



# **RE INVENTING THE PRACTICE OF LAW**

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Editor**

***EMERGING MODELS TO ENHANCE  
AFFORDABLE LEGAL SERVICES***

**ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES**

## Chapter 2

# The Lawyer as Collaborative and Preventive Peacemaker

Forrest S. Mosten

When I began practicing law in 1972, there was no roadmap to create the type of practice I now maintain. Lawyers, especially those practicing family law, were locked into a model based on soup-to-nuts services that led to outcomes resulting from the lawyers' advocacy in court. Through a series of influences in my life, I have instead evolved as a peacemaker. I rely on preventive law, mediation strategies, unbundled legal services, and principles of collaborative law to offer a practice focused on client-centered interviewing, counseling, and advising.

Like every lawyer, the way that I practice law is the result of a culmination of influences throughout my life. As a child I witnessed the impact of economic injustice on my family. As a young lawyer, Louis M. Brown, a professor and innovative practitioner who became my lifelong mentor and friend, greatly inspired me. As a practitioner, I have enjoyed the opportunity to share ideas with other lawyer innovators. My path has not been linear and has had ups and downs. However, my career has evolved in a way that is incredibly rewarding and one that I encourage other lawyers to embrace.

This chapter is based on ideas, concepts, and limited excerpts from previously published works by the author that are listed on the Mosten Mediation website, *Forrest S. Mosten Biography: Selected Publications*, <http://www.mostenmediation.com/bio.html#selected> (last visited Oct. 8, 2013).

After serving in the military in World War II, my father had a series of jobs ranging from retail store salesman to insurance broker. While he usually made enough for my family to pay the rent on a series of apartments in the center of Los Angeles, he worked on a weekly salary or commissions. His compensation package did not include health insurance, retirement benefits, employee expense accounts, or savings. After he suffered a heart attack at age 44, we had mounting medical bills with no safety net. Our gasoline bill of approximately \$30 was two months overdue. In 1959, California permitted prejudgment attachment and County Marshalls with guns and badges came at 5 a.m. to tow away our 1955 Chevrolet Impala. I will never forget the helpless rage and embarrassment that overtook my father that day. That morning, I pledged to myself that I would help others get information and resources to prevent such setbacks from occurring in their lives, or at least lessen their impact. It would take another 30 years before I understood how lawyers could be more accessible to millions of people who experience legal problems in a similar way as my father.

## My Professional Formation

The ABA Louis M. Brown Award for Legal Access recognizes innovative models of legal service delivery, primarily of the unbundled variety.<sup>1</sup> Professor Brown, the namesake for this prestigious award, played a crucial role in my own thinking and development as a lawyer for unbundled and

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1. *Louis M. Brown Award for Legal Access*, AM. BAR ASS'N, [http://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/louis\\_m\\_brown\\_award\\_for\\_legal\\_access.html](http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/louis_m_brown_award_for_legal_access.html) (last updated Jan. 23, 2013). Starting with our first meeting in 1972, for the next 24 years until his death, Professor Brown was my primary mentor and teacher. He guided my own early teaching and writing efforts and was my consultant who gathered a board of directors to advise me during my struggles to make a living in an alternative storefront practice focused on mediation. He and I tried out his “preventive client legal check-up” to assess asymptomatic legal angina of my clients (without measurable success), and he promoted my interest in client counseling as the foundation of lawyer work as a teacher and through the Client Counseling Competition. This law school event now has more than 20 participating countries. It affiliated with the ABA in 1973, with the International Bar Association in 1992 when it was named for Professor Brown, and in 2010 the competition was renamed the Louis M. Brown and Forrest S. Mosten International Client Consultation Competition. See <http://www.BrownMosten.com> (last visited May 12, 2013).

preventive services. After graduating near the bottom of his Harvard Law School Class of 1932 (a fact that he brought up at every possible opportunity), he spent nearly 60 years writing and practicing preventive law and had single-handedly developed preventive law as an overall theory and approach to legal practice. Professor Brown's maxim can well be a crying call for those lawyers who unbundle their services: "I hate to see someone in legal trouble who didn't have to be there."<sup>2</sup>

Professor Brown remains the single most important influence in my professional life. Another of his maxims, "Client learning time should be client learning time," led directly to the development of a law office client library within my office suite that serves as a classroom for client education, the bedrock of unbundling.<sup>3</sup> His focus on the importance of proactive lawyer involvement in helping clients learn how to use lawyers best and preventively is the central fabric of my practice and legal scholarship. Professor Brown's portrait hangs in both my client library (which bears his name) and in my training room. My hope is that the recipients of the many awards named after him<sup>4</sup> will continue to model and teach his innovative approach toward lawyering for many future generations.<sup>5</sup>

I began to experiment with unbundled legal services in 1980, offering a flat fee of \$695 for legal advice and services for home sellers to negotiate and draft offers. These transaction services unbundled from any disputes or litigation that might arise from the sale, and they were intended to be companion services for the For Sale signs, flags, and entry to the Multiple Listing Service that Help-U-Sell and other maverick brokers were offering.

