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COUNSEL FOR THE DIVORCE

REBECCA AVIEL*

Abstract: This article challenges the legal profession's foundational assumption that legal services must be delivered in an adversarial posture, with lawyers compelled to engage in robust partisan advocacy on behalf of their clients' individualized interests. This narrow conception of the lawyer's role is particularly inapt in family law because many divorcing spouses actually 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 so harmful to children. Couples who wish to advance these interests by retaining joint counsel are poorly served by the profession's insistence that they each retain their own lawyer or forego legal representation altogether. This binary choice, while justified by reference to seemingly beneficent notions of undivided loyalty, turns out to be costly, paternalistic, and willfully unresponsive to changing realities in the market for legal services.

INTRODUCTION

The legal profession has made it all but impossible to unbundle partisan advocacy from legal representation. In spite of repeated invitations to embrace the potential of the problem-solving lawyer whose expertise and creativity can add value for clients in non-adversarial ways,¹ the bar continues to treat as self-evident the proposition that clients who want legal assistance must obtain it from someone who can offer vigorous, even zealous advocacy, promoting the client's individualized goals from a vantage point unhindered by other considerations. Justified by reference to vague ideals of loyalty and undivided commitment, the assumption seems like a beneficent one, something that protects clients from pernicious conflicts of interest. Upon closer inspection, however, the insistence that legal advice be delivered in an adversarial posture turns out to be costly, paternalistic, and willfully unresponsive to changing realities in the market for legal services.

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¹ See, e.g., Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1250 (2008); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 785–86 (1999). Perhaps the earliest and most prominent example is that of Justice Louis Brandeis, who famously defended his representation of multiple parties on the grounds that he acted not as a traditional partisan advocate but as “counsel for the situation.” See John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 742–43.

Nowhere are these consequences more pronounced than in the area of family law. The legal profession offers surprisingly little to divorcing spouses who seek assistance in a form other than the classic model of full-fledged representation.² The paucity of alternatives is particularly unsatisfying when viewed in light of the tremendous changes that have occurred in the law of marital dissolution. In particular, the substantive legal rules that govern divorce have undergone a revolution in the past forty years, transforming divorce from a fault-based inquiry suitable for adversarial resolution to a process best characterized as the judicial restructuring of finances and relationships.³ No longer do courts determine who was at fault for the breakdown of a marriage, and then issue financial awards that can be analogized to damages for breach of the marital contract; nor do custody contests regularly result in one parent being identified as the sole or primary custodian while the other is relegated to visitation.⁴ Instead, courts focus on the equitable distribution of marital resources and strive for an allocation of parental responsibility that keeps both parents significantly involved wherever possible.⁵ Tracking these substantive developments, family courts have embraced procedural and structural changes that seek to make divorce faster, cheaper, and less acrimonious, such as early neutral evaluation by court employees, mandatory mutual financial disclosures, and other case management mechanisms uniquely tailored to the domestic relations context.⁶ Despite these profound transformations in family law, many divorce clients encounter an all-or-nothing choice when seeking legal services:

² See ABA HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 9 (noting that the majority of lawyers offer clients “an all (full-service) or nothing (wholly unrepresented) Hobson’s ‘choice’”).

³ See Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 397 (2000).

⁴ See Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 380–81, 577–78 (3d ed. 2005) (describing the traditional fault-based system); Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 61 (2010) (“The esoteric and complex nature of the necessary claims made it almost a necessity to hire a lawyer to provide guidance through the process.”).

⁵ Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 365 (2009) (noting the “commitment to shared parenting” that “is reflected not only in the increasingly common statutory preference for post-divorce custody arrangements that facilitate close and continuing contact with both parents, but also in the parenting arrangements actually produced”).

⁶ See, e.g., Family Law Facilitator Act, 14 CAL. FAM. CODE, § 10013 (2000); see also Yishai Boyarin, *Court-Connected ADR: A Time of Crisis, a Time of Change*, 50 FAM. CT. REV. 377, 377–78 (2012); Francis L. Harrison et al., *California’s Family Law Facilitator Program: A New Paradigm for the Courts*, 2 J. CTR. CHILD. & CTS. 61, 61 (2000); Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 371 (2009); Peter Salem et al., *Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Approach*, 51 FAM. CT. REV. 131, 131 (2013); CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, <http://www.courts.ca.gov/programs.htm>, archived at <http://perma.cc/4UZ2-ZE6E> (last visited Aug. 29, 2013).

either full-scale zealous advocacy in the adversarial tradition or self-representation.⁷

Such a binary choice is troublesome on multiple dimensions, with the most obvious being cost. Most divorcing families cannot realistically fund two lawyers out of one marital pot. By some estimates, 60–90% of domestic relations cases involve at least one unrepresented party.⁸ Many scholars and activists frame the issue as an access to justice problem that should be solved by the judicial or legislative recognition of a categorical right to counsel at public expense.⁹ Setting aside the practical obstacles to such a solution, the financial downsides of the full-scale model affect a wide range of couples beyond those indigent enough to qualify for publicly funded counsel. Where both lawyers are getting paid out of a finite set of marital assets, every dollar spent on legal fees inures to the detriment of both spouses, who will share a depleted resource after the lawyers have been paid.¹⁰ Speaking strictly in financial terms,¹¹ this is justifiable only from the point of view of an individual spouse who expects that his lawyer's zealous advocacy will result in an award that more than offsets that client's share of the lawyer's fees.¹² Except in those rare instances in

⁷ As explained below, the collaborative law model, while an important innovation that serves some families quite well, is much closer to traditional zealous advocacy than is at first apparent. See *infra* notes 115–123 and accompanying text.

⁸ ABA Standing Comm. on the Delivery of Legal Services, Resolution No. 108 (2013), http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.authcheckdam.pdf, archived at <http://perma.cc/Y93R-XYDQ>; see also Julie MacFarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report May 2013, at 41, available at <http://representingyourselfcanada.files.wordpress.com/2014/02/reportm15-2.pdf>, archived at <http://perma.cc/GL4Y-S7TK> (qualitative study gathering data on self-represented litigants in three Canadian provinces).

⁹ See generally Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59 (2007); Wade Henderson, *Keynote Address: The Evolution and Importance of Creating a Civil Right to Counsel*, 25 TOURO L. REV. 71, 76–78 (2009); Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L. Q. 317, 338 (2001).

¹⁰ See Mark P. Gergen, *A Thoroughly Modern Theory of Restitution*, 84 TEX. L. REV. 173, 186 (2005), (reviewing HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* (2004) (quoting Professor Jack Sampson, who estimates that “combined legal fees to divide a marital estate of \$500,000 run[] between 5% and 10% of the estate”). Even where the court orders one spouse to pay the other's attorney fees, the expenditure is still inextricably bound in the settlement of the marital estate. See BARBARA GLESNER FINES, *ETHICAL ISSUES IN FAMILY REPRESENTATION* 17 (2010) (advising that attorneys may request fees either during the preliminary stages of an action or at end of the proceeding, including fees in the final distribution of property and debts).

¹¹ Divorcing spouses may seek legal representation to protect a range of interests that cannot be monetized, such as custody of their children and protection from domestic violence.

¹² See Sarah C. Acker, *All's Fair in Love and Divorce: Why Divorce Attorney's Fees Should Constitute a Dissipation of Marital Assets in Order to Retain Equity in Marital Property Distributions*, 15 AM. U. J. GENDER SOC. POL'Y & L. 147, 157 (2006) (“Payment of attorney's fees from marital assets can solely benefit the expending spouse. . . . The attorney only protects the interests of the hiring spouse regarding the financial division of the estate and in the non-financial matters of securing

which both lawyers are adding value to the marital pot in an amount that exceeds what their fees withdraw from it, this expectation cannot simultaneously bear fruit for both spouses, creating a sort of prisoner's dilemma.

Couples who can acknowledge and act upon shared financial interests would certainly benefit from reducing the amount of legal fees expended on the divorce. Even individual spouses, however, who gauge their interests in a competitive rather than cooperative manner and believe that they deserve a larger share of the marital assets than their spouses, could benefit from minimizing legal fees.¹³ Given how expensive legal assistance has become, a significant number of divorcing individuals may find that the financial gain attributed to a zealous advocate is insufficient to offset the cost of paying that advocate, even where half the cost is borne by the other spouse.¹⁴

Even for couples that can afford it, hiring two lawyers may inject an unappealing adversarial dynamic into the proceeding.¹⁵ It is tempting to assume that in light of their marital failure, all divorcing spouses desire the assistance of a partisan advocate, loyal only to their individual interests, who will protect them from unfavorable outcomes. Some divorcing spouses, however, prioritize conflict avoidance and expeditious resolution above the maximization of financial awards or parenting time.¹⁶ Divorce cases in which both parties are

the actual divorce. The result is that one spouse benefits from expending marital funds when he or she uses those funds to protect individual interests in the divorce and property division.”)

¹³ See Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 414–15 (1998) (“Even when clients are antagonists, the potential benefits that an aggressive, unconflicted lawyer might achieve on behalf of a client may be less than the expense of the additional representation. Thus, for example, both parties to a divorce proceeding may prefer to divide their community resources using the advice of a single lawyer even though the advice may serve one client better than the other.”); see also MacFarlane, *supra* note 8, at 41 (observing that some self-represented litigants have made “a simple cost/benefit assessment and concluded that by saving legal costs they will still come out ahead, even if they recover less in dollars than they might with legal representation”).

¹⁴ See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 30 (1986). The financial disincentive to obtaining legal counsel complicates what is generally conceived of as “the central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantage.” *Id.*

¹⁵ See McMullen & Oswald, *supra* note 4, at 58 (noting that “divorce litigants choose self-representation for non-financial as well as financial reasons”); Andrew Shephard, *Tragedy and Hope*, 40 FAM. CT. REV. 5, 6 (2002) (observing that a “growing numbers of people who use family courts simply do not want or trust lawyers to serve their best interests even when they can afford them”).

¹⁶ A study conducted by the California state court system concluded: “There is strong reason to believe that much of the accepted wisdom concerning self-represented litigants is flawed. Their arrival in the domestic relations courts has probably reduced the number of hearings, shortened those that occur, and reduced the time required to dispose of cases. For the most part, it appears that persons choosing to represent themselves are making rational and accurate assessments that their cases are not complex enough to warrant retaining counsel.” John M. Greacen, *Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know*, at 32 (2002), <http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf>, archived at <http://perma.cc/P7NN-C4DV?type=pdf>.

represented by lawyers take much longer to resolve than pro se cases,¹⁷ a material difference where parties place a premium on “getting on with their lives” and repeatedly express frustration with their divorce cases “dragging on.”¹⁸

Yet even those divorcing spouses who seek a smooth and relatively amicable process might very well benefit from legal guidance. A lawyer can explain the legal principles that govern marital dissolution—e.g., the difference between separate property and marital property—and determine how those principles apply to their circumstances.¹⁹ A lawyer can identify the tax implications of particular financial distributions and propose alternatives that maximize the value of the marital estate. A lawyer can draft individualized documents that better memorialize the details of the couple’s agreement than the standard forms available through the state court system. There is ample room in family law for expertise without advocacy, for the exercise of legal judgment and skill without full-fledged partisan loyalty to an individual client.

Reformers and scholars who focus on the movement towards unbundled legal services understand that family law urgently needs a wider range of alternatives than full service or self-representation.²⁰ Some progress has been made in acknowledging and embracing limited scope representation, in which lawyer and client agree to limit the range of legal services the lawyer will provide.²¹ A particular form of unbundled legal services, however, is conspicuously absent from the scholarly discourse or the market offerings: the joint representation of amicably divorcing spouses by a single lawyer.²² This model seems to have been written off as a per se conflict of interest, perhaps understandably given the origin of divorce as an adversarial contest, and the acrimo-

¹⁷ See Greacen, *supra* note 16, at 11. One study showed that dissolutions involving children took 136 days if both parties were unrepresented and 345 days if both parties had attorneys. McMullen & Oswald, *supra* note 4, at 59 (“Our data showed that divorces tended to take longer when the litigants were represented by lawyers. This extra time is likely partly or mostly due to the greater complexity of issues in cases where lawyers were employed, but it is also possible that lawyers increase the length of the process either deliberately or by virtue of their characteristic methods of practice.”).

¹⁸ See McMullen & Oswald, *supra* note 4, at 69 (“Divorce is a painful process for most couples, and it seems reasonable to assume that most clients would prefer to get through it as quickly as possible.”).

¹⁹ For example, a lawyer can explain the fairly technical procedure for distributing portions of a non-vested pension to the former spouse of the employee. 1-4 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 4.10(4) (briefly explaining the Qualified Domestic Relations Order).

²⁰ See, e.g., Marsha M. Mansfield & Louise G. Trubek, *New Roles to Solve Old Problems: Lawyering for Ordinary People in Today’s Context*, 56 N.Y.L. SCH. L. REV. 367, 368–69 (2011).

²¹ See generally Stephanie Kimbro, *Using Technology to Unbundle in the Legal Services Community*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES, Feb. 2013, at 1, 1–2, available at <http://jolt.law.harvard.edu/symposium/articles/Kimbrow-UsingTechnologytoUnbundleLegalServices.pdf>, archived at <http://perma.cc/S4D8-2JVR> (examining the different methods of unbundling legal services that have been developed and the use of technology to unbundle legal services).

²² Interestingly, this reaction conflicts with the *Restatement of the Law Governing Lawyers*, which takes the context-specific, informed consent approach that I advocate here. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. g, illus. 8 (2000).

ny and conflict—both legal and emotional—that still characterize many divorces.²³ Nevertheless, scholars and practitioners should reconsider the categorical rejection of this model.²⁴ Joint representation certainly will not work for everyone, a point this Article will explore in detail and emphasize repeatedly, but it adds an important alternative for a certain subset of divorcing couples, with benefits that cannot be obtained in any other fashion.²⁵

This Article first identifies the current options available to divorcing spouses and explains why they are each inadequate. Building on previous research in this area,²⁶ Part I of this Article asserts that full-scale zealous advocacy in the adversarial tradition is an increasingly inapt and irrelevant model for family law.²⁷

Part II describes the experience of most families, who navigate the dissolution process without any legal representation.²⁸ During mediation, divorcing couples often encounter a neutral facilitator who can help them settle their affairs without litigation.²⁹ As valuable as this may be, however, self-represented parties do not have access to legal advice during the mediation process.³⁰ First, many of these mediators are not lawyers, and are thus prohibited from engaging in what would be the unauthorized practice of law.³¹ Second, even for those mediators who are attorneys licensed to practice law, a variety of different constraints prohibit them from offering legal advice or drafting legal documents, severely circumscribing the assistance they can offer to self-represented parties.³²

Part III examines the increasingly important middle ground of limited scope representation.³³ This Part surveys the various forms of representation, including the family law-specific version of collaborative law, and notes that for all of these options, as currently conceived, divorcing spouses would each have to hire their own attorney.³⁴ In addition to the obvious financial ramifications, this choice has important communicative and emotional consequences

²³ See *Vinson v. Vinson*, 588 S.E. 2d 392, 398 (Va. Ct. App. 2003); Utah State Bar Ethics Advisory Op. Comm., Op. 05-03 (2005).

²⁴ See *infra* notes 209–229 and accompanying text.

²⁵ See *infra* notes 154, 203–204, 207–08, 224 and accompanying text.

²⁶ See *infra* notes 46–63 and accompanying text.

²⁷ See *infra* notes 46–73 and accompanying text.

²⁸ See *infra* notes 74–103 and accompanying text.

²⁹ See *infra* notes 74–77 and accompanying text.

³⁰ See *infra* notes 74–77 and accompanying text.

³¹ See *infra* notes 79–82 and accompanying text.

³² See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2006–11 (1999); *infra* notes 83–103 and accompanying text.

