ARTICLE

Michele N. Struffolino

Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation

Abstract. The use of unbundled legal services is nothing new in this country, and it is often preferable to no representation at all. The Model Rules of Professional Conduct expressly permit attorneys to provide limited representation to their clients. Domestic-relations attorneys, in particular, have tried to ease the burden on litigants by offering unbundled legal services. However, the use of unbundled services in domestic-relations matters has caused difficulties for litigants, attorneys, and the courts. For these domestic-relations cases in particular, full service representation is crucial. To provide full satisfaction for their clients and to fulfill their ethical duty, domestic-relations attorneys must provide complete representation.

Author. Assistant Professor of Law, Nova Southeastern University, Shepard Broad Law Center. I would like to thank Steven Liquori, Nicole Jabour, Nassar Jabour, Jr., my colleagues and the Faculty Development Committee at NSU, Professor Charlene Smith, Professor Michael Dale, Professor Elena Langan, Professor Hnylka, Professor Mary Kay Kisthardt, the New Scholars Program, Grant Levine, Abigail Brown, Maya Rubinov, Jessica Vitale, and Jennifer Fitch. Additionally, I would like to thank the New Scholars Program for providing me the opportunity to present this Article at the SEALS 2011 Annual Conference. Finally, this Article is dedicated to my muses, Lennox Redmond and Charlette Ryan.

ARTICLE CONTENTS

"It is ludicrous to suggest that in the present system, a layperson armed with a few discrete sticks from the advocate's bundle can emerge from the trial thicket unscathed or that others will not be put to unnecessary expense."[1]

I. INTRODUCTION

The effectiveness of limited legal representation is often inadequate. The benefits realized when these partial legal services are used to facilitate alternative dispute resolution, administrative assistance, or dissemination of information regarding basic court procedures are lost when litigation is needed or demanded in domestic-relations matters.[2] Additionally, providing only limited assistance rather than full representation in such matters may "cause more harm than good" to those intended to reap the benefits of this alternate form of representation.[3] Even with the assistance

1. John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 16 (emphasis added).

2. *See id.* (highlighting the intricate details involved with litigation that are incapable of being executed by a pro se litigant); *see also* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 115 (2001) ("Judges are aware that self-represented parties' unfamiliarity with legal procedures or the rules of evidence may result in the denial of meritorious claims on grounds that they were not properly presented."); Howard M. Rubin, *The Civil* Pro Se *Litigant v. The Legal System*, 20 LOY. U. CHI. L.J. 999, 999–1004 (1989) (providing legal remedies to people in rural communities and distanced from licensed attorneys which are not without consequences for the overwhelmed judicial system when pro se litigants enter the courtroom). *But see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1580 (2005) ("Despite the assertion that only with counsel can a litigant have meaningful access to the courts, the reality is that, for many litigants, even with proficient (let alone deficient) counsel, they are denied meaningful access or true 'justice.'"). *See generally* CHARLES P. KINDREGAN JR. & PATRICIA A. KINDREGAN, MASS. PROB. & FAMILY COURT DEP'T, *PRO SE* LITIGANTS: THE CHALLENGE OF THE FUTURE 12–13 (1997), *available at* http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/prosefinalreport.pdf (pointing to the numerous problems confronting the judicial system when persons attempt to represent themselves in court proceedings).

3. Serpico v. Urso, 469 N.E.2d 355, 356 (Ill. App. Ct. 1984) (showing the complications that arise when a pro se defendant in a civil proceeding is not fully informed of his rights); Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 989 (2009) (explaining some of the negative aspects of unbundled legal services); *see also* Austin v. Ellis, 408 A.2d 784, 785 (N.H. 1979) (commending the lower court's patience and additional efforts to educate the pro se litigant, thus demonstrating the weight a court must bear when both parties are not providing adequate representation and the judge must take time to explain the proper procedures during a proceeding). An attorney must guide a practice on the foundation of the Model Rules of Professional Conduct, which requires an attorney to ethically advocate on behalf of a client. *See* Mary Helen McNeal, *Redefining Attorney–Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 336–37 (1997) (highlighting the serious ethical and professional concerns with allowing a client to receive unbundled legal services from an attorney); *see also* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM.