My office was located near the Los Angeles International Airport in a storefront between a pet store and an aging art deco movie theater. There

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2. See Professor Brown's autobiography. LOUIS M. BROWN, *LAWYERING THROUGH LIFE* (1986).

3. See *Louis M. Brown Client Library*, MOSTEN MEDIATION, <http://www.mostenmediation.com/legal/library.html> (last visited May 12, 2013).

4. See also the prestigious Los Angeles County Bar Louis M. Brown Conflict Prevention Award. Some recipients include William Ury, Attorney General Griffin Bell, and Ambassador Dennis Ross.

5. The importance of mentors cannot be overstated. Due to limitations of space in this chapter, I have been unable to fully discuss other mentors in my career that include Professor Francis (Hank) Carney, my research supervisor at UC Riverside; Professor Neville Brown, my tutor at University of Birmingham, England; and Judge Dorothy Nelson of the Ninth Circuit Court of Appeals, who has been a model of a true peacemaker.

were considerable walk-in clients who availed themselves of my unbundled consultation (reasonably priced at \$25). At the same time, I was motivated to offer mediation services, which I had studied as a law professor and discovered met my values and personal attributes far better than litigation. However, despite my offering mediation classes for the public in my waiting room, going door to door with mediation flyers, and offering speeches on mediation to every civic group in the community, because mediation was so new, most of the calls I received were for “meditation” or “medication.”

Slowly my mediation practice began to grow. I would like to think it was because my conflict resolution skills were developing, and satisfied mediation clients were referring others. Actually, I believe the main reason for my success was the limited supply of family mediators in Los Angeles at the time. In 1979, there were only three family mediators in Los Angeles. At the time, mediation developed out of an almost social collective or an antiestablishment political perspective that was both antilawyer and pro-consumer. Mediators were seen as marginal hippie alternative players to the established legal system. I have had immense personal satisfaction watching mediation grow into a field that has permeated the courts and even industry, where professionals can make a living from peacemaking work. In 1979, other mediators and I hoped that one day lawyers would recognize us and pay attention to us. Today, the largest gathering of dispute resolution professionals is the American Bar Association Dispute Resolution Section, with 19,000 members.<sup>6</sup> The section has also been a major proponent of the collaborative practice in training lawyers. It is my hope that one day soon the first call of someone in legal trouble will be to a mediator rather than to a lawyer.

There has been a tendency for litigants not to go to mediation because they fear not having the protection and the resource of a lawyer by their side. Due to this fear, many people find themselves in adversarial negotiations one step away from being in court. Again, unbundling provides an answer for consumers. Today, with the acceptance of unbundled consulting/coaching lawyers who are also often trained in mediation or collaborative

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6. See *Section of Dispute Resolution*, AM. BAR ASS'N, [http://www.americanbar.org/groups/dispute\\_resolution.html](http://www.americanbar.org/groups/dispute_resolution.html) (last visited May 21, 2013).

law, the public can utilize mediation by having unbundled lawyers either at the table sitting with them or as shadow coaches in a limited scope role.<sup>7</sup>

In 1991, I was appointed to the ABA Standing Committee on the Delivery of Legal Services. The mission of the Committee is to advance access to legal services for those of moderate income who have too much to qualify for legal aid, but not enough for traditional legal services. The Committee has nine members from around the country, appointed by the president of the ABA for three-year terms. This Committee focuses on innovation and encourages provocative discussions on ways to improve the delivery of legal services. Through extensive conversation with Committee colleagues—and Professor Brown—and through some extensive reading, I started to translate my prior experiences<sup>8</sup> into a coherent concept of providing limited scope legal assistance to pro se litigants to help them better navigate the justice system. This thinking morphed into an overall coaching approach for clients who could afford lawyers but choose not to use them. This also provides an opportunity for me to offer unbundling as a process option to clients who initially call a lawyer for full-service representation.

## Unbundling and Peacemaking as the Twin Foundations for My Law Practice

Today, my solo practice is grounded on two central values: peacemaking and an unbundling consumer approach. The physical layouts of both my commercial and home offices include my personal office/mediation room (with round table and accessible client flat-screen TV and flip chart), a conference room that can seat eight, and a client library. I am a California State Bar Certified Family Law Specialist. Clients seek my services due to

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7. Forrest S. Mosten, *The Seven Ways that Collaborative Practice and Mediation Intersect*, in *COLLABORATIVE DIVORCE HANDBOOK* 127–50 (2009).

8. One of those key experiences was my service as Assistant Regional Director for the Consumer Protection Bureau with the Federal Trade Commission. One of the investigations that I supervised was how maverick real estate brokers who unbundled their services were being harassed and discriminated against by local real estate associations. This unbundled model (such as Help-U-Sell) provided me with the foundational conceptual thinking that led to unbundled legal services over a decade later.

my substantive expertise, as well as my commitment never to go to court, which differentiates me from most other family lawyers.

