

Unbundling Legal Services in Mediation

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Introduction

Traditionally, lawyers who represent clients in connection with the dissolution of a marriage or other family disputes have provided full service representation. The typical model involves an attorney who does all the work, and a client who at least theoretically makes the final decisions, based on the attorney's analysis and advice, about how he or she wishes to proceed. In the main, the client's role is passive. The client is entirely dependent upon the attorney, even for status reports. It is not an exaggeration to say that clients who have opted for full service representation have almost literally turned the case over to the lawyer. In contrast, mediation directly and immediately involves the parties in the resolution of all issues.

There are two ways to look at the implications for attorneys of the trend toward mediation as the preferred model for resolving family disputes. The first is derived from the instinctive reaction of the legal establishment and many individual lawyers who embrace the full service model of legal services: Mediation will result in less work for lawyers, and will jeopardize their livelihood. The fear is that the *pro se* representation will be fostered by mediation; that litigants who chose to represent themselves in court – with its crowded dockets, strict rules of procedure, unhelpful court staff, and overworked judges – will also choose to represent themselves in a much less intimidating private proceeding. The parties will no longer “need” lawyers, or at least they will need them much less. While understandable, the logic of this analysis is suspect, and the conclusion may be unjustified.

There is a much more encouraging way to look at the trend toward mediation. The parties may not need lawyers any more than they do in court, but they will choose to use them if they can obtain the services they want at a cost they can afford. The basic problem is how to make legal services affordable. The answer is to unbundle those services.¹ The premise of this article is that *unbundled* legal services are already affordable, at least in the context of mediation. Mediation offers clients the opportunity to obtain selected legal services instead of representing themselves and going without legal services entirely.

At least when it comes to family law, the judicial system is inefficient and uneconomical. As a result, many litigants have abandoned the system in favor of mediation. Fewer and fewer clients are willing to pay an attorney's regular hourly rate for the time the attorney spends traveling to and from the

¹ The Judicial Council of California has established a task force on unbundling to make recommendations to the State Bar of California. The task force's working definition of unbundling is “an attorney-client relationship in which the attorney and the client agree that the scope of the legal services will be limited to the defined tasks that the client asks the attorney to perform.” As a general matter, there is no professional or ethical impediment to unbundled legal services. See American Bar Association, Model Rule of Professional Conduct 1.2(b); Los Angeles County Bar Association, Professional Responsibility and Ethics Committee, Formal Opinion No. 502, November 4, 1999.

courthouse, waiting for the case to be called, formal discovery, and other costly activities. Those litigants who remain in the system are representing themselves because lawyers are unwilling to render unbundled legal services, and even unbundled legal services may be unaffordable because of inefficiencies in the system. The market for full service representation in Court is thus shrinking; at the same time, the market for unbundled legal services in mediation is expanding. The challenge for lawyers is to offer mediation clients unbundled legal services at an affordable cost.

There are several reasons why unbundled legal services are more feasible in the context of mediation as opposed to litigation.

- The client can specify the services to be performed by the attorney, and the attorney's corresponding responsibility can be limited by contract to providing those services in a professional manner. In contrast, an attorney who undertakes to represent a client in court assumes numerous responsibilities as the client's "attorney of record" by operation of law.
- The client controls the time spent by the attorney. Most attorneys charge by the hour. Most of the time spent by a full-service lawyer is spent outside the presence of the client. A full-service lawyer thus works *for* the client. In contrast, unbundled legal services are usually rendered in the presence of the client; indeed, they are often interactive. The unbundled lawyer is more likely to work *with* the client.
- All of the inefficiencies of going to court are eliminated. There is little or no travel time; no waiting time; no paperwork; minimal compliance with burdensome procedural requirements.

Why Are Legal Services Unaffordable?