of changes in ethics rules to encourage the use of unbundled legal services in domestic-relations matters involving ongoing litigation,[4] the litigants are often unable to achieve satisfactory outcomes.[5] Furthermore, attorneys providing limited representation operate in uncharted waters with little confidence in being protected against malpractice and ethical complaints,[6]

LAW. 193, 198 (2008) ("Despite the benefits of providing limited assistance to an unrepresented party, attorneys must use extreme caution in their dealings with these parties, since there exists a great potential for malpractice or ethical complaints."). *But see* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 14 n.30 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf ("Surveys of [pro se] litigants who received limited assistance from courthouse or legal services programs find that a high percentage of the litigants were satisfied with the services. They also generally believed the outcomes in their cases were fairer as a result of the services.").

4. *See* ABA MODEL ACCESS ACT § 1F (2010), *available at* http://www.pabar.org/public/committees/lspublic/atj/ABA%20Civil%20Gideon%20Model%20Act%20Report%20with%20Rec%205_21_10.pdf (noting the adoption of additional safeguards for clients without access to professional legal representation and expanding a client's right to an attorney in particular civil cases). *See generally Court Rules*, Am. Bar Ass'n (Dec. 14, 2011), http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html (last updated Dec. 14, 2011) (summarizing the various state court rules that deal with unbundling of legal services).

5. *See* John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 16 (noting that the shift to unbundling legal services leaves important issues to be addressed by the pro se). Some argue that "a lack of legal assistance [creates] . . . a fundamental disadvantage and effectively limits [a client's] access to justice." Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 984 (2009); *see also* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 14 n.30 (2003) (explaining that an Oregon State Bar survey on legal needs indicated that "[m]ost people who experience a legal need and don't obtain representation feel very negatively about the legal system and about 75% are dissatisfied with the outcome of the case" (quoting D. MICHAEL DALE, THE STATE OF ACCESS TO JUSTICE IN OREGON: PART I ASSESSMENT OF LEGAL NEEDS 18 (2000)) (internal quotation marks omitted)); Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 966 (2007) (highlighting the differences in family law and other areas of law, and how those difference serve as an additional barrier for achieving optimal results in family law cases).

6. *See, e.g.*, Flatow v. Ingalls, 932 N.E.2d 726, 727–28 (Ind. Ct. App. 2010) (concerning a malpractice claim filed against a lawyer who provided limited representation to the client by agreement). The ethical concerns are much greater for the attorney in the case of providing unbundled legal services. *See* Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1005 (2007) (recognizing that some attorneys are unsure if limited legal representation is ethical); Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 916 (1998) (drawing attention to the inevitable paradigm in providing unbundled legal services); *see also* Rachel Brill & Rochelle Sparko, Current Development, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 553 (2003) (noting the ethical standards regarding conflict of interest may discourage lawyer participation in offering limited legal services to clients). *But see* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1116 (2002) ("Unbundling advocates contend that the malpractice risk can be minimized if the client signs

and the courts are still flooded with litigants who are unrepresented when presenting complex legal or highly emotional issues.[7]

Making full and adequate representation available in contested domestic-relations matters is the best way to protect litigants, attorneys, and court resources. The American Bar Association (ABA) warns that providing unbundled legal services "should not be considered a substitute for full legal representation when full legal representation is necessary to provide the litigant fair and equal access to justice."[8] This warning leads back to the problem that fueled the movement toward unbundled legal services: full and adequate representation is costly.[9] The benefit of the reduced cost of limited representation outweighs the risk of proceeding

a limited representation agreement. Attorneys can prepare a carefully worded engagement letter outlining exactly what the lawyer has been hired to do, what services will be performed, and what issues the lawyer will address.").