For my first quarter century of law practice, I led two lives. Although I developed a growing mediation and unbundling practice, I also served as a soup-to-nuts family lawyer, which meant that I represented clients in adversarial court proceedings. Over a decade ago, I decided to retire from litigation and focus totally on unbundling and peacemaking and refuse any further litigation matters. While I was afraid that I would eat tuna casserole four times a week, with the support of my wife,<sup>9</sup> I turned down large retainers and referred all potential court clients to competent litigators in my community.<sup>10</sup> My practice is now divided roughly into two equal parts. I serve as a neutral mediator half of the time. The other half is composed of four unbundled representative roles: unbundled lawyer-coach for self-represented parties, client representative during mediations presided over by other neutrals (often with a litigator co-counsel), collaborative lawyer, and preventive lawyer.

### **Lawyer-Coach for Self-Represented Parties**

In all of my unbundled roles, the foundation of my approach to lawyering is that of a client-centered interviewer, advisor, and counselor. As interviewer, I attempt to gather needed factual and personal information to assist decision making and provide factual support to solve my clients' problems. As an advisor, I try to use my legal and conflict resolution knowledge and life experience to explore (and possibly recommend) what steps my clients might take and how best to take them.<sup>11</sup> As a legal counselor, I try to help

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9. The support of family and friends to attempt innovative practice models cannot be overstated.

10. Focusing on unbundled peacemaking models differentiates such practitioners from traditional lawyers in a community and often results in increased referrals from lawyer colleagues and the public who appreciate such differentiation.

11. For an excellent primer on client-centered lawyering, see DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004). Also see THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING* (West 1997); Clark D. Cunningham, *Evaluating Effective Lawyer-Client Communication: An International Project Moving from Research to Reform*, 67 *FORDHAM L. REV. (SPECIAL ISSUE)* 1959, 1959–86 (1999); *EFFECTIVE LAWYER CLIENT COMMUNICATION: AN INTERNATIONAL PROJECT TO MOVE FROM RESEARCH TO REFORM*, <http://law.gsu.edu/Communication> (last updated May 27, 2008). Also useful is the Assessment Criteria and Team Feedback Form, the standards for the Louis

my clients generate and explore options based on legal and nonlegal factors and select among options to make the best possible decisions.<sup>12</sup>

My first step as an unbundled lawyer peacemaker is to provide informed consent to my clients about possible process options to be used. This discussion takes place as early in the relationship as possible and generally includes a detailed discussion comparing the options of roles that I can play and choice of processes that the client can select.<sup>13</sup> Before writing a demand letter or filing a court action, I believe that it is best practice to explain what other non-litigation process options are available. If I am not qualified or choose not to offer other adversarial roles that are available in my community, I believe that it is my responsibility to discuss these other options and provide resources, referrals, or at least recommend that my client should find out more information about these other service models.

Over the years, I have become well versed in comparing the positives and negatives between litigation and negotiated settlement, and I try to proactively provide a more comprehensive and nuanced explanation of the following additional options:

1. **Client Self-Resolution:** If my client decides not to actively pursue a particular position, there is no need for any further action because

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M. Brown and Forrest S. Mosten International Client Counseling Competition, which cover best practices in client counseling:

- establishing an effective professional relationship
- obtaining information
- learning the client's goals, expectations and needs
- legal analysis and giving advice
- developing reasoned courses of action (options)
- assisting the client to make an informed choice
- effectively concluding the interview
- ethical and moral issues
- post-interview reflection

See <http://brownmosten.com/pages/ICCC%20Assessment%20&%20Feedback%20Form.doc>.

12. My own approach to client interviewing, advising, and counseling has been influenced by my exposure as a law student to the work of Professor David Binder, and particularly his seminal book, *Lawyer as Counselor* (West 1991) (coauthored by Paul Bergman and Susan Price), as well as the factors for effective lawyer counseling in the International Client Consultation Competition.

13. Forrest S. Mosten, *Informed Consent and Other Best Practices to Ensure Competence*, in *COLLABORATIVE DIVORCE HANDBOOK*, *supra* note 7, at 127–50.



the matter is resolved. By taking a claim off the table due to reflective self-interest (rather than giving in or taking the route of appeasement), a client may be making the best decision of her life.

2. **Party-Party Resolution:** Almost every judge beseeches parties to go out in the hall and settle their case themselves rather than turn over their family decisions to a judicial stranger. Peacemakers give great deference to the wisdom and capabilities of their clients and respect for the other party as well. Before having a client engage my professional services, I often suggest that the client invite the other party to sit down for a cup of coffee at the kitchen table or other neutral setting and try to work out the problem themselves. My support and coaching of the client can instill confidence to overcome fear and resistance so that many of my clients can give these challenging conversations a try.
3. **Lawyer-Lawyer Resolution:** In my early days as a lawyer, most of my cases settled when the other lawyer and I sat down without our clients and worked out the deal. I still offer this option. I try to display empathy and support for my client's desire for conflict avoidance and informed choice to use me as a buffer—even if I personally favor having the parties more actively involved, since it is their lives.
4. **Four-Way Settlement Conference:** This is a familiar option that I often offer with a peacemaker perspective. I try to be sensitive to the possibilities of future reconciliation and healing. I am vigilant for opportunities to work with the other lawyer to encourage direct client communication and clients' opening statements, reduction of hyper-technical legal language, elimination of lawyer war stories or self-aggrandizing statements, and affirmative lawyer statements about our commitment to having parties in control of their family decisions and willingness to subordinate legal rights and financial gain in favor of another standard: "Can I live with the settlement?" While it is entirely proper for me to inform my client as to what is being left on the table (and protect myself against liability), I support a peacemaking approach to this traditional process choice of a four-way meeting.
5. **Collaborative Settlement Conference:** This may look very much like a traditional four-way settlement conference—but is very different. As a peacemaker, my mission is to explain the benefits and costs