The primary reason family law litigants do not use lawyers is that lawyers are unaffordable. This is not necessarily because lawyers' hourly rates are too high. It is because lawyers charge by the hour, and cannot control the number of hours they spend. Lawyers cannot control the number of hours they spend because they are often unable or unwilling to "unbundle" their services. Thus, for example, in order to appear at a court proceeding that may involve only 10-15 minutes of the lawyer's time, the lawyer must drive to and from the courthouse and wait for the case to be called. Time spent traveling and waiting, which is typically billed to the client at the same rate as time spent in court could easily add up to 3-4 hours. In order to utilize a lawyer's services in court, a client must pay for all the time the lawyer spends even though most of that time may be of no benefit to the client.

Consider the example of a common court proceeding: An initial Order to Show Cause at which the court will decide (at least temporarily) important issues having to do with custody and visitation, spousal support and child support, the use and occupancy of the family residence, responsibility for payment of debts and other obligations, and restraining orders with respect to the parties' property and personal conduct. Even temporary orders on issues may significantly affect the ultimate resolution of the entire case

as a practical matter.

What the client really needs is two hours of a lawyer's time to prepare the declarations and another 15 minutes to argue the matter.² The total cost would be significant.³ But a large number of moderate and middle income parties might consider that it was "worth it" to have expert assistance when it comes to the resolution of so many important issues. In other words, there are many parties who would pay for those services *if they were charged only for those services*.

The problem is those services are cannot be rendered in a vacuum. In order to go to court the attorney must charge the client for travel time and waiting time. Travel time might be only 30 minutes each way, an hour in total. However, most courts require all attorneys to be present for the calendar call, which typically takes place at 8:30 or 9:00 a.m., even though any given case might not be called until several hours later.⁴ The client in our hypothetical example could easily end up paying two or three times as much as the true cost of the legal services that were actually provided.

Some of the blame for the high cost of legal services must be laid squarely at the door of the courthouse. Judges have been quick to conserve their own time – by, for example, requiring virtually all testimony to be set forth in written declarations. They have been much slower to conserve the time of attorneys by, for example, staggering the call of their calendars or permitting oral argument by telephone. It is hardly surprising that lawyers cannot figure out a way to make their services "affordable" under these circumstances.

The excessive cost of litigation is not attributable solely to inefficiencies such as travel time and waiting time that are in some sense collateral consequences of living in large metropolitan areas and

² At a time when the parties may most need to be heard, they are the least likely to be heard. In many jurisdictions, these matters are resolved on the basis of written declarations instead of oral testimony, although the parties or their attorneys may have an opportunity to appear and argue at a hearing before the judge makes a decision. In California, virtually all contested proceedings – except trials – are resolved on the basis of written declarations and limited oral argument. *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, *Marriage of Stevenot* (1984) 154 Cal.App.3d 1051. Because of their congested calendars, most judges take oral testimony or permit extensive oral argument very infrequently. In an effort to conserve even more judicial time, family law judges in San Diego do not even read the file unless counsel notifies the clerk the day before and designates the documents to be read. San Diego County Superior Court, Local Rules, Family Law Rule 5.12.J. In *Lammers v. Superior Court* (2000) ___ Cal.App.4th ___, the Court of Appeal turned down a constitutional challenge to the rule under the facts of the case before it, even though it acknowledged that the rule could result in a denial of due process if it were improperly applied and a trial court did not review the record before making its order. The pressure on trial courts to expedite disposition of these cases has become so intense that there is often no hearing at all. In *Marriage of Hall* (2000) 81 Cal.App.4th 313, an appellate panel criticized the "all-to-common pattern in family law of lawyers disappearing into a judge's chamber and emerging with the judge's order, independent of any hearing or settlement."

³ Lawyers' hourly rates vary widely throughout the country. It suffices to say that the unaffordability of legal services is an issue everywhere, regardless of the going rate for legal services in any given jurisdiction.