7. *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1539–41 (2005) (noting the rise in the number of pro se litigants in various jurisdictions); Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376 (2005) (reporting the number of pro se litigants in family law cases has increased dramatically over time); *see also* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 441 (2009) ("In Maricopa County, Arizona, a pro se litigant appeared in [88%] of divorce cases in 1990."); Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 483 (2010) (stating that the number of pro se litigants is on the rise, "especially in the area of family law"); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24, *available at* http://www.thehoustonlawyer.com/aa_mar08/page24.htm (concluding that family law in general consists of an intense level of conflict, especially those involving complex and emotional issues).

8. ABA MODEL ACCESS ACT § 2 cmt. (2010); *see* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1123 (2002) ("If justice is to be practically available for all, if the litigation is not to become literally 'the sport of kings,' unbundling legal services must apply [to] litigation services, too." (quoting Charles F. Luce, Jr., *Unbundled Legal Services: Can the Unseen Hand be Sanctioned?*, MOYE WHITE (1998), http://www.mgovg.com/ethics/ghostwr1.htm.) (internal quotation marks omitted)).

9. *See* Mary Helen McNeal, *Redefining Attorney–Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 297 (1997) (citing the failure to provide resources for low- to moderate-income Americans as the reason persons often proceed to court without counsel); John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 15 (indicating the expenses incurred by obtaining adequate legal representation have encouraged clients to represent themselves); *see also* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 9 (2003) ("It is the cost of full-service representation in litigation that is prohibitive for many."); Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 985–86 (2009) (citing a recent study finding that "a majority of all pro se litigants proceeded without legal assistance due to financial constraints"). *But see* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378 (2005) ("In one survey, [45%] of pro se litigants stated that they chose to represent themselves because their case was simple . . . and not because they could not afford an attorney. . . . Almost half implied that they had the necessary funds to hire an attorney, but chose not to.").

without an attorney in all aspects of a case if the case can be completely or substantially resolved without litigation.[10] However, the reverse is not true. The risks of proceeding without full representation when the matter involves ongoing litigation are too great to justify a reduction in attorney's fees.[11] Recognition of this risk by the system and the public is the best way to obtain funding for public service programs offering full representation,[12] encourage legislatures to provide legal services to those

10. *See* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 63 (2010) ("Litigants [are] more likely to self-represent if they regard[] their cases as relatively 'simple.'"); *see also* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 12 (2003) ("[I]n the great majority of situations some legal help is better than none. An informed pro se litigant is more capable than an uninformed one."). The numerous procedures a lawyer engages in, along with a planned strategy, may inhibit the client's ability to settle the case as quickly as possible, thus increasing the amount of legal expenses incurred by the client. *See* Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 275 (2011) (citing discovery as a discouragement from participating in mediation when lawyers are abiding by their ethical obligations in representing parties). Lawyers tasked with representing their clients in the adversarial system often restrict their view of potential solutions to "what the 'law' proscribes and framing the terms of settlements around what might happen in court," thus reducing the value of having retained counsel when the issues at stake are simple and straightforward. Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 491 (2009). In addition, the involvement of lawyers will typically lengthen the duration of the case. Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 196–97 (2008).

11. *See* Rich Cassidy, *ABA Resolutions Intended to Adopt Civil* Gideon *Are Too Narrow*, ON LAWYERING (Sept. 9, 2010), http://onlawyering.com/2010/09/aba-resolutions-intended-to-adopt-civil-gideon-are-too-narrow (reporting on the adoption of a resolution by the ABA to require appointed counsel when important "basic human needs are at stake"). The litigant left without legal representation is at a great disadvantage in cases involving complex legal issues where numerous solutions are available and common terms have multiple meanings within the law. *See, e.g.*, Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 201 (2008) (indicating "[a] simple web search for a common legal term . . . will bring up a variety of websites" without providing the needed specification for the pro se litigant). The absence of attorneys is especially harmful when the pro se litigant unknowingly waives essential rights during the proceedings, including the negotiation conference. Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 313 (2005); *cf.* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 64 (2010) ("[T]here has been little hard data about the continuing impact of [pro se] status on divorce litigants, and a paucity of data about whether self-represented divorce litigants are disadvantaged by proceeding without lawyers.").