of signing a lawyer disqualification clause<sup>14</sup> (which is a safe container in which the parties can negotiate), explain different models of collaborative practice, and how the other party might react in a collaborative settling compared with other process options. In essence, I am “unbundling” my role between advisor and service provider to assure that my client receives full information to be empowered with full decision-making capability.<sup>15</sup>

6. **Mediation:** As there are many models of mediation and different mediators with a range of abilities and perspectives, my responsibility is to explain this menu of mediation possibilities in the courts and private and nonprofit sectors. I try to encourage my clients to consider mediation early. I am not above groveling in making persistent and repeated requests of both my clients and other lawyers to mediate.

The most frequent unbundled service is for clients to come in for an office consultation or schedule a phone conference to obtain advice and strategy. While many of these contacts will be to address a technical issue on the law or get my views on meeting my clients’ needs in order to solve the presenting problem, I also try to use these opportunities to try to lessen overall conflict and recommend a different, more constructive perspective.

By asking questions, inquiring about possible professional referrals and looking for ways to diffuse the conflict, I try to bring peace to the situation. Here are some possible peacemaking interventions that I utilize:

- I will inquire how the client, her children, and her spouse are doing. If appropriate, I will discuss a possible referral to family or individual therapist or other resource.
- If the parties are at loggerheads, I will ask the client about the importance of the issue at hand and whether it is possible just to “move-on”

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14. The disqualification clause is signed by the parties and lawyers (and mental health and financial collaborative professionals, as well). The clause prohibits lawyers from representing their respective clients in any adversarial proceeding should the collaborative process terminate. This focuses parties and lawyers on problem-solving and interest-based negotiation to reach a settlement given that new lawyers must be retained if the matter is litigated.

15. Mosten, *supra* note 7, at 127–50.

without expending more time or expense in trying to persuade or threaten the other side.

- I might ask the client what he could do differently to improve the situation. At appropriate times, I raise the possibility of having my client sincerely apologize for something to change the dynamics and feeling of the relationship.

### **Ghostwriter for Letters, Contracts, and Court Documents**

Whether I edit my unbundled client's draft or write a letter or pleading for my client's signature, I try to focus on the reality that I have a peacemaking opportunity. My editing can tone down any adversarial language or threats, as well as eliminate any personal attacks. In addition, I can draft invitations to the other party to consider consensual dispute resolution options, explore apologies, create mutually beneficial solutions, and practice preventive planning that can help both parties. In those states that require ghostwriters to disclose their identity on court pleadings in order to be relieved from making a full appearance,<sup>16</sup> peacemaking drafting not only effectively supports clients' positions but also creates a positive and resolution-focused impression for ghostwriting with judicial officers and other attorneys.<sup>17</sup>

### **Negotiation Planner and Simulation Role Player**

Self-represented parties need help in preparing for negotiations that range from a short telephone call with their spouse to a full-blown court mandatory settlement conference. I can be invaluable in helping clients think through what they really need, rather than what they have been demanding (their underlying interests rather than their positions). I can help modify their expectations by helping them think about "what they can live with" rather than their legal entitlements or their moral/psychological justifications for retribution,

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16. See generally *Informal National Survey of Ethical Opinions Related to "Discrete Task Lawyering,"* MD. LEGAL ASSISTANCE NETWORK, <http://www.courts.ca.gov/partners/documents/ethicalopinions.pdf> (last updated Nov. 2003) (see ghostwriting rules for Florida, Colorado, and other states).

17. Once filed with the court or submitted into evidence, pleadings and exhibits (often letters sent between parties) are part of the public record. Children of the parties, business associates, the IRS, and the press have open access to these court files. A peacemaking approach to drafting such documents may have a long-term effect on the personal and financial future of both parties.

reparations, or other payback for past wrongs committed by the other party. I will often deliver a short primer on “win-win” strategies, how to frame an offer, how to focus on the problem, how to dig under stated positions to get to interests,<sup>18</sup> brainstorm options, and other negotiation basics. I sometimes give a copy of *Getting to Yes* or other negotiation books or articles to my clients or suggest that they browse such books in my client library.