⁴ This is likely to be true of our hypothetical case. Most judges tend to call those cases that will require the least amount of time to resolve first: Stipulated continuances, opposed continuances, default prove-ups, and other routine matters. Other cases may involve "emergencies" or are otherwise entitled to priority. Of necessity, those cases that will actually require the court to exercise judgment with respect to substantive issues are called at the end of the calendar.

practicing in courts with overcrowded dockets. Theoretically, these inefficiencies could be eliminated (or at least substantially reduced). They are not inherent in the litigation process.⁵

However, the same analysis can be made with respect to discovery, which *is* inherent in the litigation process. Indeed, it is probably the single most expensive component of the entire process. One of the advantages of mediation is that it virtually eliminates discovery of all kinds in favor of a collaborative approach to obtaining and exchanging information. By contracting for unbundled legal services instead of full service representation, the parties can avoid paying attorneys to do for them what they can do for themselves. This hypothesis is based upon the following assumptions:

- Discovery is primarily directed to the litigants.
- The majority of discovery directed to third parties is intended to verify information provided by the litigants.
- An insignificant amount of discovery – whether directed to the litigants or third parties – elicits useful information that would not have been provided voluntarily, or could not have been obtained informally.

To be sure, there are exceptions to any generalization. There are certainly instances in which a party conceals pertinent information that is “discovered” during the discovery process. However, this is an extremely rare occurrence for two separate reasons: First, the majority of litigants have nothing to hide. Either the basic facts of their case are already known to both parties, or those facts may be readily ascertained and verified from records that are conveniently available (*e.g.*, bank statements, tax returns, pay stubs, etc.). Second, a litigant who has managed to conceal the existence of any significant asset during the marriage is usually committed to a “lie,” which is unlikely to be exposed either through voluntary disclosure or formal discovery.

One of the major justifications for formal discovery (as opposed to the informal exchange of information) is satisfying the *attorneys’* comfort level. This is entirely understandable. After all, the attorneys know nothing except what their clients tell them and what they learn through discovery. Since the attorneys believe that they are ultimately responsible for obtaining all pertinent information (and have potential liability if they fail to discharge that responsibility), it often turns out that discovery is recommended and even required by the attorneys, not requested by the parties. Unbundling directly addresses this issue.

By relieving the attorneys of this responsibility in favor of an informal process negotiated between the parties under the auspices of a mediator, the parties can eliminate the single most expensive component

⁵ In some instances, the system is inefficient by design. One of the techniques the court sometimes uses to coerce settlements is to make the litigation even more unaffordable by, for example, requiring the parties and their attorneys to remain in the courthouse until a settlement is reached or the building is closed, whichever occurs first. To put it bluntly, there may be a punitive overtone to the inefficiencies that are inherent in the system. Practitioners in most jurisdictions are well aware of those bench officers who are respectful of counsels’ time and the parties’ resources, as well as those who appear not to notice or care that they contribute very substantially to the high cost of litigation.

of litigation, and thus save the fees that would otherwise have been paid to attorneys for conducting formal discovery. Mediation substitutes a cooperative exchange of pertinent information between the parties for an adversarial process of discovery conducted by the attorneys. This accomplishes two important goals:

First, it transfers the responsibility for doing the work from the attorneys to the parties. Unlike the attorneys, the parties can do that work for free. Most parties are no more interested in paying their attorneys to do work for them that they could do for themselves than they are in paying their attorneys to drive to and from the courthouse. The first goal can thus be accomplished simply by redefining the process.

Second, the attorney can still render those legal services that the client actually needs at an affordable cost. For example, the attorney can prepare a list for the client of the information to be requested. An experienced attorney will already have such a list. All family law attorneys are familiar with requests for production of documents that are generic (or more colloquially, boilerplate) and are often sent out routinely during the course of the litigation process. After information has been exchanged, the attorney can review it to ensure that it is complete.

Most importantly, the attorney can analyze the information and advise the client accordingly. After all, getting the information is different from interpreting and understanding the information. Clients who can get the information under the auspices of a mediator may not understand or interpret it properly. Legal analysis and advice can be unbundled from the process of information gathering. Similar efficiencies can be achieved when it comes to propounding interrogatories (written questions to be answered under oath).⁶

Eliminating the time attorneys spend in traveling to and from the courthouse, waiting for the case to be called, and conducting formal discovery reduces the cost of a typical divorce case by at least half. More importantly, it enables attorneys to offer their services to potential clients on an affordable basis. Attorneys who are willing to unbundle will still be able to charge for those services their clients want.⁷

Because of the inefficiencies in this system that currently make legal services unaffordable to a very substantial number of litigants, many litigants choose to go entirely unrepresented. If the inefficiencies were eliminated (or at least ameliorated), clients could obtain the services they want without also paying for the cost of the inefficiencies, and lawyers could provide those services without absorbing the cost of the inefficiencies. This goal is accomplished by taking the “legal system” out of the equation: The travel to and from the courthouse, the crowded dockets and overworked judges, the cumbersome procedural rules, etc.