³³ See *infra* notes 104–133 and accompanying text.

³⁴ See *infra* notes 104–133 and accompanying text.

that have not been adequately explored in the literature.³⁵ Engaging an attorney—even for limited purposes—who represents only the individual interests of the hiring spouse has a signaling effect that, even if unintentional and inaccurate, may be fatal to the speedy and harmonious dissolution some divorcing couples are hoping to achieve.³⁶

Finally, Part IV analyzes the joint representation alternative. This Part demonstrates that there is present demand for such a model, and that some evidence suggests that this is in fact already happening.³⁷ Driven underground by the commonly held assumption that such an arrangement is per se unethical, these cases involve a lawyer formally representing one of the spouses while the other is unrepresented,³⁸ something that may superficially satisfy ethical rules but is likely the worst of all worlds in effectuating the values the rules purport to protect. Having demonstrated a demand for joint representation, this Article then confronts the most obvious obstacle to such a model: can it possibly be consistent with the profession's obligation to avoid conflicts of interest?³⁹

This Part suggests that the fairest way to answer that question is against the backdrop of the ethically troublesome alternatives, but it also examines the issue on its own terms.⁴⁰ This Part identifies substantive and procedural principles in the law of marital dissolution that are central to evaluating the possibility that divorcing spouses can be jointly represented without running afoul of the conflicts rules.⁴¹ Using these principles, this Part distinguishes between couples who might benefit from joint representation and those for whom it would be inappropriate and impermissible, and explores how a lawyer might

³⁵ See *infra* notes 104–133 and accompanying text.

³⁶ See *infra* notes 104–133 and accompanying text.

³⁷ See *infra* notes 134–150 and accompanying text.

³⁸ See Lisa Guerin, *Divorce in Oklahoma: Frequently Asked Questions*, DIVORCENET, http://www.divorcenet.com/states/oklahoma/ok_faq01, archived at <http://perma.cc/54FS-LGXM> (last visited Aug. 28, 2014) (observing, in response to the question whether one attorney can represent both spouses, that “[m]ost attorneys will represent only one party in a divorce action to avoid possible conflicts of interest [but] an attorney can draft the decree of divorce according to the agreement that you and your spouse have made, and allow your spouse to review the decree of divorce and approve it, prior to presenting it to the court for approval.”); Lee Borden, *Uncontested Divorce*, DIVORCEINFO, <http://www.divorceinfo.com/uncontesteddivorce.htm>, archived at <http://perma.cc/3W9T-C4TA> (last visited Aug. 29, 2014) (defining uncontested divorce as one in which one spouse is represented and the other is not); David Wolkowitz, *Uncontested Divorce: A Lawyer's Role*, <http://wolkowitz.com/498/uncontested-divorce-affordabe-evanston-schaumburg-chicago>, archived at <http://perma.cc/62R4-X5BF> (last visited Aug. 28, 2014) (asserting that one lawyer is “more than enough” for an uncontested divorce, but asserting that having one lawyer represent both parties is “a very bad idea”).

³⁹ See *infra* notes 151–229 and accompanying text.

⁴⁰ See *infra* notes 151–229 and accompanying text.

⁴¹ See *infra* notes 151–229 and accompanying text.

realistically ascertain into which category prospective clients fall.⁴² Observing that our existing framework for evaluating conflicts of interest demands a case-by-case approach, this Article asserts that divorcing couples should be treated no differently than other prospective clients who seek joint representation.⁴³ Treating them as categorically excluded from joint representation unnecessarily emphasizes their status as divorcing spouses, obscuring the significant set of interests they may share.⁴⁴ Finally, the Article argues that commitment to client-centered representation, respect for client autonomy, and humility about the legal profession's competence to pre-judge the actual interests of divorcing families militate in favor of the transparent, responsible, and regulated practice of joint representation.⁴⁵

I. FULL REPRESENTATION IN THE ADVERSARIAL PARADIGM

The traditional model of full legal representation is predicated on the norm of aggressive partisanship in an adversarial system, obligating lawyers to put forth every effort in pursuit of the client's interests. Lord Broughton's oft-invoked description of the attorney-client relationship describes the primacy of zealous advocacy:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.⁴⁶

Successive codes of professional responsibility have, over the years, expressed this idea in varying degrees of intensity. The Canons required a lawyer to show "entire devotion to the interest of the client, warm zeal in the maintenance and defense of [the client's] rights and the exertion of the utmost learning and ability."⁴⁷ The client was "entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect

⁴² See *infra* notes 44, 206–211, 227 and accompanying text.

⁴³ See *infra* notes 200–229 and accompanying text.

⁴⁴ See *infra* notes 209–229 and accompanying text.

⁴⁵ See *infra* notes 230–233 and accompanying text.

⁴⁶ Monroe H. Freedman, *Henry Lord Brougham: Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1215 (2006) (quoting *The Trial of Queen Caroline* (1821) 2 Eng. Rep. 3). The idea of zealous advocacy shows up in the professional responsibility codes as well. See Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1165–68 (2006) (discussing the evolution of "zeal" in the ABA's Model Rules of Professional Responsibility).

⁴⁷ MODEL CODE OF PROF'L ETHICS Canon 8, 15 (1908).

his lawyer to assert every such remedy or defense.”⁴⁸ The current rules of professional responsibility reflect a muted yet still distinct version of this ideal.⁴⁹

The merits of the adversary system have been the subject of much debate, and revisiting the topic in any depth is beyond the scope of this Article.⁵⁰ Whatever we might think of the adversary system’s virtues in other legal contexts, however, it is an inappropriate mechanism for resolving the issues that attend the dissolution of a marriage. The adversary system imposes emotional and financial costs that are precisely contrary to the interests that family law is intended to serve.

Protecting the well-being of children of the marriage constitutes one of the chief concerns of any legal framework for divorce. The substantive legal principle that governs custody disputes in every jurisdiction requires that custody orders reflect the best interests of the child.⁵¹ As family law scholars repeatedly explain, adversarial procedures are uniquely costly and counterproductive in resolving custody disputes.⁵² In previous work, I have explained that the allocation of rights and responsibilities between a child’s two parents is a singular posture in law, presenting concerns that simply do not translate to any other form of legal proceeding.⁵³ First, the majority of custody disputes result in orders that create some type of joint parenting arrangement after the divorce.⁵⁴ These plans require extensive coordination between the parties: consider, for example, the day-to-day logistics of transporting children between households or the cooperation necessary to exercise joint decision-making about education or medical treatment.

⁴⁸ *Id.*

⁴⁹ MODEL RULES OF PROF’L CONDUCT, Preamble (2013). The preamble to the current *Model Rules of Professional Conduct* notes that lawyers perform various functions, acting as advisors, advocates, negotiators, and evaluators. *Id.* As an advocate, the preamble states, “a lawyer zealously asserts the client’s position under the rules of the adversary system.” *Id.* The preamble also notes that the “basic principles” underlying the Rules of Professional conduct “include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.” *Id.*

⁵⁰ For treatment of some of this literature, see Rebecca Aviel, *The Boundary Claim’s Caveat: Lawyers and Confidentiality Exceptionalism*, 86 TULANE L. REV. 1055, 1094–96 (2012).

⁵¹ See, e.g., Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2013 (2014).

⁵² See Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106, 2109 n.6 (2013); Robert F. Cochran Jr., *Legal Ethics and Collaborative Practice Ethics*, 38 HOFSTRA L. REV. 537, 539 (2009) (“The adversarial nature of litigation and other existing dispute resolution mechanisms was particularly troubling in family law”); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 205 (2004); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86–100 (1997).

⁵³ See Aviel, *supra* note 52, at 2115–16.

⁵⁴ See *id.* at 2116, (citing, Singer *supra* note 5, at 365).

Even in divorce cases that do not require such cooperation—where one parent will be the primary residential custodian and have exclusive decision-making authority, for example—the parties must arrive at this result expeditiously and with minimum conflict.⁵⁵ Social scientists observe that a child’s adjustment to divorce and separation depends significantly on their parents’ behavior during and after the separation: children exposed to high levels of parental conflict experience the most negative effects of family dissolution.⁵⁶ Others have explored similar themes, emphasizing the damage custody litigation does to children and families.⁵⁷ There is a profound consensus that the emotional costs of adversarial custody proceedings are intolerably high. Reform efforts in domestic relations courts reflect this understanding: as Professor Jana Singer observes, courts are undergoing a “paradigm shift” away from a “law-oriented and judge-focused adversary model” toward “a more collaborative, interdisciplinary, and forward-looking family dispute resolution regime.”⁵⁸

Although the destructive effect of custody litigation on children rightfully predominates among critiques of adversarialism in family law,⁵⁹ multiple reasons remain to question whether full-fledged traditional advocacy is necessary or appropriate even for divorcing couples without minor children. Adversarial representation is financially untenable on multiple levels: few can afford it, and

⁵⁵ See Singer, *supra* note 5, at 365.

⁵⁶ See *id.*

⁵⁷ See Lynn M. Akre, *Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the “Best Interest of the Child” Standard*, 75 MARQ. L. REV. 628, 649 (1992) (“Parental conflict is intensified by protracted custody litigation, and the greater the degree of inter-parental conflict, the greater the psychological maladjustment of the child.”); Cochran *supra* note 52, at 539 (“The adversarial nature of litigation and other existing dispute resolution mechanisms was particularly troubling in family law There was a growing recognition that children are collateral damage in many divorces, especially high conflict divorces.”); Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615, 640–41 (2004) (noting that child custody litigation harms the emotional health of children and often does not enhance justice); Joan B. Kelly, *Commentary on “Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children”* (Warshak, 2010), 48 FAM. CT. REV. 81, 82 (2010) (“[T]here is broad consensus among the mental health and family law community that some older children and adolescents do become pathologically alienated from a parent following separation and that the risk of child alienation is increased in highly conflicted separations accompanied by protracted adversarial child custody disputes.”) (internal citations omitted); Andrew Schepard et al., *Preventing Trauma for Children of Divorce Through Education and Professional Responsibility*, 16 NOVA L. REV. 767, 770 (1992) (suggesting that divorce-related risks to children increase if parents engage in protracted custody disputes and that ongoing parental conflict magnifies normal divorce-related adjustment problems).

⁵⁸ Singer, *supra* note 5, at 363.

⁵⁹ See Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making—How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 11 (1998) (“Protracted family law litigation is painful and costly to the parties and the children, so if proceedings are fruitless, both human and material resources are wasted.”); Singer, *supra* note 5, at 363 (noting that “[a]n overriding theme of recent divorce reform efforts is that adversary processes are ill suited for resolving disputes involving children”).

even those who can are increasingly choosing not to expend resources in this way. By some estimates, in fewer than twenty percent of family law cases does each party have their own lawyer.⁶⁰ In fifty percent of all family law cases, both parties are unrepresented.⁶¹ Given the soaring cost of legal services and the meager opportunities for low and middle income Americans to obtain reduced cost representation,⁶² many divorcing couples do not have the resources to pay for one lawyer, much less two.⁶³ The expectation that divorcing spouses will be represented in the traditional fashion—capable advocate pitted against capable advocate, each promoting the interests of his or her own client—simply fails to accurately portray what happens on the ground.⁶⁴

To understand the growing skepticism about full-fledged adversarial advocacy in divorce cases, however, it is important to emphasize that not all self-represented litigants choose to proceed pro se because they are unable to afford a lawyer. Data concerning the number of pro se litigants who exercise a real preference for self-representation is regrettably meager, but it is becoming increasingly clear that a number of divorcing couples just do not want traditional legal representation. In an early study, twenty percent of unrepresented divorce litigants stated that they were able to afford a lawyer.⁶⁵ The phenomenon persists in more recent examinations. A leading scholar in family court reform notes that “growing numbers of people who use family courts simply do not want or trust lawyers to serve their best interests even when they can afford

⁶⁰ A study conducted in Arizona found that by 1991, 88% of all family law cases involved at least one pro se litigant. Greacen, *supra* note 16, at 3. A study conducted in Florida showed that the percentage of self-represented litigants increases as the case proceeds, with 85% of all domestic relations cases in Miami including at least one self-represented litigant by the end of the case. *Id.* at 4. An analysis performed by the San Diego County Superior Court found that 88% of all domestic relations cases involved at least one pro se litigant, while similar studies in Van Nuys and Pasadena counties found the respective numbers to be 89% and 81%. *Id.* at 7.

⁶¹ Madelynn Herman, *Self-Representation Pro Se Statistics*, Nat'l Ctr. for St. Cts. (Sept. 25, 2006).

⁶² See Macfarlane, *supra* note 13, at 39 (“By far the most consistently cited reason for self-representation was the inability to retain, or to continue to retain, legal counsel.”); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 373 (2004) (“[M]illions of Americans who are above poverty thresholds are also priced out of the civil legal process for the vast majority of their legal concerns.”).

⁶³ See Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1013 (2004) (noting the “shameful irony” that the nation with the most lawyers has among the least adequate systems for ensuring legal assistance and, even more shamefully, that the inadequacies attract so little concern). The current structure fails to meet an estimated four-fifths of the civil legal needs of the poor, as well as two to three-fifths of the needs of middle-income individuals. *See id.*

⁶⁴ This discrepancy undermines the basic assumption that justifies partisan advocacy in an adversarial system, expressed frankly in the Preamble to the Model Rules: “When an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.” *See* MODEL RULES OF PROF’L CONDUCT, Preamble (2013).

⁶⁵ Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L.Q. 407, 411 (1994).

them.”⁶⁶ As a former Colorado State Supreme Court justice observed, “there are some divorcing couples who don’t want to be told where they might disagree.”⁶⁷ This observation has borne out elsewhere after extended study. For example, following a series of public hearings on Oregon’s divorce system, a task force reported that “[m]any pro se litigants can afford lawyers” but do not engage their services because “[t]hey fear getting sucked into a vortex of conflict.”⁶⁸

Upon reflection we should not be terribly surprised that increasing numbers of divorcing spouses find traditional full-fledged representation contrary to their interests. No-fault divorce is now available in every state, meaning that couples who agree that their marriage should end may achieve this result by filing a petition asserting irreconcilable differences.⁶⁹ There is no need to prove that one spouse engaged in specified forms of marital misconduct, or to defend against such allegations.⁷⁰ Instead, the complexity and conflict often reside in the custodial and financial issues that attend the dissolution of the marriage. For couples without minor children, or who agree upon a post-divorce parenting plan, the distribution of marital assets and liabilities and the possibility of post-divorce support payments from one party to the other will likely be the source of most intense discord.

Hiring a zealous advocate to improve one’s financial outcome in a divorce proceeding, however, is a risky proposition. It signals to the other spouse that she will be disadvantaged if she proceeds without a committed advocate to protect her individual interests, and increases the likelihood that each spouse will be represented by separate counsel. The funds required to pay these two lawyers come from precisely the marital assets whose preferential allocation is the object of the representation,⁷¹ at the very time the couple is experiencing the financial

⁶⁶ See Schepard, *supra* note 15, at 6.

⁶⁷ Interview with Justice Rebecca Love Kourlis, Colo. Sup. Ct., in Denver, Colo. (Nov. 2012).

⁶⁸ Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L.Q. 95, 103 (1998) (citing OR. TASK FORCE ON FAMILY LAW, A STATUS REPORT 6–7 (1996)).

⁶⁹ See, e.g., COLO. REV. STAT. § 14-10-110(1) (2012). Some states offer a procedure by which divorcing spouses may file jointly for dissolution of the marriage. Alternatively, one spouse may file the petition with the expectation that the other spouse will not deny that there has been an irretrievable breakdown in the marriage. See *id.* (“If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken or one of the parties has so stated and the other has not denied it, there is a presumption of such fact, and, unless controverted by evidence, the court shall, after hearing, make a finding that the marriage is irretrievably broken.”). As scholars and courts have both noted, the no-fault regime in practice allows for someone who no longer wants to be married to obtain a divorce over the objection of her spouse.