If I find it is appropriate to conduct a simulated role-play with my client, I try to give my client the opportunity to “sit in the shoes” of the other party (I try to never use the term, “opposing party”)—the first step toward understanding and empathy.<sup>19</sup> Actually, in my collaborative cases, we lawyers call ourselves “collaborative partners.”

### Shadow Court Coach

While some states have court rules and approved forms for limited scope court appearances,<sup>20</sup> the basic unbundled role is for the party to self-represent in the courtroom with the unbundled lawyer helping in litigation preparation.<sup>21</sup> In addition to recommending which court pleadings to prepare and help with drafting, here are some other tasks that I perform as court coach:

**Prepare Documents and Visual Exhibits:** I help my clients organize and select documents, make sufficient copies for the court and opposing party, and provide a summary of all exhibits to be presented.

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18. “Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided on. Your interests are what caused you to so decide.” ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 41 (2d ed. 1991).

19. Consider using a video recorder so your client can replay this simulation at home. Another viable option is for your client to bring a friend or family member to provide honest feedback and suggestions to improve negotiation performance.

20. See generally *Informal National Survey of Ethical Opinions Related to “Discrete Task Lawyering,” supra* note 16.

21. Some unbundled lawyers accompany their clients to court and sit in the public gallery. (It has sometimes been suggested that, like witness counsel, the coaches can sit at counsel table; most judicial officers and legal access scholars believe that this crosses the line.) As long as the court coach does not interfere with the court proceedings (hand signals or signs clearly are not permitted), if the client wishes to pay for you to come to court to critique the client’s advocacy performance and consult during breaks, nothing seems to prevent this role as well. As a mediator and collaborative attorney, I have recommended that clients take a courthouse field trip, and I have sometimes been invited along.

**Practice Opening and Closing Statements:** I help clients write outlines or actual narratives of their statements. I work with my client to find reasonable approaches that will not further escalate tensions and make it more possible for conflicted relationships to be repaired later.

**Direct and Cross-Examination:** In the same way that I used to highlight key points for opening and closing statements when I was a litigator, I prepare my client to be a witness to present direct testimony and get ready for the other side's (or court's) examination.

### **Client Representative During Mediations Presided Over by Other Neutrals**

While I treasure my work as an impartial and neutral mediator, I believe that I can still maintain my peacemaker card by representing individual clients during the mediation process in an unbundled role.

The role of consulting lawyer in mediation is different from the traditional role of full-service counsel. Unlike the adversarial duties of the court advocate or negotiating counsel to maximize financial results and attempt not to leave any “money on the table,”<sup>22</sup> when I serve as a consulting lawyer in mediation, I must delicately balance the optimum short-term, bottom-dollar result against the successful completion of a fair and informed mediated agreement. Rather than engage in “turf struggles” over such issues as where the mediation will take place or who the mediator will be, as a consulting attorney I adopt an approach of “let it go”—actually deferring to the process requests of the other party in order to decrease conflict and make sure the case gets into mediation. Just as important, I try to display respect and support for my client's choices made during the negotiation that may

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22. See Michael Becker, *Representing Parties in Private Divorce Mediation*, TRIAL MAG., Aug. 2001, at 59, 59–60: “Clients now seek the services of lawyers who understand and support mediation, and who possess the skills and knowledge to work effectively as consulting counsel. . . . Lawyers often play a proactive role in mediation. Stated broadly, the consulting counsel offers information, assistance, and advice to ensure that a party makes good decisions, based on a full understanding of the law and possible outcomes. Consulting counsel usually works with his or her client in between mediation meetings, and is most often not present at the actual mediation sessions. . . . There are times when the presence of one or both attorneys is useful, especially at the end of the mediation, when agreements are being finalized or specific options evaluated.”

differ significantly from what a court might order or what I might have tried to negotiate.

I have found that everything I have learned as a family law litigator can be applied to representing clients in mediation. Clients need substantive family law expertise and knowledge of the court process and personnel to help them discover their BATMA's.<sup>23</sup> My ability to gather and organize facts as well as provide sources for expert information is invaluable to informed decision making. And, my experience in drafting and negotiating makes me an important resource for my client and for the mediator.<sup>24</sup> I find that the

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23. Derived from the negotiation classic *Getting to Yes*, FISHER ET AL., *supra* note 19. BATMA stands for the Best Alternative to a Mediated Agreement. In short, if your client cannot cut a deal in mediation that he or she can live with, you will need to explain what the client faces in result and transaction costs if the matter is litigated and what the *best* result possible is. BATMA should be contrasted with WATNA (Worst Alternative to a Mediated Agreement) or MLATNA (Most Likely Alternative to a Mediated Agreement). By comparing the BATMA, WATNA, and MLATNA, clients can receive a *range* of possibilities if the mediation does not result in an agreement.