A family law litigant is less likely to pay for full service representation in court because he or she cannot realistically expect to get that representation at an affordable cost even if that client would pay for one or more unbundled legal services if they were available. To put it succinctly, full service legal

⁶ In California, for example, the Judicial Council has prescribed Family Law Form Interrogatories (California Judicial Council Form 1292.10), which are intended to provide the litigants with most of the basic information they need to address and resolve the issues in their case satisfactorily.

⁷ For a complete explanation of delivering legal services “a la carte” from the lawyer’s point of view, see Forrest S. Mosten, *Unbundling Legal Services* (ABA Law Practice Management Section 2000).

representation is available, but unaffordable in the litigation context. Unbundled legal services are affordable, but unavailable as a practical matter. But there are many fewer impediments to providing unbundled legal services at an affordable cost in the context of mediation.

Who Are Consulting Attorneys?

Few attorneys can make a living by serving *only* as a consulting attorney to parties in mediation. This may explain why so few of them consider alternatives to full service representation. Consulting attorneys fall into one of two categories:

- They are litigators who have been persuaded (sometimes reluctantly) to give peace a chance. They truly think of mediation as an alternative form of dispute resolution, and they may import many of the trappings of the adversarial litigation process into the collaborative mediation process.
- They are themselves mediators. While mediators are more likely than litigators to support the process, their emphasis changes. They may not become adversarial, but their focus narrows when they are serving only one of the parties.

The scope of the services rendered by the consulting attorneys varies. At one extreme, a consulting attorney may be hired only to review an agreement negotiated by the client. Some consulting attorneys limit their role to explaining the meaning and legal effect of the agreement. If the client understands what he or she has done, and has made informed decisions, the consulting attorney has done the job.⁸

At the other extreme, some consulting attorneys define their job as getting the client a good deal, and not so incidentally avoiding responsibility, criticism, or liability. This raises several questions: Who decides? What criteria are to be used? If the consulting attorney decides (and the consulting attorney is a litigator), the tendency is to compare the mediated result with the hypothetical result of a judicial determination. Alternatively, the consulting attorney may substitute his or her notion of fairness for the client's notion of fairness.⁹

Attorneys may be involved in the process before the mediation begins, or even before a mediator is selected. Under those circumstances, the attorneys are often instrumental in deciding whether there will be a mediation and in selecting the mediator. As a general rule, the greater the involvement of the attorneys in the mediation process, they more likely they are to be part of the mediator's constituency. Because the attorneys have their own set of shifting motivations, concerns, and demands, the mediator may end up "mediating" between the attorneys as well.¹⁰

⁸ See Garfield "Signing Off," *Los Angeles Daily Journal* September 30, 1998.

⁹ See Garfield, "Demilitarized Zone," *Los Angeles Daily Journal*, August 27, 1997.

¹⁰ See Garfield and Glassman, Frederick J., "In the Beginning," *Los Angeles Daily Journal*, February 14, 1996.

Roles of Consulting Attorneys

The role of the consulting attorney is rooted in the adversarial system that has marked the evolution of dispute resolution in courts of law. The central tenet of that system is that if each party is vigorously represented by independent counsel, and there is an impartial decision-maker, the end result will be just, or at least fair.¹¹ This is the court model. In practice, this goal is unattainable. Each attorney is trying to obtain the best possible result for his or her client, not to achieve justice or even to be fair to the other side. Even though the judge is supposed to be neutral and objective, it is rare that a judge's decision satisfies both parties. Sometimes, it may not even satisfy one.