12. *See* AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104: MODEL ACCESS ACT OF 2010, at 5 (rev. ed. 2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf (identifying the increase in pro se litigants and the need for more legal services funding). *But see* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 89 (2010) ("Within legal services programs, more money allocated toward hotlines or limited-assistance programs will lead to more

most in need,[13] and further develop incentives for attorneys and firms to take on these cases at little or no cost to the client.[14]

First, this Article explores the unique challenges inherent in domestic-relations cases. Although nearly all domestic-relations issues involve some conflict,[15] this Article focuses on those cases that cannot be

clients being served. However, where assistance does not affect case outcomes to the extent full representation does, questions of values and trade-offs arise."). The confusion experienced by clients in knowing what issues they are receiving legal assistance and those they are not leads to malpractice cases against lawyers who offered less than full representation. *See* Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 297 (1997) (noting free legal services are provided to those qualifying through the Legal Services Corporation but thousands are left without assistance). *See generally* Flatow v. Ingalls, 932 N.E.2d 726 (Ind. App. Ct. 2010) (detailing claims brought by clients who received limited representation from their attorneys by agreement and filed malpractice actions following commencement of legal services).

13. *See* AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104: MODEL ACCESS ACT OF 2010, at 5 (rev. ed. 2010) (indicating that congressional funding of Legal Services Corporation falls far below the demand); CONSORTIUM ON LEGAL SERVS. & THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 9 (1994), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authocheckdam.pdf (detailing reports that indicate when a household has one legal need, "there is about an even chance that it is wrestling with more than that one need"); *see also* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 979–80 (2009) (pointing to those in the low- and middle-income community as the most in need of assistance in gaining full legal representation); Howard M. Rubin, *The Civil* Pro Se *Litigant v. the Legal System*, 20 LOY. U. CHI. L.J. 999, 999 (1989) (pointing to the low income community and the middle class as the most disadvantaged by the high cost of private legal representation).

14. *See* John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 16 (showing the alarming increase in the gap between costs and services provided by legal professionals and the lack of assistance available to those who cannot afford full representation); *see also* Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 295 (1997) (discussing the elderly population that cannot afford legal services nor qualify for free services from a nonprofit organization); Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 382 (2005) (implying a lack of incentive on the part of attorneys to perform pro bono assistance because the attorneys routinely lose money when doing so); Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused By Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 322–23 (2005) (noting a program in Massachusetts that allows law students to assist indigent clients to gain practical legal experience while in school); Rachel Brill & Rochelle Sparko, Current Development, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 553 (2003) (indicating incentives are lacking in motivating attorneys to accept pro bono cases benefiting those most in need of legal services).

15. *See* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 11 (2004), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/pdf/2004_1.pdf (detailing high-conflict cases and "the effect of conflict on children in intact and divorced families, and studies on the impact of high conflict in children of separated or divorced families"); Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 58 (2010) (highlighting the high-conflict nature of family law litigation involving children); Leslie Feitz,

resolved through mediation, collaboration, or other forms of alternative dispute resolution. Domestic-relations attorneys, family court judges, and other professionals providing services to families in crisis and dysfunction recognize these cases require more than perfunctory court involvement.[16]

This Article will continue with an in-depth discussion of unbundled legal services, which are available to financially disadvantaged litigants involved in highly emotional and complex legal matters. Understanding unbundled or limited-scope representation is best achieved by comparing these services to those provided with full representation[17] while examining the other uses of limited representation in the legal profession.[18] By

Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 197 (2008) ("Family law is rarely a happy area of practice. Most matters leave the parties with hurt feelings and an altered life."); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24, *available at* http://www.thehoustonlawyer.com/aa_mar08/page24.htm (noting the existence of conflict in any family law case). *See generally* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11 (recognizing the numerous conflicts that arise in divorce and family law litigation).

