standards nor its bonds of reciprocity.” MATHER ET AL., *supra* note 27, at 51.

29. *Id.* at 114.

30. *Id.* at 49.

31. *Id.* at 113. AAML updated the document in 2000. See AAML, *Bounds of Advocacy* (2000), <http://www.aaml.org/library/publications/19/bounds-advocacy>.

32. *Id.*

33. *Id.* See generally Mosten, *supra* note 1.

34. John Lande, *An Empirical Analysis of Collaborative Practice*, 49 FAM. CT. REV. 257, 257 (2011). Virtually all Collaborative cases involve divorces. See Unpublished Description of IACP Research (n.d.) (on file with author); Information Sheet, FAQ Based on Cases Reported to the International Academy of Collaborative Professionals Research Project (Oct. 25, 2009) (information sheet distributed at the International Academy of Collaborative Professionals Annual Networking and Educational Forum, Minneapolis, MN, on file with author, stating that 96% of cases in the database were divorce cases).

35. FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT* (2009); Lande, *supra* note 34, at 257, 264–65.

36. See John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 227–47; John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 282–86 & tbl.1 (2004).

37. MODEL RULES OF PROF'L CONDUCT R.2.1 (2002).

38. See MOSTEN, *supra* note 25, at 42–43; Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163, 176; *Assessment Criteria and Team Feedback Form*, LOUIS M. BROWN & FORREST S. MOSTEN INTERNATIONAL CLIENT CONSULTING COMPETITION, <http://www.brownmosten.com> (last visited Oct. 8, 2012).

39. See Mosten, *supra* note 38, at 170; see also MOSTEN, *supra* note 25, at 42–43.

40. See MOSTEN, *supra* note 25, at 45–46.

41. See Mosten, *supra* note 38, at 172.

42. Ass'n of Fam. & Conciliation Cts., Resources for Families, <http://www.afcnet.org/resourcecenter/resourcesforfamilies/categoryid/1> (last visited June 11, 2012).

43. See Mosten, *supra* note 38, at 172 (describing how lawyers can make their offices “classrooms of client education”); see also Southern California Mediation Association, *SCMA/Forrest S. Mosten Conflict Resolution Libraries*, <http://www.scmmediation.org> (last visited Sept. 13, 2012).

44. MODEL RULES OF PROF'L CONDUCT R.1.3 cmt.1 (2002).

45. See John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1332–36 (2003).

46. See *supra* text accompanying note 44. For general suggestions about dealing with clients who, contrary to their interests, are acting uncooperatively, see JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* 104–10 (2011).

47. Although the Model Rules of Professional Conduct do not require lawyers to advise clients about alternative dispute resolution options, the Rules encourage lawyers to do so. See generally Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 (2000). Collaborative lawyers are required to obtain clients' informed consent before undertaking a Collaborative process. See John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 402–05 (2010). Although lawyers generally are not required to get clients' informed consent before undertaking litigation or other uncertain procedures, we believe that it is good practice to do so.

48. See LANDE, *supra* note 46, at 105, 121–22; Forrest S. Mosten, *Confidential Mini Child-Custody Evaluations: Another ADR Option*, 45 FAM. L.Q. 119 (2011).

49. Louis M. Brown and other preventive scholars rely on the more developed medical model as an analogy for legal prevention. See, e.g., Louis M. Brown, *Preventive Medicine and Preventive Law: An Essay That Belongs to My Heart*, 11 J. L. MED. & ETHICS 220 (1983) (describing how a routine asymptomatic physical exam uncovered a problem that was repaired to increase Professor Brown's life span).

50. See, e.g., Forrest Mosten, *Personal Legal Wellness Check-Up*, MOSTENMEDIATION.COM (2012), <http://www.mostenmediation.com/legal/wellness.html>.

51. See MODEL RULES OF PROF'L CONDUCT R.1.1 cmt. 6 (2002).

52. See *supra* note 2 and accompanying text.

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