In mediation, the parties typically represent themselves, and attempt to reach agreement under the auspices of an impartial facilitator. While the parties may consult attorneys at any stage during the mediation process, and the attorneys may even play an active role as opposed to remaining behind the scenes, the end result is less grandiose than the elusive goal of "justice." At best, the parties end up with an agreement that satisfies their subjective notions of fairness. More often, they settle for an agreement that is neither perfectly just nor entirely fair, but that both parties can accept. The primacy of using legal criteria to make decisions that are debated by attorneys on behalf of the parties is significantly eroded.

The role of the consulting attorney in mediation embraces at least three conceptually distinct concepts:

First, there are the roles the consulting attorney can play in terms of performing discrete tasks that the client may not be able to perform as well, or at all such as analyzing the case, advising the client, negotiating on the client's behalf, and drafting documents. The attorney's role in this sense may be as an advisor, coach, negotiator, or scrivener.

Second, mediators would like the consulting attorneys to play constructive roles. Mediators may not have a substantive agenda, but they certainly have an idea of the kind of "help" they could use from the consulting attorneys. If one party is completely unrealistic in his or her demands on a particular issue, someone has to set that party straight. If the mediator does it, it may look like he or she is taking sides; at the very least, it raises questions as to the mediator's neutrality. Thus, mediators might envision a role for the consulting attorneys as agents of reality that they themselves would prefer not to play.

Third, the consulting attorneys often play a role in the mediation that mediators do not appreciate, let alone assign. Mediators cannot necessarily delegate discrete tasks to the consulting attorneys or even count on them to support the mediation process in a manner that is entirely constructive. Consulting

¹¹ The value of legal services in the mediation context is often assumed. See, e.g., ABA Model Standards of Practice for Family and Divorce Mediation, Standard VI, C., D., and E.. However, the involvement of lawyers in family mediation is not always welcome. For a cynical view of the role of consulting lawyers, see Lenard Marlow, *Mediation Moments Newsletter* (www.mediationmoments.com), especially "The Unauthorized Practice of Law" (September, 2000) and "Conflicting Interests" (October, 2000). Marlow's criticism is not new. Attorneys have long been regarded as, at least potentially, part of the problem instead of part of the solution. See Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 950, 986 (1979).

attorneys sometimes have an agenda of their own, which may conflict with the agenda of the other consulting attorney, the agenda of the mediator, or even the agenda of the party whom the consulting attorney represents.

The whole idea that the parties need separate consulting attorneys – that they should be getting *independent* legal advice – is an attribute of the adversarial system. The notion is that one attorney cannot “represent” two parties with conflicting interests. To be sure, the parties have conflicting interests; otherwise, there would not be a dispute. On the other hand, in most situations, the parties also have common interests, one of which is the efficient and economical resolution of the dispute.

The possibility that one attorney could render legal services to both parties is no longer unthinkable. Clearly, there are some legal services that an attorney is permitted to perform for two parties with conflicting interests.¹¹ The rule is still that parties with conflicting interests should ordinarily not be represented by a single attorney. However, there is ample precedent for expanding the role of a single attorney in connection with a family law dispute.

“Requests for ‘dual representation’ are common in domestic relations matters. Many couples contemplating marriage dissolution believe they share common interests and/or can amicably come to terms on support obligations, child custody and visitation and a fair property settlement. For convenience – and, especially, to save money – they want to hire a single attorney to draft the necessary documents and obtain an uncontested Judgment of Dissolution at minimal expense.”¹²

At least theoretically, the parties may also choose to hire one attorney to provide them with legal information, analysis, and advice. It has long been considered appropriate for the parties to waive potential or actual conflicts so long as the waiver is written and informed. See, e.g., California Rules of Professional Conduct, Rule 3-310. In practice, this is rarely done.

Services Rendered by Consulting Attorneys

While the tasks performed by the consulting attorneys may vary considerably from case to case, many of those tasks are subsumed under the rubric of “advising the client.” In order to fulfill this role, a consulting attorney would ordinarily be required to gather the facts (either from the client or other sources), consider the law applicable to those facts, help the client formulate realistic goals and a negotiating strategy designed to accomplish those goals, and review the parties’ mediated agreement. This is not an exhaustive

¹¹ *In Marriage of Egedi* (2001), ___ Cal.App.4th ___, the Court permitted one attorney to serve as a scrivener of an agreement negotiated between the parties.