16. *See* Schutz v. Schutz, 581 So. 2d 1290, 1291–92 (Fla. 1991) (upholding an obligation of the custodial parent to foster a positive relationship between the child and the noncustodial parent despite ongoing animosity between the parents themselves); GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 29 (2004) ("[I]ssues in high-conflict divorces cannot be resolved through mediation."); Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 12 (explaning that intense conflict between parties in family law matters often remains for several years following a final disposition in the case); *see also* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 967 (2007) (illustrating the unique nature of family law as it is guided by local laws rather than uniform federal laws); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 (1994) (acknowledging the sensitive emotional, economics, and social relationships at stake in family law matter).

17. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422–23 (1994) (outlining the full-service package typically offered to a client); Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 915 (1998) (claiming the full-representation package requires lawyers to provide "aggressive lawyer[ing] . . . leav[ing] no stones unturned on their client's behalf"); *see also* Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 296 (1997) (hypothesizing a typical elderly client's problem where the client is presented with the choice of selecting "traditional full-service representation" which allows a lawyer to effectively solve his problem). *But see* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 4 n.7 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (indicating that "limited" and "full" representation is not different in the quality of the service provided, only in the quantity).

18. Providing clients with a choice of selecting less-than-full representation from their legal provider enables clients to control the kind of services they will receive and pay for. Mary Helen McNeal, *Redefining Attorney–Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 296 (1997); *see* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L.

focusing on the need for these services in domestic-relations matters, the legal industry's recognition of the extension of limited representation to cases involving ongoing litigation will be explored.[19]

Next, to demonstrate the limitations inherent in unbundled legal services, this Article necessarily analyzes the changes in ethics rules governing limited representation and the lack of clarity given to attorneys involved in domestic-relations matters.[20] Finally, this Article will discuss the need to further monitor the efficacy of these services in contested domestic-relations matters and to build public awareness of the need for low or no cost full representation.[21] Through an understanding of the

REV. 303, 303 n.1 (2005) (defining the term "unbundled legal services" (quoting Elizabeth Amon, *Lawyers Worry a Little Bit of Help Could Mean Liability in Pro Se Cases*, MIAMI DAILY BUS. REV., Aug. 1, 2002, at A9)); Rachel Brill & Rochelle Sparko, Current Development, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 564 (2003) (reporting that attorneys recognize the potential advantages of providing unbundled services to their clients). *See generally* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 428–30 (1994) (detailing the types of services a family lawyer may offer).

19. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994) (recognizing that a client may wish to have counsel at trial but might choose "to handle court filings, discovery, and negotiations without the lawyer"). The academic community recommends caution for attorneys when providing limited representation, thus exploring the use of less-than-full representation in matters relating to the elderly community. *See* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 987 (2009); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 335 (1997) (emphasizing the numerous ethical issues that are presented when an attorney represents a client in limited capacity). *But cf.* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 987 (2009) (inferring the unbundling of legal services is best in those cases that are simple and require little to no litigation). *See generally* Rachel Brill & Rochelle Sparko, Current Development, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 563–64 (2003) (addressing the relaxation and modifications in the Model Rules of Professional Conduct in removing barriers to providing unbundled legal services).

20. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8 (2002) (pertaining to the conflict of interest requirements for an attorney to comply with ethical standards); *see also id.* R. 1.2(c) (stating after amendment in 2000 that "[a] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent"); STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf ("[T]he comment to Model Rule 1.2 was substantially changed to explicitly permit limited representation, such as a brief telephone consultation."); Rachel Brill & Rochelle Sparko, Current Development, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 563 (2003) (pointing to the lack of guidance on the ability to provide limited representation and comply with required ethical standards prior to the adoption of new rules).

