AALS Midyear Meeting, Workshop on Shifting Foundations in Family Law:
Family Law's Response to Changing Families

Dispute Resolution for Diverse Families, Jane C. Murphy and Jana B. Singer

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Family law practice has changed dramatically in recent years. Lawyers have moved beyond their traditional role as zealous advocates for individual clients to become planners, healers and dispute resolution advocates. Even when lawyers continue to act as client representatives, the new paradigm invites more active client participation and a more equal sharing of decision-making authority. Many family lawyers have also become dispute resolution neutrals, and have taken on some of the functions traditionally associated with judges. At the same time, the role of family court judges has also changed. Judges are no longer just "neutral umpires;" instead they have become active managers of cases and dockets, as well as leaders or members of interdisciplinary teams. They have also become settlement advocates and have taken on functions traditionally associated with lawyering. This reconfiguring and blurring of attorney and judicial roles has challenged existing ethical rules, as well as the concepts of lawyering and judging on which these ethical rules are based. Our presentation will explore the implications of these changes for family lawyers and family law practice.

A. Representing Clients in a Settlement Culture: Redefining Goals, Managing Dispute Resolution Choices, and Advocating for Resolution

Although lawyers continue to represent clients in the new paradigm, they do so within a changed dispute resolution framework. Instead of assuming that disputes will be resolved by an argument over rights before a third-party decision-maker, the new paradigm assumes that resolution will generally occur through problem solving and negotiation in which parties play an active role. This shift from third-party adjudication to negotiations in which parties are active participants has significant implications for the role of lawyers as client representatives.

1. The Lawyer as Counselor: Redefining Client Goals, Needs, and Interconnected Interests

The new paradigm has changed the obligations of attorneys as client representatives, redefining the meaning of competence and requiring a broader understanding of different ways to resolve disputes. Traditionally, a lawyer's role as counselor in family law was viewed quite narrowly. The client would communicate his or her goals and the lawyer would help the client "win" by achieving those goals. The lawyer viewed the client in isolation, with interests largely antagonistic to those of other family disputants. When deciding about dispute resolution options, the lawyer viewed litigation as the primary option, with settlement negotiation between lawyers as a stage in the litigation process. Under this traditional model the lawyer generally deferred to the client in framing goals but was the primary decision maker and actor in achieving those goals.

Under the new regime, the family lawyer takes a much more active role in refining the client's goals and reorienting the client from a short-term to a long-term perspective. For example, a divorce client might articulate her goals to the lawyer as a "clean break" with her ex-spouse and sole custody of the children. Rather than simply asserting sole custody as the client's legal position, the lawyer might explore with the client the interests behind her request for sole custody and the impact of her immediate goals on her children, perhaps with the help of a mental health professional. As a result of this discussion, the client might adjust her short-term position to support her longer-term interest in preserving the children's relationship with both parents and thereby fostering the well-being of the children. This attention to long term interests is an outgrowth of the lawyer's reconception of the client as a part of a family system with interests that overlap with those of other family members. It also reflects the primacy of settlement in the new paradigm and thus the need to work toward solutions that meet the needs of both parties, as well as the interests of their children.

The new lawyer also takes a more active role in counseling the client about dispute resolution options, encouraging participation in those processes that promote settlement and client self-determination.

2. The Lawyers as Dispute Resolution Advocate: Supporting Client Self-Determination

In a traditional adversarial model, the family lawyer plays the central role in the "advocacy" stage of the proceeding, either in pre-trial negotiation or, less often, in court. Clients are consulted about terms of settlement but generally are not present during settlement negotiations. If a case goes to court, the lawyer tells the client's "story," while the client plays a relatively minor role as witness. In the new regime, clients play a much more active role in the dispute resolution process. For example, client self-determination and party empowerment are at the core of both mediation and collaborative law. In the mediation context, this client role usually translates to active participation in the mediation, with the parties, rather than their lawyers, directly expressing their needs and interests. It also means that parties are the primary decision-makers not only about the terms of the ultimate agreement, but also about how their interests will be expressed and framed. Collaborative law similarly emphasizes the centrality of the client's role. Indeed, leading collaborative authorities stress that responsibility for resolving a dispute "rests firmly on the shoulders of the client." To achieve a comprehensive and durable agreement, collaborative practitioners insist that clients, rather than their lawyers, assume responsibility for considering, weighing and deciding among the available options.