¹² Hogoboom & King, California Practice Guide (2000), “Family Law” §1:80, at p. 1-25. Leonard Marlow is the leading advocate of the idea that the parties should ascertain their legal rights and duties from only one attorney. See Marlow, *Mediation Moments Newsletter* (www.mediationmoments.com), “The Law Professor” (July, 2001).

list of the services that could be rendered by consulting attorneys.¹³ But it will suffice to illustrate how the motivations, concerns, and demands of the consulting attorneys may manifest themselves throughout the mediation process.

First and foremost, consulting attorneys have an obligation to inform their clients with respect to applicable law. More particularly, what most clients want to know is what they could expect (at least in theory) if their case were to be processed conventionally through the judicial system. This inquiry, which is commonplace, reflects how deeply the court model is embedded in the popular consciousness. While it is not possible to predict what would happen in court with any precision, as a general rule, reliable guidance can be provided by an experienced family lawyer, at least within a range.

Responsibility – or, more precisely, allocation of responsibility – for the outcome of the case is a concept that must be addressed and resolved in mediation. As between the parties and the mediator, the parties must be willing to accept responsibility for the outcome of their case. Mediators typically emphasize that they do not represent either party individually, or both parties jointly, and that the mediator has no power to decide any issue for the parties. Even if the parties are willing to confer that power on the mediator, most mediators decline to change their role by serving as a private judge.¹⁴

As between the parties and their consulting attorneys, the parties must also accept responsibility. For example, a consulting attorney cannot guarantee the integrity of an informal discovery process. If the attorney does not conduct formal discovery in accordance with applicable law, the attorney should not have responsibility (let alone legal liability) if the parties' informal discovery process turns out to be flawed.

In other words, the parties must give up the right to conduct formal discovery (or to have it conducted by attorneys on their behalf), and also the right to hold the consulting attorneys responsible if the informal process turns out to be flawed. While giving up these rights may be part of the price of using unbundled legal services, their loss should be of relatively little concern to most parties. The reason is threefold:

First, the great fear is that a significant asset or liability will inadvertently be overlooked. This is a relatively rare occurrence. Most parties are already familiar with their assets and liabilities; the informal exchange of documents and other information is usually sufficient to plug any gaps in the parties' knowledge.

Second, state law often requires all significant assets and liabilities to be disclosed by both parties,

¹³ For an exhaustive list of the services that could be rendered by a consulting attorney, see Mosten, *The Complete Guide to Mediation*, Chaps. 16 and 17 (1997). The constructive role that lawyers can play in resolving disputes and adding value to deals is analyzed in Mnookin, Robert H., *Beyond Winning* (Harvard University Press 2000).

¹⁴ See Garfield, "Should a Mediator Switch Hats?" *SCMA News* (Southern Calif. Med. Assn.), Vol. 8, No. 5 (June, 1998).

with serious penalties for either party's failure to do so.¹⁵ This legal requirement already provides a measure of protection for both parties.

Third, it is relatively inexpensive to guard against this potential problem, and to ensure that there will be a remedy if it ever materializes. Section 2556 of the California Family Code already confers continuing jurisdiction on the court over undisclosed assets and liabilities. The stipulated Judgment that does double duty as a settlement agreement in most cases can provide that the court retains jurisdiction to divide the community property in all assets and liabilities that are not specifically listed and expressly divided between the parties in the Judgment.