⁷⁰ See *id.*

⁷¹ See *Alison v. Alison*, 864 A.2d 191, 194–97 (Md. Ct. Spec. App. 2004) (discussing the use of marital funds to pay divorce attorneys and collecting cases from other jurisdictions addressing the issue); *Expenditures for Attorney’s Fees as Dissipation: Spending Marital Funds for Attorney’s Fees*,

stress of maintaining two households with income that was previously supporting just one. As other scholars have recognized, this is exactly the type of situation where “the potential benefits that an aggressive, unconflicted lawyer might achieve on behalf of a client may be less than the expense of the additional representation.”⁷² Lord Brougham’s impassioned pronouncement that advocates must promote their own clients’ interests “at all hazards and costs to other persons” makes little sense where these hazards and costs deplete the very financial resources the client seeks to obtain.

Nor is the drain on precious financial resources the only pitfall that couples may face when they engage two lawyers in the traditional adversarial paradigm. These cases typically take *twice as long* to resolve as cases in which both parties are pro se, an astonishing delay given the premium we expect parties to place on resolving a divorce quickly and efficiently.⁷³ Is it any wonder that increasing numbers of couples are skeptical about engaging traditional partisan advocates to assist with their divorce? Spending ten percent of the marital estate to languish in family court twice as long as couples who forgo legal representation does not seem like a compelling value proposition.

The traditional model of full-fledged, individualized partisan advocacy has all but become obsolete for family law cases—unaffordable for most couples and unattractive for many more. Nonetheless, divorce remains a complicated and challenging process with profound and long-lasting consequences. Accordingly, legal expertise can be immensely valuable. In the sections that follow, this Article explores the existing ways in which divorcing couples can navigate the legal process without engaging lawyers in the traditional adversarial paradigm.

II. SELF-REPRESENTATION WITH THE HELP OF MEDIATORS

For many unrepresented parties in family court, mediation provides the primary point of access to any kind of assistance.⁷⁴ Family courts increasingly require divorcing spouses to participate in mediation,⁷⁵ and mediation is estab-

15 EQUITABLE DISTRIBUTION J. 85 (Aug. 1998) (noting that divorcing spouses typically do not have separate funds to pay for legal assistance).

⁷² See Zacharias, *supra* note 13, at 414–15 (observing that where the benefit of hiring a second lawyer is insufficient to offset the additional cost, both parties may prefer to pay for the advice of a single lawyer even though it may serve one client more than the other).

⁷³ Greacen, *supra* note 16, at 10.

⁷⁴ See Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room*, 51 FAM. CT. REV. 87, 87 (2013) (noting the substantial rise of divorce mediation as an alternative to traditional litigation, and the parallel rise in self-representation in family law cases).

⁷⁵ See Applegate, *supra* note 74, at 89 (noting that the best available survey indicated that ten states had mandatory attendance clauses, twenty-four states left the referral to a judge’s discretion, eight states had mixed referral mechanisms, and the remaining nine states had no statewide statute

lishing a strong track record in the resolution of family law disputes.⁷⁶ To the extent that mediation provides families with resolutions that are faster, cheaper, and less acrimonious than adversarial litigation, there is much to celebrate, although critics have been vocal about the potential for mandatory mediation to exacerbate power imbalances between parties.⁷⁷ While normative questions remain about the wisdom of mandatory mediation in certain cases, mediators play a truly central role in the resolution of pro se cases. Limits on the services they can provide, however, make them inapt substitutes for lawyers.

A. Non-Lawyer Mediators and Unauthorized Practice

Mediators need not be licensed attorneys, and many of them are not.⁷⁸ For non-lawyer mediators, providing legal advice or drafting legal documents would constitute the unauthorized practice of law.⁷⁹ I acknowledge and embrace the critique that Professor Deborah Rhode⁸⁰ and others have leveled at the bar's monopolistic use of unauthorized practice laws to protect the legal profession's own self-interest, and I support efforts to reform unauthorized practice laws to achieve a better balance between the competing interests at stake.⁸¹ Doing so, however, will not resolve all the problems associated with

regarding divorce mediation). In 1980, California was the first to adopt statewide, mandatory mediation in all custody disputes and approximately thirty-seven states and the District of Columbia followed suit. Boyarin, *supra* note 6, at 380.

⁷⁶ See Salem et al., *supra* note 6, at 373–74 (“When compared to adversarial processes, mediation results in faster settlement, greater levels of party satisfaction (even when an agreement is not reached) and, importantly, improved post-separation family relationships.”).

⁷⁷ See Craig A. McEwen et al., *Bring in The Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1336–37 (1995).

⁷⁸ See Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 702, 720 (1994).

⁷⁹ See Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 90 n.14 (1997) (“Non-attorney mediators, like all non-attorneys, would likely be prohibited from dispensing legal advice because such actions would probably constitute the unauthorized practice of law.”).

⁸⁰ See, e.g., Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 5 (1981) (describing unauthorized practice of law doctrine as “inconsistent, incoherent, and, from a policy perspective, indefensible”).

⁸¹ In Colorado, for example, prohibitions on the services provided by non-lawyer mediators have been liberalized somewhat by the Colorado Dispute Resolution Act. COLO. REV. STAT. §§ 13-22-302(4), 13-22-308. In the view of the Colorado Bar Association's Alternative Dispute Resolution Section, “[t]he CDRA implies the authorization of non-lawyers to mediate and to draft settlement agreements or memoranda of understanding, as they are frequently termed in mediation.” See *id.*; *Best Practices for Avoiding Unauthorized Practice of Law in Mediation*, 36 COLO. LAW. 25 (2007). Under the CDRA, a mediator is “a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives.” § 13-22-302(4). Thus, the CDRA implies that a mediator may draft a settlement agreement, to be approved by the parties and their attorneys. Because the CDRA does not require a mediator to be a lawyer, it provides statutory

relying on mediators as the sole source of legal assistance for divorcing couples. Even for licensed lawyers, the role of a mediator imposes constraints that severely limit the guidance that divorcing couples can hope to obtain, as I explain in the next sub-section.⁸²

B. Mediation Ethics and the Constraints on Lawyer Mediators

The role of a mediator is widely understood to be incompatible with the provision of legal advice. Mediator codes in a number of states either limit or prohibit mediators from dispensing legal advice,⁸³ as do standards of practice crafted specifically for the domestic relations context.⁸⁴ In 2001, for example, the American Bar Association (“ABA”) House of Delegates approved Model Standards of Practice for Family and Divorce Mediation.⁸⁵ Standard VI states that “[a] family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.”⁸⁶ Ensuring that participants fully understand the consequences of their agreement, which by its very nature will include the waiver of significant rights, is without question a laudable goal, one that is essential to the basic fairness of mediation.⁸⁷ The accompanying commentary, however, undercuts this objective by specifying that a mediator may not offer legal advice.⁸⁸ Given the financial realities confronting so many divorcing families, the tension is hardly mitigated by the additional comment instructing mediators to recommend that participants obtain independent legal advice before signing an agreement.⁸⁹

The reiteration of the prohibition against legal advice in the 2001 Model Standards is particularly significant because these standards were the product of an exhaustive, collaborative process by the most knowledgeable and influential actors in the field of family mediation.⁹⁰ They were self-consciously try-

authority for a non-lawyer mediator to draft a settlement agreement. *See Best Practices for Avoiding Unauthorized Practice of Law in Mediation*, 36 COLO. LAW. 25 (2007).

⁸² *See infra* notes 83–103 and accompanying text.

⁸³ *See, e.g.*, MASS. UNIF. R. ON DISPUTE RESOLUTION 9(c)(iv) (noting that “a neutral . . . shall not provide legal advice”); Florida Mediator Qualifications Advisory Panel, MQAP 96-003, at 2 (1997).

⁸⁴ *See, e.g.*, ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984).

⁸⁵ MODEL STANDARDS OF PRACTICE FOR DIVORCE AND FAMILY MEDIATION (2001), available at <http://www.americanbar.org/content/dam/aba/migrated/family/reports/mediation.authcheckdam.pdf>, archived at <http://perma.cc/4WSK-DZJR>.

⁸⁶ *Id.* at vi.

⁸⁷ *See Engler, supra* note 32, at 2016–17. As Russell Engler has argued, a process that offers no protection to an unrepresented litigant who unknowingly waives significant rights is indefensible. *Id.* at 2017.

⁸⁸ MODEL STANDARDS OF PRACTICE FOR DIVORCE AND FAMILY MEDIATION cmt. 16, at vii.

⁸⁹ *Id.*

⁹⁰ *Id.* at ii (“The Model Standards of Practice for Family and Divorce Mediation are the family mediation community’s definition of the role of mediation in the dispute resolution system in the twenty-first century. They are the latest milestone in a nearly twenty-year-old effort by the family

ing to produce guidelines that were “state-of-the-art,”⁹¹ reflecting the many lessons learned since the promulgation of the previous standards for mediators in family disputes in 1984.⁹² That the reworked standards continue to bar family mediators from providing legal advice reflects the tenacity of the prohibition and the degree to which it is accepted as a wise one by the family mediation community.⁹³ To the extent that leaders in the field acknowledge a role for mediators to play in fostering greater understanding on the part of mediation participants, this rationale is based on a distinction between information and advice.⁹⁴ Mediators, according to the prevailing view, can provide general information about the law (i.e., “Colorado requires divorcing parents to submit a parenting plan”) but may not advise individuals on how the law applies to their situation (i.e., “Your child’s medical needs may warrant a departure from the statutory child support amount”). In theory, the distinction allows mediators to shed light on a bewildering process for unrepresented litigants without offering the individualized guidance the standards forbid. In practice, however, the dividing line is difficult to ascertain, yielding persistent confusion about what is and what is not permissible. Moreover, as Professor Russell Engler has thoughtfully observed, “most assistance needed by unrepresented litigants is likely to involve what would fall within an intellectually honest definition of legal advice.”⁹⁵

There is some indication that this insight may be making its way into an evolving understanding of the mediator’s role. The American Academy of Matrimonial Lawyers (AAML), noting that the ABA’s Model Rules of Professional Conduct do not address ethical issues relevant only to specific practice areas, endeavors to offer this type of guidance to family law practitioners.⁹⁶ The family law standards of conduct promulgated by the AAML in 2009 retain some aspects of the predominant view. AAML Standard 8.3 states that an attorney acting as a mediator in a family dispute should urge each party to obtain

mediation community to create standards of practice that will increase public confidence in an evolving profession and provide guidance for its practitioners.”); *id.* (“The Model Standards are the product of an effort by prominent mediation-interested organizations and individuals to create a unified set of standards that will replace existing ones. They draw on existing codes of conduct for mediators and take into account issues and problems that have been identified in divorce and family mediation practice.”).

⁹¹ *Id.*

⁹² *Id.* at ii–iii (describing the various ways in which the 1984 standards were in need of revision).

⁹³ It may also very well reflect the ways in which the interests of the organized bar, which has vigilantly policed the boundaries of legal practice, shape the product of ABA processes.

⁹⁴ See MODEL STANDARDS OF PRACTICE FOR DIVORCE AND FAMILY MEDIATION cmt. 16, at vii.

⁹⁵ See Engler, *supra* note 32, at 2026.

⁹⁶ American Academy of Matrimonial Lawyers (AAML), BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS, Preliminary Statement (2009), available at <http://www.aaml.org/library/publications/19/bounds-advocacy>, archived at <http://perma.cc/5XZ-PQC7>.

independent legal advice.⁹⁷ Yet, in a notable departure, AAML provides a limited allowance to attorney mediators to give advice. Standard 8.4 states that an attorney acting as a mediator in a marital dispute should only give advice that will enable the parties to make reasonably informed decisions.⁹⁸ Recognizing the controversial nature of the issue, the commentary reasons that the guidelines that attempt to distinguish between providing permissible information and impermissible advice appear largely semantic and unenforceable.⁹⁹ Moreover, to the extent that such rules prohibit advice that would assist the participants in making informed decisions, these rules are undesirable from a policy standpoint.¹⁰⁰

A similar evolution can be detected in the revisions made to the Model Standards of Conduct for Mediators, a joint effort of the American Arbitration Association, the Society of Dispute Resolution Professionals, and the American Bar Association Section on Dispute Resolution. The 1995 version states that:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice.¹⁰¹

In contrast, the updated version, promulgated in 2005, reads:

The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.¹⁰²

The new version omits the prohibitory references to providing advice, suggesting obliquely an emerging possibility that the mediator's role might be expanded to include this valuable service.

Although this development in the understanding of the mediator's ability to assist unrepresented parties is a positive one, it should not stunt further innovation in the delivery of legal services to divorcing spouses. A significant

⁹⁷ *Id.* standard 8.3.

⁹⁸ *Id.* standard 8.4.

⁹⁹ *Id.* standard 8.4, cmt. 101.

¹⁰⁰ *Id.*

¹⁰¹ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, standard VI cmt. 4 (1995).

¹⁰² MODEL STANDARDS OF CONDUCT FOR MEDIATORS, standard VI cmt. (A)(5) (2005).

gap remains between a mediator who offers only that “advice that will enable the parties to make reasonably informed decisions” and a lawyer who can serve a divorcing couple in a more comprehensive manner, offering a wider spectrum of advice, managing court deadlines and appearances, assisting with the drafting of settlement agreements, and so on.¹⁰³ A divorcing couple can benefit from having an attorney-client relationship with someone who is accountable for advancing their interests to the fullest extent allowed by the joint representation. Although joint representation requires sensitivity and certainly imposes constraints upon the lawyer’s conduct, a lawyer operating in the context of an attorney-client relationship can offer much more than a mediator, even under a liberalized understanding of the mediator’s role.

III. THE EMERGING MIDDLE GROUND OF LIMITED SCOPE REPRESENTATION

As the previous section demonstrates, the assistance of a mediator is not a substitute for the guidance of a lawyer. What limited help a mediator may be able to provide does not adequately cover that essential middle ground between full-fledged advocacy in the adversarial paradigm and self-representation. Mediation address some of the concerns associated with the adversarial handling of family issues, but does not fill the legal advice gap that is faced by divorcing couples who want someone with expertise to guide them to a satisfactory resolution of all divorce-related issues.

For many scholars and reformers working to enhance access to justice for low and middle income Americans, the solution lies in the “unbundling” of legal services.¹⁰⁴ Also described as “limited scope representation,” “limited assistance representation,” or “discrete task representation,” unbundling allows clients to choose legal services from an à la carte menu according to their goals, preferences, and financial resources. Forrest Mosten, a pioneer in the unbundling movement, explains that, “the client is in charge of selecting one or several discrete lawyering tasks contained within the full-service package.”¹⁰⁵

¹⁰³ See *id.* standard 8.4. Even where providing legal advice is not prohibited or discouraged, it nonetheless may have unintended consequences. See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 687 (Minn. 1980) (per curiam) (concerning a legal malpractice claim). For example, the provision of such advice may be enough to trigger the formation of an attorney-client relationship and all of its ramifications. See *id.* For present purposes, I assume that an attorney following the AAML guidelines who effectively communicates to mediation participants that she is not acting as an attorney can avoid the formation of an attorney-client relationship.

¹⁰⁴ See, e.g., Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825, 831–32 (2012) (describing the benefits of unbundled legal services).

¹⁰⁵ FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 1–2 (2000). Mosten describes the full package of legal services as “(1) gathering facts, (2) advising the client, (3) discovering facts of opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court.” Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422–23 (1994).