Lawyers play a more limited role in most of the settlement-focused dispute resolution settings. In mediation, lawyers play a supporting, rather than a primary role. Lawyers help prepare clients to articulate their needs and interests in mediation through the counseling process described above. Once parties reach mediation, the lawyer may or may not be present. If present, the lawyer is expected to defer to the party's voice. The lawyer's principal role during mediation is to review, and in some cases, draft agreements reached by their clients.

Another way that lawyers share responsibility with clients in the new paradigm is by providing "unbundled" legal services or limited task representation rather than full representation. These services may be related to traditional litigation–conducting legal research, drafting or reviewing pleadings, accomplishing service of process, or preparing clients for or attending court appearances. Discrete task representation can also support clients in the newer dispute resolution alternatives. A client may engage a lawyer to discuss dispute resolution options, to prepare for mediation, to coach or "script" the client's role in the negotiation process, to attend a mediation or negotiation session or to review or draft an agreement reached during mediation or direct negotiation with the other party.

3. The Lawyer as a Planner: Preventing Conflict and Harm

The lawyer client relationship in family law traditionally began after a serious dispute between families members occurred. The client would consult a lawyer when her husband or live-in partner moved out or, more likely, when she wanted to commence a legal action or was served with court papers. The lawyer and client would then engage in what has been called "legal triage for acute legal problems." In the new regime, by contrast, family lawyers increasingly play a role before a conflict occurs. This pre-dispute planning emphasizes the lawyer's roles as a planner and "peacemaker." Lawyers in this role help clients by proposing a plan for the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities." While the concept of preventive law has been around for decades, it has gained new currency with the changed focus in family dispute resolution. Today's preventive and therapeutic lawyers counsel individuals to use legal mechanisms to anticipate and plan for family transitions. This kind of planning is particularly helpful to clients such as non-marital partners or de facto parents, who may be unprotected by the law in the absence of an agreement. Lawyers can anticipate and resolve issues, ranging from establishing or limiting parentage to delineating post-separation obligations. Family lawyers also advise clients to designate dispute resolution methods in advance of conflicts.

4. The Lawyer as a Healer: Restoring and Improving Family Relationships

Family lawyers who represent clients in the new paradigm may also seek to expand their role from advocacy to "healing." For decades, prominent lawyers and academics have urged lawyers to use their skills as problem-solvers to reduce conflict and help clients to heal rather than fight. More recently, a comprehensive framework for the lawyer as "healer" has emerged in the "comprehensive law movement." This movement takes "an explicitly…integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to law and lawyering. It is the result of a synthesis of a number of new disciplines within law and legal practice…collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation.

Lawyer's practice "healing" when they work with clients–often in partnership with other professionals–to frame goals and make dispute resolution choices that "maximize the emotional, psychological and relational well-being of the individuals and communities involved." Lawyers also help families heal from conflict and (re)build a parenting partnership when they encourage

non-adversarial dispute resolution options such as mediation and collaborative practice. Similarly, a lawyer who assumes the role of a neutral may choose a process that focuses on healing over short-term dispute resolution or other goals.

B. Lawyers as Dispute Resolution Neutrals

In addition to transforming the role of the family lawyer when representing clients, the new regime offers enhanced opportunities for lawyers to serve as neutrals that facilitate agreements, evaluate competing claims or, in some instances, resolve disputes. Although many lawyers now serve as mediators, lawyers were largely absent in the early days of the family mediation movement. The new regime allows lawyers to combine client representation with work as a dispute resolution neutral and to shift back and forth from one role to the other.