Given the protections that are inherent in each party's existing knowledge, the relative ease of conducting informal discovery, the fiduciary duties imposed by law, statutory procedures designed to ensure that all community assets and liabilities are accounted for, and effective legal remedies if all else fails, a party who gives up the right to hold a consulting attorney responsible isn't giving up very much. Based on my experience, the responsibility lawyers assume for the outcome of their clients' cases is more theoretical than real in any event. Many of the services they perform in the name of discharging their professional responsibilities are of minimal value to the client and have virtually no effect on the outcome of the case. Holding a lawyer responsible for that outcome in any meaningful way (let alone imposing legal liability) is a very rare occurrence.¹⁶

When a litigated case is stripped of ex parte applications, Orders to Show Cause, discovery, law and motion practice, trial preparation and trial, what remains is legal analysis and advice, participation in the negotiations, and document preparation. Depending on the nature of the issues, the sophistication of the parties, the mediator's preferred model, and a host of other factors, the consulting attorneys may not be directly involved in the negotiation of any issue. Even drafting the stipulated Judgment is a task often ceded to the mediator. By the end of the process, both parties usually have a high level of confidence in the mediator's impartiality, and may be more comfortable if the settlement agreement is prepared by the neutral instead of either party's consulting attorney. Analysis and advice thus become the most important legal services that a client may need from a consulting attorney.

Many mediation clients want, need, and are willing to pay for legal analysis and advice from their

¹⁵ In California, for example, husbands and wives have fiduciary duties to each other that continue until all community property has been divided. Calif. Fam. Code § 721. The Courts have wide discretion to enforce these fiduciary duties. In a notorious case, a wife purchased a winning lottery ticket, and divorced her husband without disclosing her right to receive more than one million dollars over a period of many years. When the husband found out several years later – long after the divorce proceedings had been concluded – he reopened the case, and was awarded 100% of the winnings, not just the 50% to which he would have been entitled if his ex-wife had complied with her fiduciary duties. *Marriage of Rossi* (2001) ___ Cal.App.4th ___.

¹⁶ Family lawyers are unwilling to take shortcuts when it comes to discovery for very good reasons. They have potential liability. While rare, it can be very significant. *See, e.g., Gursev Schneider & Co. v. Wasser, Rosenson & Carter* (2001) ___ Cal.App.4th ___ (client's forensic accountants have a cause of action for indemnity against a client's former family lawyers as a result of \$2.5 million arbitration award for overlooking assets).

consulting attorneys. If the primary goal is to get from point A to point B, these clients will be interested, first and foremost, in basic transportation. That justifies hiring a mediator to guide them. Safety is their next concern. That provides the incentive to bring a consulting attorney on board. Theoretically, a mediation client could hire a full service lawyer. There is virtually no discrete service that a mediation client could not ask the lawyer to provide. However, it is rarely the case that a mediation client would want a full-service lawyer. Most clients are wholly unwilling to pay for the bells and whistles of full service legal representation, which they regard as unnecessary, wasteful, and unaffordable.

As more parties choose mediation to resolve their legal disputes, more of those same parties choose to be advised by consulting attorneys. The parties' motivations are varied: They may call upon the attorney to provide them with information about their legal rights and duties, evaluations about the strengths and weaknesses of the case, negotiating strategies that help them achieve their goals, and so forth.

Whether the consulting attorney is a litigator or a born-again mediator, there are three issues that affect the delivery of unbundled legal analysis and advice in the mediation context. The unbundled lawyer has to struggle with these issues. The client seeking unbundled legal services should inquire about them. The mediator must assess their affect on the process.

First, the client's legal rights are only one factor to be considered. Most clients are interested in their legal rights, and the consulting attorney meets a client's needs by explaining those rights. However, legal rights are rarely free from doubt. The task of the consulting attorney thus becomes to make a "best case" and "worst case" analysis for the client on an issue-by-issue basis. This guards against the tendency of the consulting attorney to imply, and the client to believe that the client's rights may be determined objectively and absolutely. Consulting attorneys must remember that client's rights are often uncertain, and that the unpredictability of litigated outcomes is the primary reason that mediation clients wish to avoid them.

Second, the resolution of any given issue will be controlled by the client's sense of fairness, not the attorney's. Apart from the issue of whether a legal right can be ascertained with anything approaching certainty is whether and to what extent hypothetical legal rights determine the outcome of the mediation. A consulting attorney may truly believe that his or her opinions with respect to the client's legal rights and duties coincide with a just result, and that the client should settle for nothing less. In a system where well over 90% of all cases are ultimately resolved by settlement, a client's theoretical legal rights are invariably compromised. Mediation clients have merely selected another method of negotiating those compromises. Consulting attorneys do their clients a disservice when they attempt to override a client's ultimate right and responsibility to make final decisions.