24. See HAROLD ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM SOLVER IN ANY COUNTRY OR CULTURE* (2d ed. 2010); *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103 (2005); JOHN W. COOLEY, *MEDIATION ADVOCACY* (2d ed. 2002). Some tips for effective independent representation in mediation include the following:

- Client should be thoroughly advised as to the appropriateness of commencing and/or terminating mediation and the effects of mediation on the client;
- Before commencement of mediation, make an independent assessment of the client's general suitability for mediation and whether emergency needs require immediate judicial relief;
- Establish a working agreement with opposing counsel and the mediator that will balance protection for your client with the flexibility needed for successful mediation;
- Determine the level of client contact during the mediation process. Some clients require attorney consultation before and after each session and others need only an occasional phone chat. If follow-up letters are sent to counsel, determine whether your client requires your specific approval and/or reaction to each letter or just a "flagging" of crucial areas. In any event, the letters should provide a roadmap of the progress of the mediation and give counsel updates as to the issues under review and the trade-offs being made;
- Monitor the informational "discovery" to ascertain whether your client is receiving adequate information to make informed decisions;
- Educate your client on negotiation strategy and the interrelationship between mediation and the court process;
- Help client raise agenda items that will solve immediate needs and make the mediation work more effectively;
- If the mediation is headed for "trouble," determine corrective measures. Some options include: instructing client to raise the problem before or during the next

best design is when both consulting attorneys also have mediation training so that there are three peacemaking, problem-solving professionals working to help the parties.

### **Collaborative Lawyer**

Collaborative law is an unbundled service because lawyers limit the scope of their services by contracting to bilaterally withdraw if the matter is litigated. It is also based on mediation principles in that the parties are empowered to be at the center of the process. Not only are lawyers less adversarial toward each other, but they join together to ensure that the negotiation belongs to the parties, and the lawyers sign on to treat their own clients and the other party in a respectful and peaceful manner for the benefit of all members of the family.

Collaborative lawyers sign on to the following peacemaking principles:

- Respect and dignity for the other party and other professionals;

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mediation session; directly contacting opposing counsel and/or mediator; attending mediation session yourself; writing corrective letter to mediator; or pulling plug immediately by recommending suspension or termination of mediation;

- Determine how experts are to be chosen, paid, instructed, and review any letter of instruction for scope of assignment and how reports are to be used. Review experts' reports in a careful and timely fashion;
- Respond promptly to any problem that arises. If you are opposed to particular client action in mediation, 'duke it out' with client and/or opposing counsel and/or mediator long before final MSA is submitted for review. Occasionally, a party will engage in protracted mediation and learn about counsel's reluctance or disapproval *after* mediator fees have been spent and a deal has been cut with spouse;
- Advise clients about the necessity of temporary court orders and monitor the drafting and filing thereof;
- Review MSA, Stipulated Orders and/or Judgment before client signature and court approval. Negotiate problem provisions with opposing party and a mediator, if appropriate;
- Be available for personal support of client throughout mediation process;
- Perform or refer to associate counsel such ancillary legal work such as wills, estate planning, vesting, agreement with third persons, QDROs;
- Monitor enforcement of executory provisions of agreement;
- After mediation is concluded, maintain contact with client for changes in circumstances or changes in the law that affect client's situations.

*See* Forrest S. Mosten, *Representing Clients in Private Mediation*, 8 FAM. L. NEWS & REV. 23, 25 (1987); COMPLETE GUIDE TO MEDIATION: THE CUTTING EDGE APPROACH TO FAMILY LAW PRACTICE (2d ed. 1996).

- Direct and open communication with the other party and professionals;
- Voluntary and full disclosure of relevant information and documents necessary to make agreements;
- Commitment to the healing of the family; and
- Use of interest-based negotiation to try to meet the needs of both parties.

Collaborative law encourages the respectful use and cooperation of lawyers, mental health professionals, and financial professionals on behalf of the divorcing families. The world's largest collaborative organization, the International Academy of Collaborative Professionals, is based on an interdisciplinary approach and its mission is defined as collaborative practice that encompasses many models.<sup>25</sup>

Collaborative law puts a buffer between the parties and the courthouse by taking away the customary lawyer tools of threats and court action. I can discuss statutes, cases, and possible outcomes in court without making overt threats of filing a court action. As a full-time peacemaker (rejecting adversarial court representation in all matters), I believe that the absence of such power and leverage tactics permits parties to focus on their own needs and those of people in their lives (children, business associates, members of their church, etc.) to build agreements.

In the collaborative process, a contract—the participation agreement—provides for the inadmissibility of collaborative communication and documents. I stress privacy and confidentiality as major incentives for many clients to turn to collaborative divorce. The participation agreement can be a private agreement among parties and professionals or a court order. The disqualification clause is a safe “container” for the parties and professionals to work out issues without the imminent looming specter of litigation.<sup>26</sup>

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25. The principles of Collaborative Practice on the website of the International Academy of Collaborative Professionals (IACP) state: “While Collaborative lawyers are always a part of collaboration, some models provide child specialists, financial specialists and divorce coaches as part of the clients’ divorce team. In these models the clients have the option of starting their divorce with the professional with whom they feel most comfortable and with whom they have initial contact. The clients then choose the other professionals they need. The clients benefit throughout collaboration from the assistance and support of all of their chosen professionals.” *Principles of Collaborative Practice*, IACP (Jan. 24, 2005), <http://www.collaborativepractice.com/lib/Ethics/IACP%20Principles%20of%20Collaborative%20Practice.pdf>.