The Model Rules of Professional Conduct promulgated by the ABA explicitly authorize this arrangement. Rule 1.2(c) was amended in 2002 to allow a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹⁰⁶ Forty-one states have adopted this provision or something substantially similar.¹⁰⁷ In February 2013, the ABA House of Delegates approved a resolution encouraging practitioners to consider providing unbundled legal services.¹⁰⁸ Additionally, the ABA’s *Handbook on Limited Scope Legal Assistance* describes thirteen different types of limited scope representation that attorneys may offer to their clients.¹⁰⁹ Lawyers have begun to capitalize on this emerging market by offering prospective clients detailed explanations of the variety of service models they might consider.¹¹⁰ As one unbundling expert enthuses, “[t]his concept—that attorneys and clients can agree that the attorney will handle only a part of the case, such as preparing the papers, or the actual court appearance on one issue—is spreading rapidly. It is a win-win-win situation. The litigant gets a lawyer when he or she really needs it, the lawyer gets business, and the court gets the lawyer’s focus in moving the case.”¹¹¹

Limited scope representation is an important development in the expanded provision of legal services to Americans who otherwise cannot afford legal help. Professor Russell Engler, an access-to-justice expert who has written extensively on the provision of services to low and middle-income clients, describes an emerging “legal services spectrum” that “includes self-help services, public legal education and information, advice from non-lawyers, and advice and brief services by lawyers in various settings.”¹¹² The ABA’s handbook on

¹⁰⁶ MODEL RULES PROF’L CONDUCT R. 1.2(c) (2002).

¹⁰⁷ ABA Policy Implementation Comm., Variations of the ABA Model Rules of Professional Conduct (Apr. 7, 2011), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html, archived at <http://perma.cc/3E97-PKK5>.

¹⁰⁸ ABA Standing Comm. on the Delivery of Legal Services, Resolution No. 108 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.authcheckdam.pdf.

¹⁰⁹ HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, A Report of the Modest Means Task Force, ABA Litigation Section, at 16–29, available at <http://apps.americanbar.org/litigation/taskforces/modest/report.pdf>, archived at <http://perma.cc/PK6N-5LDV>.

¹¹⁰ See, e.g., Connecticut Legal Coaching, LLC, <http://www.ctlegalcoaching.com/>, archived at <http://perma.cc/9HPF-RVGM> (last visited Aug. 29, 2014); Law Offices of Donald F. Conviser, <http://www.conviserfamilylaw.com/styles.html> (last visited Aug. 29, 2014) (differentiating between traditional retainer-based full service, unbundled services in which the client is considered pro per, and limited scope representation); Forrest S. Mosten, Mediator & Collaborative Attorney, <http://www.mostenmediation.com/legal/coaching.html>, archived at <http://perma.cc/CPZ6-PMXX> (last visited Aug. 29, 2013) (listing different services that might be performed for the client, including legal research, negotiation, and drafting).

¹¹¹ Richard Zorza, *Access to Justice: Economic Crisis Challenges, Impacts, and Responses*, NATIONAL CENTER FOR STATE COURTS, at 10 (2009).

¹¹² Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL’Y REV. 31, 47 (2012).

limited scope assistance uses family law as the paradigmatic example of a field that is appropriate for this kind of assistance, suggesting that this form of representation is particularly apt for many divorcing spouses.¹¹³

Notably, however, existing models of limited scope representation offer only a partial solution to the problems that animate the search for new delivery models for family law litigants.¹¹⁴ Because these models all involve hiring two different attorneys to assist each spouse on an individualized basis, they do not offer an opportunity for couples to recognize the gains that may be had from sharing counsel. Collaborative law, a form of limited scope assistance unique to family law, demonstrates the shortcomings of existing models of limited scope representation.

A. The Special Example of Collaborative Law

The collaborative law approach ameliorates many of the concerns that animate the search for an alternative model to deliver legal services in the family law context. Although the practice of collaborative law varies significantly,¹¹⁵ the approaches share an emphasis on resolving divorce-related matters through negotiated settlement rather than litigation. Divorcing spouses who share this objective each hire their own collaborative law attorneys who agree to serve their respective clients only in negotiation. If the parties fail to arrive at an agreement, the attorneys will be disqualified from taking the case to trial.¹¹⁶

The disqualification agreement is what makes collaborative law a species of limited scope representation; it is also what provides the parties and their lawyers with an incentive to work collaboratively towards settlement when the temptation may be otherwise. As Professor Scott Peppet explains, “the arrangement motivates the attorneys to seek settlement because they will not be

¹¹³ ABA HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, at 61–62, available at <http://apps.americanbar.org/litigation/taskforces/modest/report.pdf>, archived at <http://perma.cc/C7EM-S76B>.

¹¹⁴ *Lerner v. Laufer*, 819 A.2d 471, 482–85 (N.J. 2003) (discussing issues in a particular limited scope representation).

¹¹⁵ See, e.g., Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 132–41 (explaining the varieties of collaborative law and their respective ethical ramifications).

¹¹⁶ Pauline H. Tessler defines collaborative family law as follows:

Two clients, each represented by an independent lawyer working within all applicable ethical mandates in the jurisdiction, in a limited purpose retention memorialized in a contract or participation agreement that provides, inter alia, that the lawyers are hired solely to help the parties reach resolution of their differences, and that the lawyers may never participate in any adversarial proceedings between the parties. All negotiations take place face to face, with the parties present and actively participating according to a structured sequence of tasks and agendas. Discovery is voluntary and is made subject to good faith commitments of completeness and accuracy.

Pauline H. Tessler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 91.

able to collect additional fees by taking the case to court. Simultaneously, mandatory disqualification makes it costly—although not impossible—for a client to litigate because he or she will need to hire a new attorney and get that lawyer up to speed on the divorce. Most important, each side knows *at the start* that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement The intention is to never use the disqualification provisions—by agreeing to mandatory attorney withdrawal, the parties credibly commit to settlement so that litigation (and attorney withdrawal) becomes far less likely.”¹¹⁷

Divorce in the collaborative law model thus promises to be less adversarial, and the results seem to bear this out.¹¹⁸ Its practitioners are so enthusiastic about its transformative potential that they commit significant resources to restructuring their practices in the collaborative vein.¹¹⁹ Collaborative divorces, however, can be slow and expensive. According to Pauline Tessler, one of the nation’s most prominent practitioners and advocates of collaborative law, the standard collaborative divorce process includes the client and attorney first making contact; early stage communications with the other party or opposing counsel; pre-meetings, agenda-setting, and the first four-way meeting with both parties and their attorneys; the debriefing of the first four-way meeting between each client and respective attorneys; the mid-game, which can involve multiple four-way meetings; and the end-game, which usually concludes the settlement.¹²⁰ Divorcing couples must underwrite a significant amount of attorney time, presenting many of the same financial concerns that attend traditional full-fledged representation.¹²¹

Collaborative law helps a particular subset of divorcing spouses: those who intend to resolve their divorce through settlement rather than litigation, but who want to be represented in those negotiations by a committed advocate with individualized obligations in the traditional mold. Few divorcing couples can afford this expensive model, however, and collaborative law does not offer

¹¹⁷ Peppet, *supra* note 115, at 133; see also Pauline H. Tessler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 320–21 (2004) (discussing the incentive for collaborative lawyers to remain at the negotiation table longer because, given the potential for disqualification, the lawyer as well as the client suffers the risk of failure).

¹¹⁸ See Peppet, *supra* note 115, at 120; William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 397 (2004).

¹¹⁹ See Tessler, *supra* note 116, at 95–97.

¹²⁰ Elizabeth F. Beyer, Comment, *A Pragmatic Look at Mediation and Collaborative Law as Alternative to Family Law Litigation*, 40 ST. MARY’S L.J. 303, 320 (2008) (discussing PAULINE H. TESSLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 102 (2001)).

¹²¹ See *supra* notes 46–73 and accompanying text.

something new to couples who believe that they can make their legal fees go farther—and potentially recognize other benefits as well—by sharing counsel.

While the costs of a collaborative law divorce are considerably lower than taking a divorce case to trial,¹²² they are still substantial—out of reach for some families and unappealing for others. The question is whether collaborative law offers enough of a reduction in adversarialism and attorney fee expenditures to suffice as the profession's sole innovation in the provision of legal services to divorcing families. As the number of self-represented divorce litigants continues to increase alongside the growth of collaborative law, the answer seems to be no.¹²³

B. A Limited Departure from Partisan Advocacy

Limited scope representation as it is currently understood—including the collaborative law variety—is squarely grounded in the paradigm of partisan advocacy.¹²⁴ At first glance, this may appear paradoxical—after all, collaborative law in particular has been subject to scrutiny and criticism for being insufficiently protective of individual client interests and for departing too precipitously from the norm of zealous advocacy.¹²⁵ As one of its most prominent practitioners acknowledges, however, collaborative lawyers serve as a committed advocate on the side of an individual divorcing spouse.¹²⁶ Collaborative lawyers commit to a particular dispute resolution process and exclude litigation from the scope of their representation, but otherwise function as partisan advocates.¹²⁷ Other forms of limited scope representation share this attribute: whatever discrete task the lawyer performs, the lawyer's loyalty remains with one spouse alone. The lawyer's role is to advance the interests of the individual spouse.

What could possibly be wrong with this method of representation? The profession reflexively treats this not only as an unmitigated good, but a nonne-

¹²² See Schwab, *supra* note 118, at 377.

¹²³ See *supra* notes 104–122 and accompanying text.

¹²⁴ See Tessler, *supra* note 117, at 320 (describing collaborative law as “building vigorous assistance of legal counsel into the heart of the process”).

¹²⁵ See Schwab, *supra* note 118, at 380–81; John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1329 (2003) (noting that the disqualification agreement “creates incentives for lawyers to pressure their clients to settle inappropriately and leave clients without an effective advocate to promote their interests and protect them from settlement pressure”).

¹²⁶ See Tessler, *supra* note 117, at 318 (arguing that clients appear to want a “contained, settlement-oriented, creative, private, respectful process without sacrificing the benefits of having a committed legal advocate at their sides”); Tessler, *supra* note 116, at 99 (noting that collaborative lawyers “remain advocates for their respective clients”).

¹²⁷ Collaborative lawyers might characterize their practice as a special kind of zealous advocacy, one that vigorously advances the interests of their clients’ “better selves” or “highest intentions.” See Tessler, *supra* note 116, at 73.

gotiable minimum of ethical representation, and the assumption has not been subject to much, if any, challenge in the academic literature.¹²⁸ This assumption, however, is imported from other areas of law, where the expectation that two parties to a dispute will have conflicting interests is more viable.¹²⁹

The validity of the assumption in the family law context should be examined. It rests on empirical questions about the extent to which divorcing couples see themselves as having interests that harmonize more than they conflict.¹³⁰ If divorcing couples' inquiries to the practicing bar are any indication, significant numbers of prospective domestic relations clients take this view.¹³¹

As the following section explains, hiring two different attorneys to assist each spouse on an individual basis provides more legal assistance than some divorcing clients want, and of a different tenor.¹³² These couples seek a particular form of limited scope representation—one in which a single lawyer provides them with guidance as to the set of interests they share; assists them in arriving at a negotiated resolution of all divorce-related issues; and provides them with the drafting expertise necessary to make their agreement clear, concrete, and comprehensive.¹³³

IV. JOINT REPRESENTATION

This Part introduces the joint representation alternative and demonstrates the present demand for such a model. Next, this Part undertakes a close examination of the ethical rules that govern such arrangements. Finally, this Part concludes that the categorical prohibition of joint representation for divorcing spouses fails to accord them the same respect that other prospective clients receive when seeking the benefits of shared counsel.

A. The Demand for Joint Representation

Perhaps the most essential thing to understand about joint representation is that many divorcing couples want it. Joint representation appeals to couples in relatively amicable divorces because it substantially reduces the costs of representation and may reduce the animosity that can develop in adversarial settings.¹³⁴ Family law practitioners are often asked whether they can represent both spouses in a divorce matter,¹³⁵ and routinely address this on the “Fre-

¹²⁸ See *supra* notes 46–73 and accompanying text.

¹²⁹ See Aviel, *supra* note 52, at 2115–17.

¹³⁰ See *supra* notes 46–73 and accompanying text.

¹³¹ See *infra* notes 134–150 and accompanying text.

¹³² See *infra* notes 134–150 and accompanying text.

¹³³ See *infra* notes 134–150 and accompanying text.

¹³⁴ FINES, *supra* note 10, at 94.

¹³⁵ See, e.g., *Frequently Asked Questions*, DIVORCE MAGAZINE, <http://www.divorcemag.com/TX/faq/#legal>, archived at <http://perma.cc/4WNH-NNL3> (last visited Aug. 30, 2014).

quently Asked Questions” portion of their websites.¹³⁶ Almost invariably, the family law practitioners’ websites treat divorcing spouses as having categorically unwaivable conflicts of interest that preclude joint representation under any circumstances.¹³⁷

The fact that many lawyers refuse to participate in a transparent joint representation does not mean that the clients who seek it end up with two different lawyers, each representing a single spouse’s individual interests.¹³⁸ Rather, divorcing couples seeking joint representation to save money and time and avoid conflict are being encouraged to consider an arrangement in which one of them is represented and the other is not. The website of a Chicago family law firm asserts that having one lawyer represent both parties is “a very bad idea,” but posits that one lawyer is “more than enough” for an uncontested divorce.¹³⁹ An online guide to obtaining a divorce in Oklahoma, addressing whether one attorney can represent both spouses, observes that “[m]ost attor-

¹³⁶ See *id.* Practitioners invariably respond that they cannot represent both spouses. See, e.g., *Divorce FAQ*, BOLGEN & BOLGEN, http://www.bolgenlaw.com/divorce_faq.htm#where, archived at <http://perma.cc/NRF6-PS43> (last visited Aug. 30, 2014) (“Because of the conflict of interest between divorcing spouses (even those that maintain a cordial relationship), a lawyer cannot represent both parties. If you are asking this question, you may want to consider Divorce Mediation. If you and your spouse have already reached agreement on all aspects of your divorce, we recommend that one party retain an attorney to draft the separation agreement and other documents, and that the other spouse at his or her option can retain an attorney simply to review the agreement.”); *FAQ*, GOODWIN & PRUETTE, <http://www.mjgoodwin.com/faq/>, archived at <http://perma.cc/66BM-UAUR> (last visited Aug. 30, 2014) (“A lawyer cannot represent both spouses and are prohibited from advising a couple about their legal rights. An attorney has a duty of loyalty to her clients. Therefore, an attorney cannot give legal advice to two people with differing interests. You and your soon to be ex-spouse have differing interests, no matter how amicable the divorce is.”); Charles Jamieson, *Legal Rights: Using the Same Lawyer*, DIVORCE 360, <http://www.divorce360.com/divorce-articles/law/advice/legal-rights-using-the-same-lawyer.aspx?artid=957>, archived at <http://perma.cc/X43C-6HY6> (last visited Aug. 30, 2013); *Uncontested Divorce FAQs*, KESSLER & SOLOMIANY, http://www.ksfamilylaw.com/FAQS/uncontested_divorce/, archived at <http://perma.cc/S34J-4SCV> (last visited Aug. 30, 2014); SOFT DIVORCE.COM, <http://softdivorce.com/frequently-asked-questions/#16> (last visited Aug. 30, 2014); *Frequently Asked Questions*, MILTON FAMILY LAW, <http://www.womensdivorcerights.com/faqs.php>, archived at <http://perma.cc/U9GC-J5UA> (last visited Aug. 30, 2014) (Wisconsin divorce laws strictly prohibit one lawyer to represent both parties); *Frequently Asked Questions*, NIRENSTEIN GARNICE PLLC, http://ngslaw.com/lawyer/Scottsdale-Phoenix-AZ_fq1094.htm#Jump5797, archived at <http://perma.cc/GXN5-6G8T> (last visited Aug. 30, 2014); *Frequently Asked Questions*, THE LAW OFFICE OF ANN M. POMPELIO, LLC, <http://www.pompeliolaw.com/faq.html>, archived at <http://perma.cc/JN2D-WRAJ> (last visited Aug. 30, 2014) (stating that in New Jersey, “One lawyer cannot represent both the husband and the wife in divorce litigation”); *Texas Divorce Law FAQ’s*, THE WRIGHT FIRM FAMILY LAW, <http://www.denton-familylaw.com/divorce.html#2>, archived at <http://perma.cc/8HVR-YVW3> (last visited Aug. 30, 2014).