The new paradigm also offers lawyers other opportunities to serve as neutrals. For example, some lawyers have assumed the role of parenting coordinators who serve as a "combination educator, mediator, and limited purpose arbitrator in parenting disputes." Lawyers have also assumed the role of "early neutral evaluator (ENE)," most often in court-based programs. Drawing on elements of mediation, arbitration and case management, a number of family courts now require or permit parties to participate in a process in which an ENE evaluates child access or financial issues. Finally, family lawyers can serve as neutrals for parties with financial resources, who retain them as arbitrators or private judges. In both instances, the lawyers derive their authority to serve as neutrals from the agreement of the parties.

C. *Expanding Access to Legal Services through New Lawyering Modes*

Whether dispute resolution takes place in a court, an agency or a community based resource, access to legal information and advice is critical to ensuring that the interests of all family members are protected during the process. Contrary to the views of some early reformers, the shift from adversary to non-adversary dispute resolution has not eliminated the need for lawyers, nor diminished the importance of legal advice. It has, however, changed the roles and responsibilities of lawyers.

Although a majority of disputants in today's family courts proceed without legal representation, both courts and court reformers have been slow to respond to the needs of unrepresented parties. Initially some judges discouraged any such reform efforts, reasoning that making court more accessible would encourage parties to dispense with lawyers even where parties could afford legal assistance. More recently, courts have offered limited supports for unrepresented parties. These include standardized family law pleadings available online or in court clerks' offices, court-based *pro se* offices that provide legal information to unrepresented parties, and telephone hotlines. Some court systems have also used technology to expand access to legal information and advice through court websites, videos and podcasts.

But for many families neither this limited *pro se* support nor simplified processes are enough. Many parties in complex or high conflict disputes need individualized assistance from a lawyer. Moreover, when lawyers get involved early as planners or problems solvers, conflicts can be avoided or reduced, thus decreasing the numbers of cases where full representation is needed.

The availability of unbundled legal services–when clients engage lawyers for discrete tasks–can expand family members' access to affordable legal services at critical points.

Bar associations and legal service providers have recognized the need for discrete task representation by endorsing the practice, modifying ethical rules and providing public funding for *pro se* advice clinics in courthouses. But more comprehensive change is needed to fully establish discrete task representation in family practice. These changes include standardizing retainer agreements that conform to ethical rules permitting limited representation, modifying ethical rules to address permissible communication with clients receiving limited representation and clarifying the extent of disclosure required for ghostwritten pleadings. Court should also adopt rules that facilitate withdrawal for lawyers who agree to make limited appearances in court. Standardizing practices and clarifying ethical rules should encourage more lawyers to offer unbundled services in family cases.

The legal profession should also develop structures to make limited task representation more accessible and more affordable. Government funded legal service providers should consider redirecting legal services budgets now used almost exclusively for either brief advice and referral or full representation to expand limited task representation, particularly in court houses and other locations designed to bring legal services to the people who need it. Unbundled services should include representation before, during, and after court or community based-mediation. Community and court based advice clinics should also serve the large influx of low income parents in court as a result of the changes in paternity and child support policy.

Policy-makers should also consider allowing attorneys to serve as "lawyers for the family" in limited situations involving divorce or parental separation. The legal profession has traditionally frowned on joint representation in the context of divorce, with many authorities viewing it as presenting a non-waivable conflict of interest. But such a view seems anachronistic in an era of no-fault divorce, when voluntary agreement is encouraged and many couples are able to resolve the financial and parenting consequences of their dissolution without resort to litigation. In her recent article entitled *Counsel for the Divorce*, law professor Rebecca Aviel explains that many divorcing parents both want and seek joint counsel, "understanding that they have profound shared interests in minimizing transaction costs, maximizing the value of the marital estate and reducing the hostility and animosity that are harmful to their children."[1] She argues persuasively that these couples are poorly served by the profession's insistence that they each retain their own lawyer or forego legal representation altogether. Aviel concedes that joint representation would not be appropriate or ethically permissible in all situations, for example where domestic violence exists or where the parties have markedly different interests or earning capacities at the time of the divorce. But she suggests that "[p]articularly in domestic relations matters, where the adversarial paradigm is rapidly losing relevance for most families, it is time to consider whether lawyers can serve as 'counsel for the divorce,' bringing to bear their skills as advisors, mediators, drafters, problem-solvers, and process managers."[2]