26. To train as a collaborative lawyer, I recommend taking one basic and several advanced



In my collaborative practice, I try to have my clients benefit from the consumer-oriented approach of unbundling by providing a menu of collaborative models so that clients have a choice of how to utilize the collaborative process before they start. For example, rather than have a set team of mental health and financial professionals that must be used in every case, I discuss the benefits and risks of using collaborative law with lawyers alone, and how other professionals can be added into the process now or at a later stage, if needed. In this way, clients are in charge of designing the process that best fits their needs.<sup>27</sup>

### **Preventive Unbundled Lawyering to Build Positive Relationships**

It is a fundamental tenet of my practice that once I have utilized my conflict resolution services to settle a dispute, my job as preventive lawyer is just beginning. I try to use my professional experience to predict how my client and other people in her life might behave in the future and take concrete preventive steps to make sure that my client has the benefit of my advice before trouble happens in the future.<sup>28</sup>

I use symptomatic preventive planning to translate the experience of recent legal trouble to motivate my client to consider ways to avoid similar problems in the future. One method of preventing future conflict is to build in future asymptomatic procedures following the resolution of a legal dispute.<sup>29</sup> To understand symptomatic and asymptomatic lawyering, it is helpful to use the analogy of medical care. If a patient fell down and hurt her arm, the pain symptoms might bring her in to see the doctor. Once

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Collaborative Trainings, studying the growing literature, and joining a local Interdisciplinary Collaborative Practice Group.

27. See Forrest S. Mosten, *Structuring the Interdisciplinary Practice Model*, *supra* note 7, at 113–15 (2009).

28. See LOUIS M. BROWN & EDWARD DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* 309 (1978); see also Bruce J. Winick, David B. Wexler & Edward A. Dauer, *Special Theme: Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 *PSYCHOL. PUB. POL'Y & L.* 795, 798–999 (1999).

29. Louis M. Brown and other preventive scholars rely on the more developed medical model as an analogy for legal prevention. A few of Brown's articles include *Legal Autopsy*, 39 *J. AM. JUDICATURE SOC'Y* 47 (1955); *Family Lawyer and Preventive Law*, 35 *CAL. ST. B.J.* 43 (1960); *Preventive Medicine and Preventive Law: An Essay that Belongs to My Heart*, 11 *J.L. MED. & ETHICS* 220 (1983), which describes how a routine asymptomatic physical exam uncovered a problem that was repaired to increase Professor Brown's life span.

there, the physician treats the pain symptoms through medicine or other procedures. This entry model should be contrasted with the asymptomatic yearly medical physical exam. In this latter example, the patient might not have any symptomatology, but by seeing the doctor for a routine annual checkup, incipient medical problems may be diagnosed and solved early—preventing later critical care or worse. In the same way, conflict in its many forms brings clients to see lawyers. Once resolved, a preventive lawyer may set up regular visits or other procedures for client-lawyer interaction that can prevent or avoid conflict down the road.

### Future Dispute Resolution Clauses

I utilize the drafting of a judgment or court order following settlement or trial as an opportunity to encourage positive preventive problem solving before potential conflict erupts into a legal dispute. I try to put as many barriers as possible between the parties and the courthouse in a comprehensive, mandatory future dispute resolution protocol to be part of any settlement agreement.<sup>30</sup> Some elements of this protocol may include encouraging personal meetings of the parties in neutral locations, providing informal written explanations of concerns, and requiring proposals for resolution and consultation with therapists, clergy, and other third parties before any more-formal process is initiated. If the matter is still unresolved, the parties can agree to require participation in mediation or collaborative law sessions. If such processes do not resolve the issues, parties can seek the confidential and non-admissible input from parenting and financial experts within the mediation or collaborative law processes prior to going to the next step of a more formal and admissible report.<sup>31</sup> If the matter is still unresolved and the parties need a court decision, I try to introduce protocol that can

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30. “Effective prevention, however, goes beyond the language written into the contract. Prevention is better conceived in the broader contexts of real-life systems in which people interact with one another and with the objects and spaces of the physical world.” Thomas D. Barton, *The Modes and Tenses of Legal Problem Solving, and What to Do About Them in Legal Education*, 43 CAL. W. L. REV. 389, 398 (2007); THOMAS D. BARTON, PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE (2009).

31. Forrest S. Mosten, *Multi-Step Dispute Resolution Protocol*, *supra* note 7 app. B no. 9. See Forrest S. Mosten, *Confidential Mini-Evaluation*, 30(3) FAM. CT. REV. 373–84 (1992); Forrest S. Mosten, *Confidential Mini Child Custody Evaluations: Another ADR Option*, 45 FAM. L.Q. 119 (2011).

provide for the parties to meet in mediation to limit issues and provide for the least contentious and expensive litigation process. Finally, after a litigated result is obtained, the protocol can mandate a return to mediation or a collaborative process to clarify any judicial orders and permit the parties the opportunity to heal.<sup>32</sup>

### **Monitoring Settlements to Maximize Compliance**

Just as most people signal before making left-hand turns, most people keep their agreements. I have had extensive experience with the current and future costs to clients who either breach their agreements or have to react to the other side's breach. My mission, therefore, is to help both parties comply with settlement terms *before* any dispute about compliance arises.