Third, economic considerations necessarily constrain the scope of unbundled legal services. An unbundled attorney's job is not to expound on a client's legal rights as if those rights are written in stone. It is also not to ensure a mediated outcome that mimics the hypothetical result of a contested trial. It is not even to ensure the integrity of the mediation process, which the parties have entrusted to the mediator. The single most important habit of mind for a consulting attorney is to recognize and respect the limited nature

of that role. When clients ask if they need to have consulting attorneys, the answer should be only if they want them. From a mediator's point of view, even if they want them, it should be only to have done for them what they cannot do for themselves. All participants in the process – including the parties, the mediator, and the consulting attorneys – must guard against the tendency to allow legal considerations to play too powerful a role in the mediation process.

Consulting attorneys may be involved only at the beginning, throughout the process, or only at the end. The level of the consulting attorneys' involvement is typically decided by the parties in consultation with their attorneys. In many models, at the very least, the parties involve attorneys at the end of the process to review the deal for its legal sufficiency, give an opinion on its merits, and perhaps prepare the necessary documentation. It would be preferable for most clients to have the benefit of a consulting attorney's unbundled legal analysis and advice at the outset of the mediation. But the postponement of the attorney's involvement reflects a perception that this is one of the few ways it can be limited.

Regardless of the level of the attorneys' involvement, tension may arise from the clients' desire to have the attorneys' stamp of approval on the mediated deal, on the one hand, and the attorneys' desire to ensure that the mediated deal is comparable to the result of litigation, on the other hand. This tension arises primarily from the fact that consulting attorneys are often litigators, and litigators tend to adopt as the standard of fairness their notion of how a judge might decide the case. One of the most difficult tasks for a consulting attorney is to let go of his or her own notions of fairness in favor of supporting the mediation process and validating the parties' notions of fairness. In turn, the parties must let go of the idea that attorneys who have agreed to render unbundled services are guarantors of the outcome.

Conclusion

The majority of the services for which family lawyers charge their clients are perceived as unnecessary and wasteful, or more efficiently and economically rendered by someone else (often the client), or not as legal services at all. Mostly, those services are the vestigial remains of an adversarial system that does not work well for most family law litigants. For lawyers, the choice is between continuing to offer full service representation to a shrinking market of reluctant clients, or taking advantage of the opportunity to provide unbundled legal services to an expanding market of enthusiastic consumers.

In contrast to litigation, mediation works well for virtually everyone.¹⁷ But the fact that mediation is more user friendly than litigation does not mean that all legal services are superfluous. Analysis and advice are the essential legal services that mediation clients still want and need. The challenge is to ensure that mediation clients are able to obtain those services – and only those services – at an affordable cost.

In order to realize the promise of unbundled legal services in the resolution of family disputes, all of

¹⁷ Those instances in which a dispute is not realistically amenable to mediation are analyzed by John Wade in "Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge," *Mediation Quarterly* 259 (Spring, 2001).

the following need to occur:

- Acceptance of mediation as the preferred method of dispute resolution;
- Availability of attorneys who are willing to unbundle legal analysis and advice in the mediation context from the services that comprise full service representation in Court;
- Awareness on the part of mediation clients that unbundled legal services are available; and
- Access to attorneys who are willing to provide such services.

The simple act of staying away from the courthouse neatly addresses the disinclination of prospective clients to pay excessive fees, and the unwillingness of an attorney to offer unbundled legal services. Unbundling serves the needs of mediation clients who would otherwise be unable to afford an attorney's services. Attorneys can render legal services at an affordable cost because there is no longer any travel time or waiting time for which they must charge, the need for their involvement in other aspects of the process can be significantly reduced and their potential liability may be limited. The task for mediators, therapists, lawyers, and others with an interest in the success of family mediation is to spread the word.