¹³⁷ See, e.g., NIRENSTEIN GARNICE PLLC, *supra* note 136 (asserting that “[d]ivorcing spouses should never, ever be represented by the same lawyer under any circumstances”).

¹³⁸ See Patrick L. Baude, *One Lawyer for the Family: A Response to Alysa Rollock*, 73 IND. L.J. 601, 603–04 (1998) (discussing the undesirable outcomes that attend the refusal to provide counsel to a couple or family unit).

¹³⁹ Wolkowitz, *supra* note 38.

neys will represent only one party in a divorce to avoid possible conflicts of interest.”¹⁴⁰ Immediately following that, the website suggests that “[a]n attorney can draft the decree of divorce according to the agreement that you and your spouse have made, and allow your spouse to review the decree of divorce and approve it, prior to presenting it to the court for approval.”¹⁴¹

Another family law practitioner, prominent in the unbundled legal services movement, provides a detailed explanation on his website regarding the various options available to divorcing spouses.¹⁴² He contrasts “uncontested divorce” from “pro se divorce,” describing uncontested divorces as similarly “simple and inexpensive” but involving the assistance of a lawyer.¹⁴³ He explains:

The first thing you need to know about uncontested divorce is that the lawyer you get to do your uncontested divorce cannot represent both of you. As a society, we assume that the spouses in a divorce have necessarily different interests. The ethical principles for lawyers therefore require that a lawyer cannot represent both parties. The lawyer must represent one of you and not the other. The lawyer will need to know at the outset which of you is his or her client and which of you is not.¹⁴⁴

With some candor, the attorney acknowledges that this inequity represents one of the disadvantages of the model of uncontested divorce he proposes. The lawyer explains:

Like it or not, the law sees divorce as an adversarial contest between you and your spouse. And because a lawyer must not represent two parties who are competing with each other, the lawyer cannot represent both of you. He or she must represent either you or your spouse. In an uncontested divorce, that means the other party will not have a lawyer at all. That’s an imbalance of power between the spouses.¹⁴⁵

These offerings seem to be translating into real-life arrangements with some regularity. One judge, with over thirty years on the bench and a great deal of experience handling family law matters, posited that joint representa-

¹⁴⁰ *Divorce in Oklahoma: FAQs*, DIVORCENET, *supra* note 38.

¹⁴¹ *Id.*

¹⁴² Borden, *supra* note 38.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

tion in effect happens “all the time.”¹⁴⁶ To avoid the appearance of conflict, lawyers asked to represent a divorcing couple will formally represent just one of the spouses, but will in fact assist the couple jointly in arriving at an agreement and in drawing up a settlement that reflects the agreed-upon terms of both spouses.¹⁴⁷

What should we make of this phenomenon? In my view, it changes the tenor of discussions about joint representation, confronting us with the need to take a hard look at the costs of refusing to consider it for couples whose circumstances make it appropriate. Demand for this service model is so strong that the bar’s unwillingness to provide it in a transparent fashion is producing a dubious substitute. Although the arrangements described above might appear superficially compliant with the ethical rules, they are the worst of all worlds in advancing the values the rules purportedly protect. No rule prohibits a lawyer from representing a client in a matter where the other party is unrepresented, but it is hardly the model of justice to which the profession should aspire. It is inequitable, and renders hollow the legal profession’s commitment to the norm of individualized partisan advocacy, exposing some of the fictions upon which the norm relies.¹⁴⁸

Yet the obvious inequity of proceeding *pro se* against a represented opponent does not fully capture the troubling nature of these arrangements. Where one party has a lawyer and the other does not, that fact should be manifestly clear so the unrepresented party can evaluate proposals and drafts with appropriate skepticism, understanding that they were prepared by an individual partisan advocate with loyalty only to the represented spouse.¹⁴⁹ These arrangements present a murky amalgamation of traditional partisan loyalty—owed to only one of the divorcing spouses—and quasi-joint representation, in which both spouses can expect to benefit from the lawyer’s assistance.¹⁵⁰ The unrepresented spouse’s perception that the lawyer’s assistance might benefit him or her exacerbates the inequity of such lopsided representation.

This kind of imbalance appears to be a costly consequence of resisting joint representation. A fair assessment of the risks and shortcomings of joint

¹⁴⁶ Interview with State Court Judge (Nov. 7, 2012) (notes and contact information on file with author). Because of the sensitivity of the subject matter the judge interviewed requested anonymity. The interviewee does not endorse my analysis or conclusions, nor is the interviewee responsible for any errors I may have made.

¹⁴⁷ *Id.*

¹⁴⁸ *See, e.g.*, ABA MODEL RULES OF PROF’L RESPONSIBILITY, Preamble (stating that “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done”).

¹⁴⁹ The lawyer would, of course, be bound by Model Rule 4.3, but these requirements are fairly minor. *See* MODEL RULES OF PROF’L CONDUCT R. 4.3 (2012) (stating that lawyers cannot “state or imply that the lawyer is disinterested” when dealing with unrepresented parties).

¹⁵⁰ *See infra* notes 107–136.

representation should take into account the troubling nature of the arrangements that fill the gap. Nonetheless, in the section that follows I consider joint representation on its own terms and examine whether it can satisfy the rules of professional responsibility.

B. The Ethics of Joint Representation

Loyalty to the client is one of the core professional norms lawyers must honor.¹⁵¹ The Model Rules express this principle in multiple ways, but most pertinently in Rule 1.7, which prohibits representations that will present a concurrent conflict of interest. Analyzing a conflict of interest under this rule involves two stages. First, a lawyer must assess whether the two clients are directly adverse to each other or whether the representation of one will be materially limited by the lawyer's obligations to the other.¹⁵² Even if the answer is yes to either of these two questions, the lawyer may still proceed if the lawyer reasonably believes that he or she can provide competent and diligent representation to both clients; the representation is neither prohibited by law nor involves one client's assertion of claims against the other in the same proceeding or tribunal; and both clients give informed consent.¹⁵³

The assumption that divorcing spouses have irretrievably conflicting interests that categorically prohibit joint representation would seem to rest on the premise that they are "directly adverse" to one another under 1.7(a)(1) and asserting claims against each other in the same proceeding under 1.7(b)(3).¹⁵⁴ Divorcing spouses, however, are not always adverse to one another, nor do they always assert claims against one another.¹⁵⁵

Every state now offers no-fault divorces, meaning that any couple who shares the view that the marriage should end can pursue a divorce without proving that one spouse was at fault for the dissolution of the marriage.¹⁵⁶ In a number of states, a married couple may file *jointly* to petition for the dissolu-

¹⁵¹ See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt 1 (2012) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

¹⁵² See *id.* R. 1.7(a) (specifying that a concurrent conflict of interest exists where "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer").

¹⁵³ *Id.* R. 1.7(b)(1)–(4).

¹⁵⁴ *Id.* R. 1.7(a)(1), (b)(3).

¹⁵⁵ See *supra* notes 134–150 and accompanying text.

¹⁵⁶ Some states offer both traditional fault-based divorce and no-fault divorce, but make the latter procedure available only where both spouses agree the marriage should end. In such states, someone who wanted a divorce over the other spouse's objection would have to prove that one of the fault grounds existed. See Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 615 (1999) (noting that fault grounds continue to exist as an alternative divorce procedure in most states).

tion of the marriage.¹⁵⁷ In divorces initiated by a joint petition for dissolution, the spouses do not assert claims against one another and cannot be said to be directly adverse.¹⁵⁸

Moreover, states increasingly offer streamlined procedures to couples who agree not only to the dissolution of the marriage, but to the resolution of the attendant custodial and financial issues as well. In Colorado, for example, a divorcing couple without children who agrees on all financial issues can file a separation agreement and an affidavit with the court to obtain a decree without even making an appearance.¹⁵⁹ California offers a similar avenue to divorcing couples with minor children, provided that they are able to arrive at a written agreement addressing all custodial and financial issues.¹⁶⁰ Examining contemporary divorce procedures in detail reveals that two divorcing spouses are not

¹⁵⁷ See, e.g., MASS. GEN. LAWS ch. 208, § 1A (2013); Forms to Start a Divorce, MINNESOTA JUDICIAL BRANCH, <http://www.mncourts.gov/selfhelp/?page=1669>, archived at <http://perma.cc/H3ED-EX23> (last visited Aug. 30, 2014); Joint Petition for Divorce, THE STATE OF NEW HAMPSHIRE JUDICIAL BRANCH, available at <http://www.courts.state.nh.us/forms/nhjb-2058-fs.pdf>, archived at <http://perma.cc/4V43-2UXN>; Joint Petitions for Divorce, CLARK COUNTY [NEVADA] COURTS, http://www.clarkcountycourts.us/shc/divorce/self_help_startdivorce.htm#Jointpetitions, archive at <http://perma.cc/65E8-XZAQ> (last visited Aug. 30, 2014); Joint Petition with Minor Children, STATE OF WISCONSIN CIRCUIT COURT (last visited Aug. 30, 2014), available at <http://www.wicourts.gov/formdisplay/FA-4110.pdf?formNumber=FA4110&formType=Form&formatId=2&language=en>, archive at <http://perma.cc/VP5W-GVKL>. I treat as a distinct category states in which joint petition is only available where the couple owns no real estate, has no children, all marital assets are less than \$10,000, etc. These couples are very unlikely to benefit from spending money on the assistance of counsel. See *Getting a Joint Simplified Divorce*, ILLINOIS LEGAL AID, http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentID=1780#q=9, archived at <http://perma.cc/3VPW-AAAL> (last updated Oct. 2011); Joint Petition for Summary Dissolution, SUPERIOR COURTS OF CALIFORNIA, available at <http://www.courts.ca.gov/documents/fl800.pdf>, archive at <http://perma.cc/V2M9-9YCZ> (last updated July 1, 2013).

¹⁵⁸ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. g illus. 8 (2000) (recognizing the difference between contested and uncontested divorces for purposes of evaluating a lawyer's ability to advise a divorcing couple); see also *id.* cmt. d. illus. 6 ("Husband and Wife have agreed to obtain an uncontested dissolution of their marriage. They have consulted Lawyer to help them reach an agreement on disposition of their property. A conflict of interest clearly exists between the prospective clients. If reasonable prospects of an agreement exist, Lawyer may accept the joint representation with the effective consent of both. However, in the later dissolution proceeding, Lawyer may only represent one of the parties and Lawyer must withdraw from representing both clients if their efforts to reach an agreement fail.").

¹⁵⁹ See Instructions to File for a Dissolution of Marriage or Legal Separation If There Are No Children of the Marriage or the Children Are Emancipated, available at <http://www.courts.state.co.us/Forms/renderForm1.cfm?Form=50>; Affidavit for Decree Without Appearance of Parties (Marriage). Interestingly, for couples with minor children, a decree without appearance is only available where each party is represented. *Id.* Although this requirement ensures that cases involving children benefit from the guidance of counsel and guards against the abuses that can occur when only one party is represented, it imposes a two-lawyer requirement on couples who agree on all of the custodial and financial issues of their divorce, a costly imposition for couples who don't feel that they need this form of representation. See *id.*

¹⁶⁰ See Completing Divorce or Separation, Uncontested Case, JUDICIAL BRANCH OF CALIFORNIA, available at <http://www.courts.ca.gov/8411.htm>, archive at <http://perma.cc/SX9C-49NJ>.

necessarily “directly adverse” within the meaning of 1.7(a)(1) or asserting claims against each other under 1.7(b)(3).¹⁶¹

Thus, Rule 1.7 does not categorically prohibit joint representation in uncontested divorces. Rather, a more nuanced inquiry is required: in a limited scope representation assisting a particular couple, would the duties owed to one spouse materially limit the representation of the other? If so, could the lawyer reasonably believe that she could provide competent and diligent representation to both? What would she have to explain to the couple to ensure that their consent to the representation was informed?

Answering these questions is no simple endeavor, and there may be many couples for which the representation would not ultimately be permissible—couples, for example, whose dissolution involves significant imbalances in economic power or allegations of abuse.¹⁶² As I explain in the next section, however, the first thing to understand about the conflicts analysis is that it must be done within the rubric of a limited scope representation.

1. Starting from the Limited Scope Representation

When asking whether the representation of one spouse would be materially limited by the lawyer’s duties to the other, the inquiry begins by identifying the set of obligations that the limited scope representation would entail.¹⁶³ Though a seemingly simple or inconsequential analytical step, a great deal flows from it. Accepting the premise of limited scope representation means that we do not treat every lawyer-client relationship as defined by the same full set of obligations that characterizes the traditional model; rather, we treat lawyer-client relationships as customizable, subject only to the bounds of reasonableness.¹⁶⁴ We allow lawyer and client to specify the particular terms of their

¹⁶¹ Other mechanisms also reduce the adversity dynamic in family law cases, including the growing affirmative obligation to provide complete financial disclosures to the other spouse, formulaic calculations of child support, and increasing emphasis on private settlement. The emphasis on private settlement is relevant because it makes divorce counsel less like litigators and more like transactional attorneys, working to structure mutually beneficial arrangements. Allowing clients to waive conflicts presents more concern where litigation is contemplated because independent counsel can advance the goals of adversarial truth-finding and other systemic considerations. *See Zacharias, supra* note 13, at 420–21.

¹⁶² *See In re Houston*, 127 P.2d 752, 753 (N.M. 1999) (suspending an attorney for representing wife in dissolution proceeding and husband in criminal proceeding arising out of domestic abuse and child abuse allegations).

¹⁶³ *See Zacharias, supra* note 13, at 427–28 (“The ‘representation,’ however, includes limitations to which the lawyer and client have agreed under Model Rule 1.2. The rule therefore does not preclude representation in which the client agrees to limitations that keep the lawyer from optimizing the representation.”). Zacharias referenced earlier versions of Rule 1.7 and 1.2, but the point is still trenchant. *See id.*

¹⁶⁴ MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2012) (specifying that a lawyer may limit the scope of representation if the limitation is reasonable and the client gives informed consent).

arrangement, and to expressly “exclude specific means that might otherwise be used to accomplish the client’s objectives.”¹⁶⁵ When we are trying to assess whether a lawyer’s representation of two clients presents a conflict of interest under 1.7(a)(2), we should be concerned with the *particular* set of responsibilities the lawyer has actually undertaken for the clients, pursuant to their limited scope agreement, rather than the theoretical range of possibilities that full representation would entail.

The first step involves envisioning these parameters. What would a joint representation look like? Let us take as an example a couple in which both spouses work outside the home in similarly salaried jobs. The couple wants to dissolve their marriage without litigation and with the assistance of a lawyer. The couple wants someone familiar with the system to shepherd them through the deadlines and required documents, but they hope for more substantive assistance as well.

The couple intends to arrive at a negotiated agreement, and although they want the lawyer to memorialize the terms of their agreement in a comprehensive and unambiguous way, they seek assistance that goes well beyond that of a scrivener. The couple wants to understand the legal principles that form the backdrop for their negotiation. Which of their assets would be considered marital property, and which would be treated as separate property? How would these assets be valued? How might the couple handle assets of a hybrid character, like a house that was owned by one spouse prior to the marriage, but for which the couple expended marital funds paying down the mortgage? What about a pension comprised in whole or in part of funds earned during the marriage?