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[1] Rebecca Aviel, *Counsel for the Divorce*, 55 B.C.L. Rev. 1099, 1099 (2014).
[2] Aviel, 55 B.C.L. Rev. at 1147.

D. Implications of New Roles for Lawyers and Judges

The expanded roles of lawyers and judges in the new paradigm hold significant promise for families. But these transformed roles also present challenges for lawyers, judges and family disputants. For example, the changed roles of both lawyers and judges have diminished the importance of legal norms and blurred the previously distinctive functions of each of these critical players in the legal system. The lawyer, who once focused primarily on the client's legal interests and the judge, formerly focused on adjudicating the dispute, are now engaged in the common task of "problem-solving" and family reorganization -- often as part of an interdisciplinary team that includes an array of non-legal players.

These blurred roles raise challenges in preserving the integrity and fairness of the family dispute resolution system. Accountability may be diminished in a system where lawyers and judges share roles. It may be unclear who has made decisions and what standards apply to those decisions. When a client is unhappy with decisions reached as a result of team "problem solving," who is responsible? When judges actively promote settlement, the parties' perception of the judge's traditional decision-making role may compromise the voluntariness of the decision to settle. Having the same judge serve as both settlement advocate and adjudicator may also raise due process concerns, given the difficulty of ignoring inadmissible information received during unsuccessful settlement discussions.

These new roles also challenge the ethical norms that have traditionally governed the conduct of judges and lawyers. Lawyer's ethical rules generally assume the full representation model. As a result, discrete task representation may challenge notions of competency, loyalty to client, and the lawyer's obligations to the administration of justice. On a more practical level, providing unbundled legal services, particularly in a high volume, court-based setting, may result in inadvertent violations of rules governing actual, potential or imputed conflicts of interest. When limited representation involves court appearances or drafting documents, there may be uncertainty about the lawyer's obligation to disclose his or her assistance or withdraw from the case after the end of the lawyer's involvement.

The practice of collaborative family law has also posed challenges to traditional notions of professional responsibility. For example, the disqualification requirement that is at the heart of collaborative practice was initially challenged as contrary to traditional ethical standards that limit attorney withdrawals that prejudice clients, This concern is particularly acute for low-income clients who may not have other options for representation if a collaborative lawyer withdraws because litigation is needed. Opponents of collaborative practice also argued that a lawyer who signs a four-way collaborative participation agreement may assume duties to another party to the agreement, whose interests conflict with those of the lawyer's client–a result that could raise ethics concerns. Allowing lawyers to serve as "counsel for the divorce" raises similar ethical concerns, given the profession's traditional reluctance to countenance joint representation of parties involved in court proceedings.

Lawyers who serve as mediators may also confront ethical challenges. In particular, a lawyer acting as a mediator or other neutral may run afoul of conflict of interest rules if the mediator's discussion of legal information is considered the practice of law or constitutes dual representation of the two family members. Similar concerns arise when the lawyer mediator drafts or memorializes an agreement reached during mediation, particularly when the parties are unrepresented.

These tensions between traditional ethical rules and the evolving roles of family lawyers do not warrant a return to the past. Rather, they highlights the need to rethink existing ethical norms to accommodate contemporary family practice and to tailor dispute resolution options to conform to ethical norms that are worth retaining. While some of this work has started, much remains to be done.