One method to increase compliance is to build in scheduled meetings and assessments. Many parents or business partners agree to periodic meetings by phone or in person. Often we start with regular telephone meetings and meet in person only if necessary. These meetings occur when there may be no problem or issue. Actually, this is the best situation. Rather than always negotiating problems, asymptomatic regular meetings can be used to share information and anticipate potential problems.

Regularly scheduled future assessments and reevaluation of current agreements can be helpful to permit parties to meet semiyearly or annually to discuss ongoing issues like parenting or distribution of profits. In addition to giving parties the comfort that agreements can be modified, if they are planning for a regularly scheduled meeting in two or three months, instead of confronting each other, they might save up concerns for the meeting that can be with just the parties, with a neutral mediator, or in a collaborative representative setting.

Another asymptomatic approach is to calendar executory settlement provisions or life-cycle events for planned future discussion. This is based on the preventive law maxim that "a file never closes," and when clients leave my office, they should know when we will next meet and how the meeting

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32. Tools to aid this preventive agenda include websites such as [www.ourfamilywizard.com](http://www.ourfamilywizard.com), which provides calendars for upcoming activities, contact information for medical and educational providers, and information with less risk of escalation between parties than phone calls or in-person discussion.

will be arranged and by whom. I calendar these contacts on my Outlook program. My clients and I can anticipate the need for meetings when the family residence is scheduled to be sold, when children obtain the age to change schools or begin driving, or when spousal support is set to end so that child support and other issues may need refinement.

### **Preventive Client Education**

People are not born clients knowing what to say and do when dealing with me, the other party and counsel, and with my staff. It is my responsibility to teach my clients how to be effective in that role, particularly as effective collaborative clients. To accomplish this, I have books, brochures, articles, and sample forms and instructions readily available for my clients to use. I have also prepared accessible handouts in advance so they are ready when I need them.

As I indicated above, I have established a client library in a small room in my office. If you do not have an extra room, you could put it in your own office or in the corner of your waiting room. A client library is a collection of consumer-friendly books, DVDs and videos, audiotapes, brochures, and other resources. It is the clients' home in my office where they can draft documents, make a private telephone call, or just have a private cry. I could not practice unbundling without a client library. It is a concrete symbol of client empowerment that supports my values and skills of my practice.

Finally, I use an asymptomatic legal/conflict wellness checkup to help clients self-assess the current state of their legal health.<sup>33</sup>

## **Conclusion**

### **A Peacemaker's Path to a Profitable Practice**

Rather than being a financial disaster, my decision to be a non-court unbundled lawyer resulted in rapid growth of my practice beyond my most optimistic expectations. My gross receipts increased by over 33 percent

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33. See *Personal Legal Wellness Check-Up*, MOSTEN MEDIATION, <http://www.mostenmediation.com/legal/wellness.html> (last visited Oct. 8, 2013).

during the first year following my decision not to accept litigation engagements. Uncollectable fees went down from 30 percent of gross billables to 2 percent.

The financial benefits, although important, pale in comparison to the joy and rejuvenation I feel toward practicing law. Although I am of Medicare age, I get up in the morning ready to run to the office. I cannot imagine retiring from law practice. Having a totally non-litigation practice with an unbundled approach, I have rediscovered that it is not only possible but personally and professionally rewarding to be a lawyer. What I do, day after day, is to work for peace for my clients and their families. I have become increasingly comfortable with my role as peacemaker. I understand that many lawyers reading this may find it out of the ordinary, combining the roles of peacemaker and unbundled lawyer. My message is that the combination of peacemaking and unbundling is exactly the work many of us perform already, and the challenge is for us to define our lawyer signatures with this new paradigm and to be transparent with clients about what services we offer and how this approach differentiates us in the legal marketplace.

*Forrest S. Mosten is internationally recognized as the “Father of Unbundling” for his pioneering work in Limited Scope and Discrete Task Services to provide affordable and understandable legal services to the underserved members of our society. He is in solo private practice in Los Angeles as a family lawyer and mediator in which unbundling and other non-litigation activities are the foundation of his professional work. He is the author of four books and numerous articles about unbundling and other issues of legal access and peacemaking, serves as a keynote speaker for legal conferences worldwide, and is adjunct professor of law at the UCLA School of Law. He has served on the ABA Standing Committee on the Delivery of Legal Services and the ABA Commission on Interest on Lawyers Trust Accounts, and has received the ABA Louis M. Brown Lifetime Achievement Award, as well as the ABA Lawyer as Problem Solver Award for his contributions in Legal Access. He can be reached through the website [www.mostenmediation.com](http://www.mostenmediation.com).*