The couple believes that having this knowledge will help them arrive at a settlement that is fair—not just in an abstract way, but judged against the legal principles that govern divorce. They believe that the lawyer’s expertise will help them identify solutions that can hedge against unequal distributions of risk or create additional value to be leveraged during the dissolution.¹⁶⁶ Perhaps they have agreed to share custody of their children equally, but would like advice on what type of plans work best for families in their circumstances and which plans are disfavored.¹⁶⁷ They would like to know if they have devised a

¹⁶⁵ *Id.* R. 1.2 cmt. 6.

¹⁶⁶ A minimally competent family law attorney could, for example, enlighten even sophisticated clients as to the mechanism of a qualified domestic relations order, which can be used to distribute the marital portion of an unvested pension if and when the pension should vest.

¹⁶⁷ See McMullen & Oswald, *supra* note 4, at 68. The authors of one empirical study note that the contemporary “emphasis on custody mediation and settlement” yields “a multitude of idiosyncratic custody outcomes.” *Id.* They note that, “a preliminary examination of randomly selected divorce files from our sample revealed a range of custody solutions so diverse that they could not be categorized. It appears that every divorcing family addresses custody in its own way.” *Id.* Thus, the assistance of a

schedule that would be considered too disruptive by the judge who must sign off on their custody agreement.¹⁶⁸ They seek what scholars have described as a “constructive lawyer” whose “legal creativity” and capacities for “problem-solving” and “peace-making” add value for their clients and others as well.¹⁶⁹

What the couple does not want, or is willing to forego in order to recognize what they consider to be the superior benefits of sharing counsel, is for the lawyer to identify arguments that one spouse might make to obtain a larger share of marital assets¹⁷⁰ or parenting time over the objection of the other. They want to understand the law of divorce inasmuch as it would help them facilitate agreement; they do not need the kind of advice that advances the interests of one spouse at the expense of the other.¹⁷¹ Although the dividing line between these categories is not always clear and may not be discernible until

professional who has observed this vast range of possible solutions benefits couples immensely. *See id.*

¹⁶⁸ Crafting a sensible joint custody plan involves balancing several competing interests: frequent contact with both parents, minimal transitions for children, and distributing preferred weekend days in an equitable fashion. As a result, the joint custody plan that is optimal for a particular family might be more intricate than the uninitiated would expect. For example, a couple sincerely committed to the equitable allocation of post-divorce parenting time might contemplate a schedule of alternating weeks. Although this plan achieves joint custody with minimal travel for the children, the children go an entire week without seeing one parent. To ameliorate this problem while trying to avoid excessive transfers, some attorneys will propose a 3-3-4-4 plan, in which the children are with one parent for three days, the other for the next three days, then back to the first residence for four days, and then with the second parent for four days. The child is always at one residence Sunday through Wednesday and the other Thursday through Friday, which provides consistency, and only Saturday fluctuates from week to week.

¹⁶⁹ *See* Menkel-Meadow, *supra* note 1, at 792. Menkel-Meadow envisions a world in which:

Lawyering was informed by a different mind-set, orientation, consciousness, or “frame” than maximizing individual client gain. Suppose for the moment that what we thought a lawyer should do would be to “solve a problem,” make a bad situation better, improve relationships between embittered parties, or facilitate the best possible arrangements in complex environments with many (not only two) competing claims. . . . Going a step further, some might suggest that a lawyer should aim to maximize joint, mutual, group, or collective gain in using her craft—the misnamed “lawyer for the situation.”

Id.

¹⁷⁰ Although some statutes provide for the equal distribution of marital property, most instruct judges to divide marital property *equitably*, taking into consideration a variety of factors. The Uniform Marriage and Divorce Act, for example, upon which many states model their domestic relations statutes, instructs judges to consider “all relevant factors,” including each party’s contribution to the acquisition of marital property, the value of separate property set apart to each spouse, and the economic circumstances of each party at the time the property distribution is to become effective. UNIF. MARRIAGE & DIVORCE ACT § 307 (1973). In contested divorce proceedings, then, parties may contend that they are entitled to a larger share of marital assets by pointing to their spouse’s substantial separate property or asserting that their spouse contributed comparatively little to the acquisition of the marital property. *See id.*

¹⁷¹ They do not wish, for example, to obtain the assistance of a lawyer in identifying ways that one spouse might undermine the other’s claims of contribution to the marital estate.

the lawyer is perilously close to it, the essential feature of the desired assistance is the deployment of legal expertise to facilitate agreement.¹⁷²

Why should this kind of advice be available only in an adversarial posture? Why should each spouse have to pay for and obtain such guidance individually, from a lawyer whose role is to point out where the client might press for additional advantage? Is it not possible to envision this kind of help unbundled from partisan advocacy? The answer cannot be that it is impossible to explain legal principles in a neutral fashion, because clients expect this kind of advice all the time. The very concept of client counseling presupposes the idea that whatever debates we might entertain about the manipulability of law or the appropriate contours of a lawyer's advice,¹⁷³ legal rules, as applied by actors in the real world, have some ascertainable content independent of the clients' objectives that the client wants to understand.

Accepting this line of thinking does not require that we ignore the realist critique of law. The law's indeterminacy shapes but hardly eliminates the client's desire to understand the law as it appears from a viewpoint other than hers. Where the law is indeterminate enough to produce more than one plausible result, clients want to know the range of realistic possibilities. Where the legal rule in question is so radically indeterminate as to frustrate such endeavors,¹⁷⁴ a lawyer can convey that insight, which itself advances the client's understanding. In other words, a lawyer can describe the law and predict its application to a particular fact pattern without adopting the perspective of an individual client. Moreover, this provides an enormously useful service even for a client who obtains no additional guidance on how she might optimize her own self-interest within the legal parameters identified by the lawyer. In full-fledged representation, we expect that the lawyer's objective analysis of the law will be followed by partisan advice to the client about how the client can most effectively pursue her objectives given the legal landscape as sketched out by the lawyer. But it is perfectly plausible to envision a limited scope representation in which only the first type of advice is offered—objective analysis without the valence of advocacy.¹⁷⁵

¹⁷² See ABA MODEST MEANS TASK FORCE, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 32 (2003) available at <http://apps.americanbar.org/litigation/taskforces/modest/report.pdf>, <http://perma.cc/SX9C-49NJ> (discussing an Oregon lawyer's "non-adversarial divorce service," in which she handles only uncontested divorces and provides legal counseling and legal assistance, but does not otherwise represent the client).

¹⁷³ Steve Pepper et al., *The Internal Point of View in Law and Ethics: Introduction*, 75 FORDHAM L. REV. 1143, 1146–48 (2006).

¹⁷⁴ The Best Interests of the Child standard is one such candidate, as I have explored in earlier work. Aviel, *supra* note 51, at 2014–18.

¹⁷⁵ The Model Rules once explicitly envisioned this kind of representation. See Ethics 2000 Commission, Report on the Model Rules, ABA, available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html, archive at <http://>

In this vein the lawyer might instruct the couple that, “[i]n this jurisdiction, all assets acquired by each of you before the marriage are treated as separate property, as are gifts or inheritances.” The lawyer can explain that labor performed during the marriage is considered marital labor, and its fruits are considered marital property, regardless of the name on the paycheck or the account into which such funds are deposited.¹⁷⁶ The lawyer could examine the circumstances surrounding the acquisition of all the couple’s assets and offer an objective view as to their likely value and whether they were separate or marital assets, allowing the couple a legally informed perspective from which to arrive at a mutually agreeable distribution of property.

The lawyer can propose various allocations of marital property, allowing the couple an opportunity to weigh the strengths and weaknesses of each alternative—advising the couple, for example, as to whether market conditions counsel against selling the marital home in spite of the fact that the sale would bring needed liquidity and facilitate an equal and administratively simple division of assets. For couples amenable to delaying the sale to maximize their

perma.cc/6VSK-HMPU. Rule 2.2, titled “Lawyer as Intermediary,” previously set forth the terms for joint representation:

(a) A lawyer may act as intermediary between clients if (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client’s consent to the common representation; (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients’ best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant to making them, so that each client can make adequately informed decisions.

(c) The lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

See id. at 73. Rule 2.2 was eliminated by the 2002 amendments to the Model Rules, after the Ethics 2000 Commission found that situations governed by Rule 2.2 could be dealt with adequately under Rule 1.7 and that the existence of the two rules was confusing rather than helpful. *See Reporter’s Explanation of Changes*, AM. BAR ASSOC., available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html, archived at <http://perma.cc/745Y-H9P3>.

¹⁷⁶ *See* American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 669, § 4.05 cmt. (a) (2002) (“A fundamental principle of community-property law followed today in most common-law jurisdictions is that the fruits of labor performed during marriage by either spouse, i.e. marital labor, belong to the marital community, and are not the separate property of the laboring spouse.”).

return, the lawyer might offer suggestions for drawing up a financial plan that will cover the period before the house can be profitably sold. Without improperly favoring one spouse over the other, a lawyer can offer significant assistance in the distribution of the couple's assets, one of the core tasks of the dissolution process.¹⁷⁷

How might a lawyer engaged in a joint representation manage the issue of alimony? It is one thing to assist a couple in identifying their separate property and divvying up marital assets, but spousal maintenance seems to present the sort of challenging grey area referenced above. The suggestion that one spouse might be entitled to ongoing payments from the other spouse for a period after the divorce is what many would consider the kind of advice that advances the interests of one spouse at the expense of the other.¹⁷⁸

This conclusion, natural as it may seem, bears scrutiny. First, the financial issues in a divorce are intertwined—property distribution and spousal support must be negotiated and resolved holistically because parties might accept trade-offs across these issues as a way to obtain a mutually agreeable comprehensive settlement. Moreover, to insist that a lawyer providing joint representation for a divorcing couple cannot provide any guidance about alimony indulges in the conceptual error of assuming “cardboard clients”—individuals who are “one dimensional figures interested only in maximizing their legal and financial interests.”¹⁷⁹ In fact, as Professor Katherine Kruse has explained so persuasively, clients are “whole persons whose legal issues often come deeply intertwined with other concerns—relationships, loyalties, hopes, uncertainties, fears, doubts, and values—that shape the objectives they bring to legal representation.”¹⁸⁰

There are a multitude of reasons that spouses might share a common view as to why maintenance might be appropriate or inappropriate for their circumstances. Perhaps the higher-earning spouse, the likely obligor, views legal rules as “guides to the conduct of social life,” and values the law as a source of objective authority about what is fair, an expression of the way in which friends, colleagues, and loved ones might judge the outcome.¹⁸¹ Perhaps the lower-earning spouse values a sense of finality and independence above the monetary entitlement the law might afford.

Even indulging the assumption that the higher-earning spouse prefers to avoid paying maintenance and the lower-earning spouse prefers to receive it,

¹⁷⁷ This assistance is much more substantive and involved than what a mediator can offer. See *supra*, notes 81–85.

¹⁷⁸ See *supra* note 171 and accompanying text.

¹⁷⁹ See Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 104 (2010).

¹⁸⁰ *Id.*

¹⁸¹ H.L.A. Hart, *THE CONCEPT OF LAW* 90 (2d ed. 1994).

one can imagine a situation where the lawyer explains the law of spousal maintenance in a way that does not advance the interests of one spouse at the expense of another. For example, consider a law that specifies that maintenance should only be awarded if the couple was married at least three years.¹⁸² The lawyer can certainly explain that much to a couple without compromising the neutrality of the joint representation. For most couples, determining whether their marriage was of sufficient duration to bring maintenance into issue will be straightforward.¹⁸³ Couples married less than three years will instantly realize that a judge would not award maintenance, although as masters of their own voluntary agreement, they will still need to decide whether to incorporate it into their settlement. Couples married longer than three years will see that they need additional guidance about the law of spousal maintenance to assess whether it is relevant to their situation. In either case, the lawyer's transmission of the three-year minimum is not inextricably infused with advocacy, something so complex or contested that it has no ascertainable meaning independent of the lawyer's influence.

If we accept that a lawyer can explain the three-year minimum from a position of neutrality, or at least something that looks tolerably like it, why can't the lawyer go a bit further, providing a more detailed explanation of the law's terms and pattern of application, without being characterized as advancing the interests of one spouse at the expense of the other? If the law provides for a higher-earning spouse to make such payments to a lower earning spouse under certain conditions, does the lawyer advance the interests of one spouse at the expense of another to offer his view regarding the existence of these conditions? If the lawyer had never seen an alimony award where the salary discrepancy between the spouses was less than 15%, or with a duration that exceeded ten years, could she not say so?

Suggesting that the lawyer cannot raise the issue of maintenance and explain its contours without promoting the interests of one spouse at the expense of the other embraces a radical form of the indeterminacy thesis, viewing the law "not as a coherent guide to permissible conduct, but as an arsenal of weapons that can be used to justify virtually any position a client wishes to main-

¹⁸² See, e.g., H.B. 13-1058 § 14-10-114 (Colo. 2013) (establishing guidelines for the calculation of alimony awards in cases involving marriages of more than three years in duration).

¹⁸³ I acknowledge the work of scholars who have demonstrated that even seemingly straightforward rules can sometimes present interpretive problems and require substantive value judgments. Prominent among these is Gary Peller, who asserts that no straightforward rule can be applied mechanically without the influence of social or political ideology. See Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1175 (1985). For example, the rule that a president must be thirty-five years old, he argues, really exists to ensure that the president is mature enough to assume the responsibilities of office. See *id.* at 1174.

tain.”¹⁸⁴ Such radical indeterminacy has been quite vulnerable to scholarly criticism.¹⁸⁵ To whatever extent it reflects the intuitions of most practicing lawyers about how to craft arguments when representing a client,¹⁸⁶ it need not consti-

¹⁸⁴ See Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917, 917–18 (1985).

¹⁸⁵ See Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 488 (1987) (arguing that “the strong version of the [indeterminacy] thesis seems indefensible”). Solum offers three “firm conclusions” about indeterminacy:

First, legal doctrine underdetermines the results in many, but not all, actual cases. That is to say that aside from the easiest cases, aspects of the outcome are rule-guided but not rule-bound. For example, in the most routine cases, the amount of a traffic fine or of a damage award may vary within some range. Second, although there may be some cases in which the result is radically underdeterminate, in the sense that any party could ‘win’ under some valid interpretation of legal doctrine, it does not follow that the doctrine itself is indeterminate over all cases. For example, the three-pronged test for impermissible state establishment of religion, articulated in *Lemon v. Kurtzman*, is often criticized as highly underdeterminate. But, in spite of any uncertainty about some applications of the Lemon test, we can be quite sure that a court applying the Lemon test would strike down any law giving parochial school teachers a pay raise out of state funds. Third, it is pure nonsense to say that legal doctrine is completely indeterminate even with respect to very hard cases. Even in the hardest hard case, legal doctrine limits the court’s options. One of the parties will receive a judgment, not some unexpected stranger; the relief will be related to the dispute at hand and will not be a declaration that Mickey Mouse is the President of the United States.

Id.

¹⁸⁶ This assertion has been contested, however. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990). Wilkins observes that:

[I]f the most radical version of the indeterminacy thesis were really true for lawyers, one would expect to find a world with virtually no certainty or predictability about the arguments lawyers make or the advice they give. There would be widespread disagreement about the actual scope of legal boundaries in all but the most routine cases, and lawyers would continually wonder about how to structure transactions so as to avoid future liability. This is not how most practicing lawyers experience their lives. By all accounts, most lawyers feel quite capable of judging what constitutes a “good” legal argument. In addition, lawyers depend on the ability to make reasonably accurate predictions about how particular legal disputes will be resolved. These widespread realities suggest that there must be some meaningful constraints on the manner in which lawyers interpret legal rules.

Id. Yablon argues that the indeterminacy claim of Critical theorists finds support in the practicing bar:

The very fact that opposing lawyers are invariably able to ask courts or other decisionmakers for directly contradictory results and have no trouble finding potentially applicable doctrinal rules with which to fill their briefs is strong evidence for the Critical claim that doctrinal rules are indeterminate and, therefore, cannot explain value choices.

Yablon, *supra* note 185, at 939. But he also acknowledges that:

Lawyers can, and often do, “determine,” in the sense of “predict,” the results of concrete cases, and they do so largely through an analysis and application of doctrinal principles. Every time a lawyer advises a client that one course of action entails less legal risk than another, or tells one client she has a case while advising another he doesn’t, that lawyer is predicting, often with a high degree of success, the probable result of a

tute the sole mode in which lawyers advise clients unless one *truly cannot imagine* a useful statement of legal principles that is not colored by a particular client's interests and objectives. We know this is not true, in the same way we know, as Professor Larry Solum reminds us, that walking one's dog does not violate the antitrust laws.¹⁸⁷ Just as a law professor or a CLE instructor or a clerk talking to her judge could set forth the language of the statute and distill the fact patterns of decided cases to develop some map of the sure cases on either end of the spectrum and the mass of close cases in the middle, so too could a lawyer engage in this type of discussion with clients.

I do not suggest that those doctrinal principles that can be identified and discussed from an objective stance are so determinate or complete as to enable confident and neutral predictions about the likely outcome of every divorce case; rather, I argue simply that knowing the doctrinal principles that can be ascertained is worth something. These principles matter. They occupy enough of a role in the legal system that people whose lives are affected by the system would want to know them. Professor Solum makes the point quite elegantly by observing that in all but the easiest cases, "aspects of the outcome are rule-guided but not rule-bound."¹⁸⁸ It is perfectly rational for amicably divorcing spouses to conclude that knowing the rules that guide their divorce is worth paying for, even if they do not wish to expend resources on more extensive forms of legal assistance.

Acknowledging what Professor Solum calls "significant zones of under-determination and contingency in legal doctrine,"¹⁸⁹ in no way forecloses the type of representation envisioned in this Article. This more modest indeterminacy thesis, which acknowledges the existence of hard cases that cannot be resolved simply by mechanical application of doctrinal principles, merely limits the scope of the advice the lawyer can give, making the predictions vaguer, the signposts farther apart.¹⁹⁰ The lawyer can say, "All we know about alimony is this. Everything else is up for grabs, and I cannot help one of you grab it at the expense of the other." The lawyer must monitor the point at which neutral explication of relatively clear legal principles transforms into argumentative strategies that can deploy indeterminacy for one client's end or the other.¹⁹¹

concrete case. Indeed, much of what lawyers sell is their ability to predict the responses of legal institutions based (at least in part) on their ability to analyze doctrinal materials."

Id. at 918.

¹⁸⁷ See Solum, *supra* note 185, at 484 (noting that lawyers have a data set that demonstrates their ability to predict legal decisions).

¹⁸⁸ *Id.*

¹⁸⁹ See *id.* at 503.

¹⁹⁰ See *supra* notes 182–187 and accompanying text.

¹⁹¹ See *id.*

This model requires the couple to tolerate certain lacunae in the lawyer's discussion of the law; in discussing principles of marital property, for example, the lawyer could not identify ways in which one spouse might undermine the other spouse's claims of contribution to the marital estate. In a limited scope representation, that is perfectly acceptable. It is considerably more troubling to imagine a couple arriving at a binding agreement without having such issues raised and explained, as happens all too frequently in mediation with pro se parties.¹⁹² Jointly represented couples benefit from the guidance of a lawyer who understands and explains the rules, even if they do not wish to pay for the assistance of someone who can exploit the ambiguity and indeterminacy of the rules in their individual favor.

The couple we are concerned with is highly motivated to resolve all pending issues in the divorce quickly, smoothly, and inexpensively, without engaging in litigation. Prioritizing these legitimate, even laudable goals means foregoing certain aspects of the lawyer's toolkit, but there is certainly plenty left to be useful. In this context, the lawyer's guidance regarding alimony brings the issue to the couple's attention; educates the couple about the law's contours, such as they can be ascertained in a legal system probably best described as weakly indeterminate; and helps them assess whether it is realistic to arrive at agreement on this issue.

The lawyer also can use her understanding of spousal maintenance as part of an overarching problem-solving strategy. If the lawyer sees that one spouse places a relatively high priority on having liquid assets in the short term, the lawyer could suggest spousal maintenance payments as an alternative to a 50-50 split of marital property, which leverages the divergent interests between the spouses for mutual gain.¹⁹³ And even if one is not persuaded that a single lawyer can ethically provide a divorcing couple with any guidance on alimony, this would still leave open the possibility of joint representation for couples who have made decisions about alimony prior to consulting with a lawyer and who do not seek counsel in that particular area.

To suggest that a lawyer cannot add value for the couple without improperly favoring one or the other represents a hidebound, even impoverished view of the lawyer's role, not only elevating individualized partisan advocacy above all other forms of legal assistance, but making it inextricable from the other functions a lawyer can perform.¹⁹⁴ Especially given the financial imperatives

¹⁹² See *supra* notes 74–77 and accompanying text.

¹⁹³ As used here, “divergent interests” refers to the notion that two parties to a negotiation can benefit when they want different things. See generally ROGER FISHER, WILLIAM URY, & BRUCE PATTON GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (3d ed. 2011).

¹⁹⁴ See Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 785 (1999) (describing the tradi-

that drive couples to seek joint representation, it does not benefit clients to insist that two lawyers duplicate these functions so that each client receives individualized partisan advocacy. This imposition runs contrary to the insights that inspire the movement towards unbundled legal services and resists the now decades-old call for the profession to recognize the lawyer's core competencies as problem solver and process manager.¹⁹⁵

For a divorcing couple, then, one can envision a limited scope representation in which the lawyer advises and assists spouses in arriving at a negotiated agreement of all pending issues in the divorce. The representation is limited to the couple's joint interests in learning how the law applies to their situation and obtaining the benefit of the lawyer's expertise and experience, for the purpose of arriving at an agreement. This limitation is reasonable under the circumstances, and thus one permitted by Rule 1.2(c) where the clients give informed consent.

The clients' informed consent is, of course, essential to the arrangement, and the lawyer's obligation to explain the limitations of this form of representation is substantial. As with many other aspects of the attorney-client relationship,¹⁹⁶ the client's ability to authorize this course of action depends on the attorney's adequate explanation of its risks and alternatives. Although the details of each couple's circumstances will shape the contours of the discussion, a lawyer must take several essential steps to obtain a truly robust, informed consent.

First, the lawyer must work with the couple to identify a clear, shared intention for amicable settlement of all divorce-related issues; determine whether and to what extent the couple has already arrived at agreement; and ascertain what legal assistance the couple seeks. The lawyer should clarify whether the couple seeks assistance beyond that of a scrivener, and if so, should warn the couple that the lawyer's guidance about the prevailing legal principles may undermine previously agreed upon terms. Imagine, for example, a couple who has agreed that one spouse will receive alimony well below the jurisdiction's presumptive guidelines. As explored above, a lawyer can inform the couple of that fact without engaging in impermissible partisan advocacy, but it nonetheless might destabilize the couple's tentative agreement and expose rifts that could bring the joint representation to an end.

tional conception of the role of lawyer as an advocate of his client and as someone else's adversary as "crabbed and incomplete").

¹⁹⁵ See *id.*

¹⁹⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.5–1.9 (emphasizing a lawyer's responsibility to adequately explain the details of a representation to the client with regard to contingent fee agreements, waivers of confidentiality, conflicts of interest, business transactions, and aggregate settlements).

Second, the attorney must set forth the limits of confidentiality in a joint representation. The lawyer must explain that information disclosed by one spouse must be shared with the other whenever it is relevant to the representation.¹⁹⁷ The couple must also understand that the attorney-client privilege only protects the couple's communications with their attorney against compelled disclosure by third parties. Thus, if a dispute later emerges between the divorcing spouses, neither can invoke the privilege against the other.¹⁹⁸ Because the sharing of relevant information is essential to a workable joint representation, the lawyer may want to meet with each spouse individually to ensure that there are no potential secrets that would derail the representation.

Finally, the lawyer must explain the various contingencies that might require her to withdraw from the representation.¹⁹⁹ If issues emerge upon which the couple cannot agree, or if one spouse asks the lawyer to keep confidential information that is relevant to the divorce, the lawyer will have to withdraw. To obtain further assistance, the spouses will then need to engage two more lawyers, driving up the expense and making the attempt at joint representation a costly one. In sum, the lawyer must emphasize the uncertainty inherent in a joint representation, and ensure that each member of the couple knowingly and voluntarily chooses to proceed in that fashion.

2. Conducting the Conflicts Analysis

Once we understand how much analytical work is being done by the limited scope of the representation, the conflicts assessment takes on a different tenor. If we treat the limited scope agreement as pre-existing, it is not clear that the lawyer's representation of one spouse would be "materially limited" by her duties to the other spouse beyond what is inherent in the limited scope agreement. I understand why this seems objectionable—this reading seems to deprive Rule 1.7 of its independent force, treating Rule 1.2(c) as a bypass around the strictures of Rule 1.7, or perhaps transferring the conflicts analysis to a rule less suited for it. Rule 1.7, however, contemplates this inter-relationship with Rule 1.2. Comment 32 instructs that "[w]hen seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances, and thus, that the clients may be required to assume greater responsibility for deci-

¹⁹⁷ See *id.* R. 1.7 cmt. 31 (providing that "[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other").

¹⁹⁸ See *id.* R. 1.7 cmt. 30 (stating that the attorney-client privilege does not attach between commonly represented clients and that lawyers must advise their clients that if litigation emerges, none of their communications with the lawyer will be protected).

¹⁹⁹ See *id.* R. 1.7 cmt. 31.

sions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation.”²⁰⁰ The comment then cross-references Rule 1.2(c), demonstrating that the conflicts analysis is shaped by the limited scope representation and vice versa.

For the sake of being analytically thorough, however, let us read 1.7(a)(2) as referencing some irreducible minimum of lawyer obligation that exists in spite of a limited scope agreement, so as to trigger the lawyer’s obligation to satisfy 1.7(b). Put differently, let us imagine that a joint representation, while compliant with 1.2(c)’s requirements for a limited scope representation, nonetheless does present a “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client,” thereby triggering a conflicts analysis under 1.7(b). A joint representation of divorcing spouses can satisfy 1.7(b), as well it should. Rule 1.7(b) sets forth sensible requirements that ensure that clients in a joint representation understand what they are giving up and receive a competent performance for those aspects of the representation that are within the agreed-upon scope.²⁰¹

There is no reason not to allow attorneys to undertake this analysis for a divorcing couple who seeks joint representation. Although joint representations may not necessarily satisfy 1.7(b) in any categorical way, there will be couples who could receive competent, diligent representation consistent with the terms of the contemplated limited scope agreement, and who would consent to the arrangement after being thoroughly apprised of its potential shortcomings.²⁰²

In envisioning what a limited scope representation might look like for a divorcing couple, we sketched out how an attorney could provide competent, diligent representation to both spouses even while forgoing individualized partisan advocacy on behalf of either. Not all couples fit this profile, however. Some couples arrive at the point of dissolution with interests that actually conflict in a concrete and tangible way, and where one or both spouses have individual needs that are stronger and more compelling than their joint interest in reducing the cost and hostility of the divorce process.

The starkest example is where one spouse has been the victim of abuse at the hands of the other, which renders impossible the reasoned, cooperative negotiation, premised upon knowledge of legal principles and creative problem-solving, upon which joint representation is predicated. Nor are there gains to

²⁰⁰ *Id.* R. 1.7 cmt. 32.

²⁰¹ *See id.* R. 1.7(b).

²⁰² *See* Klemm v. Superior Court, 75 Cal. App. 3d 893, 902 (Ct. App. 1977) (directing the trial court to reconsider an attorney’s motion to represent both a husband and wife in a noncontested marital dissolution after a conflict arose, because questions remained whether the couple’s written consent had been sufficiently informed by the attorney’s disclosure).

be recognized by achieving the dissolution with a minimum of acrimony. Victims of domestic violence need a committed, even aggressive advocate, loyal only to their interests, who can obtain restraining orders against their batterers, argue for sole physical and legal custody of their children, and obtain property and maintenance awards heavily weighted towards their clients' interests in recovering from the abuse and achieving financial independence.

The critique of mediation as dangerous and unjust for victims of domestic violence²⁰³ applies with even greater force to joint representation. A limited scope representation would be unreasonable under Rule 1.2(c) in this situation. Nor could competent and diligent representation be provided to both spouses, making the representation impermissible under Rule 1.7(b)(1). Applying the rules simply confirms the common sense inclination that joint representation is unethical for couples whose relationship is plagued by abuse.

Domestic violence is not the only phenomenon that would make a joint representation inappropriate. Imagine a couple comprised of individuals with markedly different earning capacities at the time of divorce. Perhaps, as is still often the case, the couple decided jointly during the marriage that the overall welfare of the family would be maximized if one spouse were to put her own educational and professional pursuits on hold to manage the household and care for the couple's children.²⁰⁴ Such an arrangement allows the other spouse to devote time and energy to professional advancement, resulting in an enhanced income stream that benefits the entire family during the marriage.²⁰⁵ Upon dissolution, however, the economic dependency fostered by this arrangement is solely born by the caregiving spouse, while the other spouse walks away from the marriage with professional and financial prospects reflecting the family's investment in his or her career.²⁰⁶

²⁰³ See generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

²⁰⁴ See, e.g., *Lorenz v. Lorenz*, 881 N.Y.S.2d 208, 208 (App. Div. 2009). In *Lorenz v. Lorenz*, the husband's annual income was roughly \$100,000, while the wife's was around \$20,000 at the time of divorce. *Id.* The court attributed this disparity in part to the effects of marital decision-making, stating that while the husband developed skills and a lucrative career, the wife devoted her time and energy to the needs of their children and the family's domestic needs. *Id.*

²⁰⁵ The framework of equitable distribution rests on this idea, making it enormously important in divorce law.

²⁰⁶ There is extensive scholarly literature analyzing this pattern of labor specialization and considering its implications for rendering justice at divorce. See, e.g., Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 42-49 (1989); Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIMONY L. 61, 69-81 (2008); Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1241 (noting that spouses, usually wives, who "contribute nontangible care work to the marriage" improve the well-being of the couple and its children "even if the market does not value that work"); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L. REV. 2227, 2229-30 (1994).

The higher earning spouse may freely and readily embrace the idea that the financial components of the divorce must address this inequity, and might fully participate in the drafting of an agreement that provides the caregiving spouse with an appropriate package of marital property and post-divorce support. If not, however, it would be impossible to provide competent and diligent representation to a couple in this posture. A wife whose nonfinancial contributions to the marriage render her economically vulnerable cannot plausibly share an attorney with a husband who views his earning capacity as the result of individual effort, and thus his alone to enjoy after the divorce.

The truth is that we can imagine any number of divorcing couples for whom joint representation would be inappropriate and unethical. Whenever spouses have incompatible views about how an issue should be resolved, and place a higher value on obtaining their preferred resolution of that issue than the gains that come from an uncontested divorce, the same attorney cannot represent them.²⁰⁷ This represents a straightforward application of Rule 1.7, which calls for an examination of the facts of each situation and an assessment of the actual needs and interests of the specific clients in question. Rule 1.7, which cautions against the risks of joint representation for any type of client,²⁰⁸ adequately guides the sorting of appropriate candidates for joint representation from those who cannot be ethically represented in this way. Indeed, it is the assertion that the interests of divorcing spouses *cannot* be trusted to the ordi-

²⁰⁷ Although an absence of disputed issues is a necessary condition for joint representation, I do not mean to suggest that it is sufficient. Superficial expressions of agreement can mask power imbalances between the parties and cannot necessarily be relied upon as a basis for a lawyer to assist a couple in drafting an egregiously one-sided settlement. See *Blum v. Blum*, 477 A.2d 289, 297–298 (Md. App. 1984). For example, in *Blum v. Blum*, an attorney drafted a settlement agreement for a divorcing couple in which the wife conveyed her interest in the marital home to her husband, who was permitted by the terms of the agreement to stay in the home as long as he wished. *Id.* at 292. Upon the sale of the home, he was to pay his wife five percent of the net proceeds or a minimum of \$5,000. *Id.* The purchase price of the home was \$110,000 and the amount owed was \$65,000, suggesting equity of at least \$45,000, depending of course on the fluctuation of market conditions. See *id.* at 291. Because nothing in the agreement provided the wife with assets that came anywhere near the amount necessary to offset her interest in the home—in fact, she also released claims to other assets such as a credit union account in the husband’s name—the court described the agreement as “so lopsided as to shock the conscience.” *Id.* at 292. The court reviewing the agreement “found that Mr. Blum was the dominant force in the marriage,” illustrated by examples such as “regimented shopping expeditions; the required precise parking of the car; washing of the car wheels; budgeting constraints; lack of flexibility in arranging the food and clothing; the relative positions of the parties in the marriage; and Mrs. Blum’s concern that he would not let her leave the marriage.” *Id.* at 295–96. The court also found that the husband dictated the terms of the agreement, making the engagement anything but a true joint representation. *Id.* at 293. Although it should be obvious that a lawyer engaged in a permissible and authentic joint representation cannot simply take direction from one party at the manifest expense of the other, the case also illustrates that superficial expressions of agreement do not provide an adequate basis for a joint representation; rather, a lawyer must exercise some independent judgment in reviewing a proposed settlement, evaluating the agreement to ensure that it meets minimum standards of fair and equitable distribution. See *id.* at 297–98.

²⁰⁸ See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmts. 29–33.

nary case-by-case operation of Rule 1.7 that requires justification. In the section that follows, I explain why such categorical treatment of divorcing couples is unsound.

3. Rejecting the Categorical Approach

In the framework provided by Rules 1.2 and 1.7, joint representation can only take place where each member of the couple knowingly and voluntarily agrees to it. They are likely to be the best source of knowledge about whether such an arrangement serves their interests. The question for the legal profession, then, is this: why should we treat all divorcing couples as unavoidably, unconsentably conflicted when they themselves feel otherwise?

In light of the multiple factors that motivate couples to choose joint representation and the lack of satisfactory alternatives, the insistence that all divorcing couples have irrevocably conflicting interests does not withstand scrutiny. Consider, for example, the reasoning expressed in the standards of conduct promulgated by the American Academy of Matrimonial Lawyers, which treat joint representation as categorically impermissible. Under the section entitled “Conflict of Interest,” Standard 3.1 states that, “[a]n attorney should not represent both husband and wife even if they do not wish to obtain independent representation.”²⁰⁹ A comment explains, “it is impossible for the attorney to provide impartial advice to both parties. Even a seemingly amicable separation or divorce may result in bitter litigation over financial matters or custody. A matrimonial lawyer should not attempt to represent both husband and wife, even with the consent of both.”²¹⁰

This reasoning and result should be rejected for several reasons. First, the comment assumes too much by noting the possibility that a seemingly amicable divorce could result in bitter litigation down the line. The same consequence would result for couples who had chosen collaborative divorce process, with the consequence that both attorneys would have to be disqualified. The reasoning further overlooks the possibility that couples who choose joint representation—even as compared to those who choose collaborative divorce—should be treated as a distinct subset of divorcing couples who are particularly committed to resolving the divorce without litigation. Additionally, the comment does not account for the possibility that the joint representation itself may further reduce the prospect of litigation, precisely because the individual spouses are not being advised by attorneys fulfilling the role of a traditional partisan advocate.

²⁰⁹ American Academy of Matrimonial Lawyers, BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS, Standard 3.1 (2009), available at <http://www.aaml.org/library/publications/19/bounds-advocacy>, archived at <http://perma.cc/ME27-JC29>.

²¹⁰ *Id.* cmt. 38.

In any event, the assertion that a lawyer cannot provide impartial advice to both husband and wife misses the mark because impartial advice constitutes *exactly* the kind of advice, and the *only* kind of advice, that is available to couples choosing joint representation.²¹¹ As previously discussed, an attorney can provide guidance about divorce law in a way that does not favor the interests of one spouse at the expense of the other.²¹² There is a great deal that can be usefully explained to a divorcing couple from an impartial stance about the law that governs the dissolution of marriage. And while it is indisputable that the reach of this advice is considerably more circumscribed than what an attorney would offer to a divorcing individual in a full-scale representation, we should trust that divorcing couples seek joint representation, with this inevitable limitation, because they place a higher value on the benefits they get in exchange—in cost savings, speed, and reduced acrimony.²¹³

What a lawyer cannot provide to both husband and wife is partisan advice—advice about how to maximize one party's position in the dissolution over the objection of the other. A lawyer dispensing partisan advice identifies the facts that form a point of weakness for the other party on a disputed issue, and explains to the client how to use these facts to force concessions in negotiation or enhance the likelihood of success in litigation.

The argument for joint representation is premised upon the view that there is a difference between these two modes of legal advice, that practicing attorneys can ascertain the difference, and that clients can benefit from impartial advice even if they do not have access to the full scope of partisan advice available in a traditional representation. Although the lawyer is limited by her neutrality as between the two spouses, she is an expert advocate for their shared interests, and as such has much to offer.

It bears emphasis just how substantial these shared interests are: minimizing transaction costs, maximizing the total value of the marital estate at the time of the dissolution, and reducing the negative impact of the divorce on any children. The legal profession should not presume—irrebuttably, no less—that these interests are of lesser consequence to divorcing spouses than their conflicting interests, or that the gains from sharing counsel are less than the gains that can be recognized by pursuit of each spouse's individual interests. At the very core of limited scope representation is the idea that clients should be able to make this kind of trade-off, benefitting from limited legal assistance even if they cannot or do not wish to obtain the full package of legal services. If individual clients seeking assistance for a business venture or an employment mat-

²¹¹ See *supra* notes 200–208 and accompanying text.

²¹² See *supra* notes 134–199 and accompanying text.

²¹³ See *supra* notes 134–150 and accompanying text.

ter can be trusted to make this decision knowingly, rationally, and in their own self-interest, divorcing spouses should be able to as well.

It seems that the ready rejoinder would emphasize something categorically different about a married couple seeking to dissolve their union. Upon close examination, however, the apparent distinction starts to break down, placing too much weight on marital status and making it overly conclusive in the conflicts analysis. We can see this when we reflect on the joint representation of married couples in estate planning or small business matters. Consider, for example, a hypothetical that ethics and estate planning scholars have grappled with repeatedly.²¹⁴ A married couple's request to have the same lawyer draft identical wills for each of them appears to present no immediate concern that would bar the lawyer from proceeding.²¹⁵ As it turns out, the wife confides in the lawyer that she secretly objects to some of the provisions but does not want to initiate marital discord by raising her concerns with her husband.²¹⁶ While she instructs the lawyer to proceed with the wills as planned, the lawyer must grapple with the ethical implications of having learned that the wills do not reflect the individual preferences of one client.

The hypothetical has inspired a number of different insights about the proper role of a lawyer in representing intact families.²¹⁷ Professor Thomas Shaffer criticizes the norm of radical individualism that obscures the importance of family relationships and refuses to recognize the lawyer's obligations to the family unit.²¹⁸ Professor Russell Pearce proposes a model of "optional family representation," in which clients can choose whether to be represented as a collection of individuals or as a family group.²¹⁹ Professor Alyssa Rollock, by contrast, asserts that lawyers "should treat spouses and family members as autonomous individuals with potentially conflicting interests as well as common goals."²²⁰ Professor Patrick Baude suggests that we treat the

²¹⁴ See Stanley A. Kaplan, *The Case of the Unwanted Will*, 65 A.B.A. J. 484, 484 (1979).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See, e.g., Teresa Stanton Collett, *And the Two Shall Become as One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 107 (1993); Teresa Stanton Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 REAL PROP. PROB. & TR. J. 684, 688, 736 (1994); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1257 (1994); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 968-72 (1987).

²¹⁸ See Shaffer, *supra* note 217, at 968-72.

²¹⁹ See Pearce, *supra* note 217, at 1294-317.

²²⁰ See Alysa Christmas Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 IND. L.J. 567, 571 (1998). Professor Rollock stated:

The family should be viewed by the attorney neither as a unit nor as an aggregation of individuals possessing identical interests, but rather as autonomous individuals with potentially conflicting interests. Intermediation should be possible in some circumstances,

family as “an economic institution with ongoing rules of its own, and as such, as an entity entitled to have a lawyer in just the way a partnership is entitled to have a lawyer.”²²¹

These diverse perspectives reveal that while the joint representation of married spouses in estate planning has been the subject of considerable debate, it does not engender the same categorical rejection confronting the joint representation of divorcing spouses.²²² Scholars and practitioners tend to assume that married couples have convergent interests, whether in regards to estate planning, running the family business, or other matters, until the married couple demonstrates otherwise.²²³

Perhaps it is similarly reasonable to assume that divorcing couples have divergent interests—after all, the failure of their marriage may very well produce irreconcilably conflicting interests to match the irreconcilable differences that form the basis for their divorce.²²⁴ Couples should at least have the opportunity to demonstrate otherwise, however. As Professor Terry O’Neil suggests, an attorney best serves a family when she “asks specific questions about the particularized dynamics of the family she is being asked to represent.”²²⁵ Although the point was made with regard to intact families, the reasoning holds true as well for families in the midst of dissolution. As discussed throughout this Article, the financial and emotional upheaval caused by a divorce provides compelling reasons to minimize transaction costs, maximize the value of the marital estate, and reduce the adversarial dynamics that are so harmful to children.²²⁶

but the attorney should undertake that representation only after concluding that the joint representation will benefit each of the parties and after obtaining their informed consent.

Id.

²²¹ Baude, *supra* note 138, at 602.

²²² See John R. Price, *The Fundamentals of Ethically Representing Multiple Clients in Estate Planning*, 62 U. MIAMI L. REV. 735, 745–46 (2008) (“Most authorities and commentators agree that the joint representation of multiple clients, such as a husband and wife, is ethically proper if there are no disabling conflicts and none is likely to arise.”); Steven H. Hobbs, *Family Matters: Nonwaivable Conflicts of Interest in Family Law*, 22 SEATTLE UNIV. L. R. 57, 60 (1998).

²²³ See Price, *supra* note 222, at 745–46.

²²⁴ See Baude, *supra* note 138, at 603 (characterizing “amicable divorce” as one of the “great oxymorons” of family law).

²²⁵ Terry A. O’Neill, *Reasonable Expectations in Families, Businesses, and Family Businesses: A Comment on Rollock*, 73 IND. L.J. 589, 598–99 (1998).

²²⁶ See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 02-428 n.2 (2002). Addressing the simultaneous representation of a niece and an uncle in an estate planning matter, the ABA has recognized that considerable efficiency is gained when one lawyer or firm manages the legal affairs of all family members. *Id.* The lawyer or firm learns about family businesses, assets, and personalities and can provide quality representation in less time. *Id.* Teresa Stanton Collette, who has been vocal about the risks of family representation, nonetheless acknowledges that the advantages include “pooled information, pooled resources, cost savings, co-client support, commitment to the collective

Assuming the unity of interests between married clients and the adversity of interests between divorcing spouses vests too much presumptive force in the clients' current and intended marital status. Married people cheat on, lie to, and steal from their spouses without ever intending to end the marriage, acting in ways that threaten if not destroy the set of joint interests they share with their spouses.²²⁷ Divorcing spouses, on the other hand, can and sometimes do approach the end of their marriage with a common purpose, as paradoxical as that seems.²²⁸ The fact that they no longer wish to be married does not necessarily mean that they cannot agree on how the restructuring of their financial and parental relationships should take place. Although this stance may appear both overly pessimistic about marriage and overly optimistic about divorce, the perspective I urge is ultimately one of agnosticism and humility. The legal profession simply does not know enough about the individual family to presume one way or another. Fortunately, our existing framework for evaluating conflicts of interests does not require such knowledge. It requires only that we ask the right questions of the people seeking our help.

CONCLUSION

In 1916, seeking confirmation to the U.S. Supreme Court and under fire for reportedly having represented multiple clients with conflicting interests, Louis Brandeis was said to have justified his conduct on the grounds that he had not been functioning in the posture of a traditional partisan advocate.²²⁹ Rather, he asserted, he acted as “counsel for the situation,” attempting to “strike a balance between the rights and obligations of each party and then work out a solution equitable to all.”²³⁰ Although Brandeis was eventually confirmed, for some the term became tainted by the sense that it reflected a lapse in professional judgment on the part of an otherwise great figure of American jurisprudence.²³¹ For others, it remains a salutary term, one that calls to mind

good, presentation of a united front, and reducing the drain on judicial resources.” Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 REV. LITIG. 567, 578 (1997).

²²⁷ See FLA. BAR PROF'L ETHICS COMM., Op. 95-4 (1997), available at <https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+95-4?opendocument>, archived at <http://perma.cc/X73Z-89KM>.

²²⁸ This approach is reflected in a number of blogs and websites dedicated to exploring this kind of divorce. See, e.g., POSTCARDS FROM A PEACEFUL DIVORCE (Aug. 8, 2014), <http://www.postcardsfromapeacefuldivorce.com/>, archived at <http://perma.cc/P8GM-UDSN>; ASK MOXIE (Aug. 8, 2014), <http://www.askmoxie.org>, archived at <http://perma.cc/5PKD-3KLL>; CO-PARENTING 101 (Aug. 8, 2014), <http://co-parenting101.org>, archived at <http://perma.cc/U3WY-886Z>.

²²⁹ See Dzienkowski, *supra* note 1, at 742–43.

²³⁰ See *id.*

²³¹ See Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1505–07 (1996). Spillenger characterized the term as a “hurried and embarrassed excuse” offered by Brandeis when his conduct was challenged. *Id.* at 1507. The term seems to stretch

an image of lawyers as innovators, mediators, harmonizers, and servants of a more expansive vision of the good.²³²

The need to explore representational models that differ from traditional partisan advocacy has only become more acute over the past century. Particularly in domestic relations matters, where the adversarial paradigm is 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.

As demonstrated here, the existing mechanisms for delivering legal services to divorcing spouses have significant shortcomings, which should inform our assessment of joint representation. The failures of existing models should not blind us to the risks and pitfalls of joint representation, which is not for everyone, but neither should one assume that divorcing spouses necessarily have such profoundly conflicting interests that the same attorney cannot represent them. In fact, the set of interests divorcing spouses can share—in minimizing transaction costs, maximizing the value of the marital estate, and reducing hostility and acrimony—may substantially outweigh the ways in which their interests conflict.

The error lies in vesting marital status—or, more precisely, the intent to undo marital status—with conclusive force in the conflicts analysis. The conflict of interest rules treat very few fact patterns in this categorical way, instead taking a fact-sensitive approach. Divorce should be no exception. Couples who believe that their interests are best served by engaging one attorney to manage the legal issues surrounding their divorce may very well be correct.

the conventional definition of the lawyer’s role “almost to the edge of legitimacy.” David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2067 (1997).

²³² See Spillenger, *supra* note 231, at 1522–29 (collecting sources).