21. *See infra* Part V.A–B (explaining the need for full representation for all litigants in domestic-relations cases); *see also* Or. State Bar, Formal Op. No. 2011-183, at 547–51 (2011), *available at* http://www.osbar.org/_docs/ethics/2011-183.pdf (describing the scope of representation and attorney obligations to the client when the scope is limited); CHARLES P. KINDREGAN JR. &

limits and the benefits of limited representation, the legal system and the public can begin to explore other avenues to assist families in crisis.[22]

II. UNIQUE CHALLENGES INHERENT IN CONTESTED DOMESTIC-RELATIONS MATTERS

A. *Legal, Emotional, and Societal Roadblocks to Obtaining a Just and Positive Outcome*

The family law attorney providing traditional, full service representation in domestic-relations matters faces unique challenges. These attorneys represent individuals facing serious economic, social, and emotional issues.[23] The substantive and procedural laws that apply in family court

PATRICIA A. KINDREGAN, MASS. TRIAL COURT PROB. & FAMILY COURT DEP'T, *PRO SE* LITIGANTS: THE CHALLENGE OF THE FUTURE 63–64 (1997), *available at* http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/prosefinalreport.pdf (recommending that videotapes and an interactive website be used to help educate the public about court processes); Amber Hollister, *Unbundling Legal Services: Limiting the Scope of Representation*, OR. ST. B. BULL., July 2011, *available at* http://www.osbar.org/publications/bulletin/11jul/barcounsel.html (reporting on the advantages of unbundled legal services for the community and the caution for lawyers to adhere to ethical legal standards); Howard M. Rubin, *The Civil Pro Se Litigant v. the Legal System*, 20 LOY. U. CHI. L.J. 999, 1010 (1989) (indicating that many courts in Illinois have been handing out information regarding proceeding pro se, and lists and locations of legal aid clinics). The need to publicize the option of limited representation to clients comes with the need for clients seeking these services to understand that lawyers are still required to comply with ethical standards. Monitoring those lawyers providing limited representation is essential because "clients . . may have no way of knowing whether their lawyer is engaging in unethical or illegal behavior." Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 989 (2009).

22. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 12 (2003) ("We also recognize that limited assistance is not a choice, but a necessity, for many people."); Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1117 (2002) (touting "ghostwriting" as one of the benefits when clients are able to have pleadings drafted by attorneys, but explaining that this service is limited in that the client is not accompanied into the courtroom when these pleadings are considered); Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 569–70 (2007) (referring to limited appearances provided by the unbundled legal service model where the client benefits in having their position clearly articulated by their lawyer, but the representation is limited to a particular proceeding or legal issue involved in the case); John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 16 (stating that those in the legal industry who favor incorporation of unbundled legal services cite reduced costs as a benefit to the client).

23. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 965 (2007) (recognizing the "psychological aspects of family representation" and the level of human emotion involved); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 (1994) (pointing to the multiple facets of family law that impact a client's life once the case is closed); *see also* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 67–68 (2010) (combing the many definitions of success in a divorce

are unique and often localized.[24] Even other areas of law, such as contract or property law, apply differently in domestic-relations matters.[25] Trial court decisions in family matters are highly discretionary, contributing to a lack of uniform standards and an inability to predict outcomes.[26]

matter because of emotional attachment to property, and the economic and emotional needs competing within the client); Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378–79 (2005) (recognizing that the inability to afford representation is but one of many factors why people proceed with limited or no representation); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24, *available at* http://www.thehoustonlawyer.com/aa_mar08/page24.htm (highlighting the specific impact on parents and children involved in a high-conflict domestic-relations matter).

24. Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 966–67 (2007); *see* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 430 (1994) (citing the state guidelines for child support and spousal maintenance). Family law is especially unique because it is the only area of the law that looks prospectively rather than retrospectively. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 969 (2007) ("[A]s relationship problems, [family law] disputes are never truly over."). Authority in divorce disputes rests with the judge, who often must decide the rights and obligations of the parties upon the termination of the relationship; therefore, the court favors private agreements between the parties to better address the specific needs of each party. Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 246 (2011). Furthermore, family law involves the difficult "best interest of the child" standard, which lacks clarity in procedures and guidelines. *See* Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventative Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)"*, 10 FLA. COASTAL L. REV. 263, 264 (2009) (emphasizing the standard applied in divorce matters where children are involved frequently fails to adequately deliver the best interest of the child in the final disposition).

25. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 966 (2007) (noting the unique application of various types of law in the context of family law); Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. FAM. STUD. 1, 3 (2003) (addressing the need for state guidance regarding domestic-relations issues regardless of an existing contract agreement between the parties). While the unique nature of family law alters the application of other kinds of law (i.e. contract and property), family law is founded on the historical development of employment and commerce concepts, and the state's interest in education and welfare of children. *See* Martha Minow, *"Forming Underneath Everything that Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819, 819 (1985) (interpreting modern family law as a development from other legal fields). Due to the level of human emotions involved in the typical domestic-relations case, contract principles would be impossible to apply. Consider the concrete language in a contract specifying terms of a settlement agreement during a negotiation process. "The use of [particular] language conducive to the resolution of . . . issues" is essential in reducing the psychological effect the words have on the client. Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventative Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)"*, 10 FLA. COASTAL L. REV. 263, 293 (2009).

26. Outcomes on the same issues can vary greatly depending on the judge involved. Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law*

Although family law is often used to support laws in other areas, such as employment and education, there is recognition of the professional and societal importance of the legal rulings in domestic-relations matters.[27]

Assisting clients in obtaining their goals in a domestic-relations matter requires skill beyond basic competency standards.[28] Because of the important emotional and financial issues involved in resolving a family crisis, attorneys must be able to identify and address issues in many areas of the law including taxation, bankruptcy, tort liability, and estate planning.[29] Complicating an attorney's ability to plan and carry out these

Attorney, 75 UMKC L. REV. 965, 967 (2007); *see* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 11–12 (noting the heavy weight of responsibility on judges to determine family law issues when little is known about the dynamics and relationships within the family unit); *see also* Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 57 (2010) (demonstrating the range of discretion available to judges when they direct parents to "encourage and nurture" their child's relationship with the other parent (citing Schutz v. Schutz, 581 So. 2d 1290 (Fla. 1991))). A discretionary standard of review is allowed in family law cases due to the intermingling of psychology and the law within domestic-relations matters. *See* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (commenting that divorce is an area where intense levels of conflict occur throughout the legal proceedings).

27. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 967–68 (2007) ("[O]ne cannot so easily isolate family law, as it is fundamental to many other areas of the law: 'Family law is in two senses "underneath" other areas of the law. Its low status within the profession is well-known . . . .'" (quoting Martha Minow, *"Forming Underneath Everything That Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819, 819)).

28. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 968 (2007) (portraying the role of the family law attorney as including certain skills such as an understanding of complex legal issues in areas of bankruptcy, tort liability and taxation, just to name a few); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 (1994) (describing the numerous concerns a client will have once the domestic-relations matter is resolved). The duration of a family law case may have financial consequences and increased psychological effects on the client. *See* Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventative Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)"*, 10 FLA. COASTAL L. REV. 263, 266 (2009) (recognizing the spouse's interests contributing to their legal positions will determine the length and expense of the legal matter). *See generally* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 13–17 (discussing the layers within a family law matter when the underlying relationships are abusive and or feature high-intensity conflict).

29. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 968 (2007) (commenting on the numerous legal issues involved with domestic-relations matters and the emotional impact on the client). Most divorce matters will involve at least some level of emotional conflict due to the separation from a spouse and the altered status of the individual in society. *See* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (noting

relevant tasks is the fact that simply identifying the client's goals or objectives requires the attorney to assess the client's mental and emotional state and decision-making abilities: "Tto ignore [the] fear, anger, . . . sadness, . . . or any other psychological states of mind is to leave the client in a condition that makes rational informed decision-making difficult, if not impossible."[30]

B. *Conflict: An Added Challenge for the Family Law Attorney*

All domestic-relations matters involve some degree of conflict.[31] Family law matters requiring ongoing judicial involvement usually involve

that the "stages of separation" produce emotion and conflict among the parties); *see also* Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventative Law to the Divorce Process: Enhancing the Attorney–Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)"*, 10 FLA. COASTAL L. REV. 263, 270–71 (2009) (addressing the societal impact a person going through divorce experiences). The number of issues and level of complexity will vary depending on the couple's income, location, and whether they have children. *See* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 57–58 (2010) (describing many factors that contribute to whether a married couple should employ an attorney to assist in the termination of the marriage relationship).

30. Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 982 (2007). The psychological effects of terminating the marriage and altering family dynamics permeate the domestic-relations area of law. *See* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (noting divorce is one of the legal issues that involves numerous psychological aspects). To add to the psychological stress, clients are likely to experience a grave concern for the effects of their legal issues on the children. *See* Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 252 (2011) (relating the impact felt by children initially, and then into their adult lives, after experiencing a divorce in the family unit). For an attorney to provide adequate representation in a family law matter, the client's concerns should be addressed, which include, but not limited to, the economic, social, emotional, and practical issues affecting the person after a final decision in their legal matter. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 (1994) (describing the numerous concerns the client will have in such an emotional legal matter).

31. Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24. "In the legal system, representation of children and families stands apart from other areas of law." Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 966 (2007). Family law involves different levels of emotion, often guilt or anger, between the opposing parties. These emotional conflicts are intensified by the lawyer who insists on practicing law aggressively and interacting within the adversarial system in a family law matter. *See* Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 491 (2009) (emphasizing the need for the lawyer's role to be a peacemaker to help the client achieve future family improvements and heal from the emotional process). Family law touches the core of the familial relationships and personal matters. *See* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 197 (2008) (discussing the feelings of clients and the effect a family law case will have on their life).

one or more indicators of heightened conflict.[32] This Article focuses on those cases that may be described as "high conflict," meaning those matters involving litigation in family courts where one or more issues or parties fit the internal and external indicators of matters involving conflict.[33]

It is difficult to find one definition of the term "high conflict," although attorneys, judges, court personnel, and other professionals often involved in family matters often cringe when the term is used.[34] For lawyers, these

32. Domestic-relations cases involving abuse, children, or contested issues will typically involve more legal proceedings than those lacking such issues. *See* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 13 (highlighting the variety of issues that may arise in a family law matter); Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 57 (2010) (claiming the involvement of child custody in a legal matter can increase the amount of litigation due to the parents' opposing views); *see also* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (inferring that the emotional intensity involved in family law matters contributes to the length of litigation and lasting impact of the case). *See generally* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 24–25(2004), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/pdf/2004_1.pdf (identifying the various levels of conflict in a family dispute context).

33. *See* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 2, 18 (2004) ("[O]ne alarming symptom of a high-conflict divorce [is one where] . . . a child may decide that he or she does not want to visit one parent or the other." (internal quotation marks omitted)); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (describing conflict within family law cases that may range in form and affect numerous relationships). *See generally* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11,11 (discussing divorce and custody cases that are considered to be high conflict in comparison to less complex and emotional family matters).

34. GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 26 (2004). The term "high conflict" when used to describe domestic-relations matters is best defined as the high or extreme end of a continuum of cases. These cases often involve allegations of verbal and physical abuse, parent alienation, uncooperative behaviors, and actions to deliberately cause emotional distress to the other spouse. The most extreme cases may involve suicide or homicide. *See* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (describing the numerous forms conflict may be presented in a domestic-relations matter); *see also* Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 58 (2010) (naming symptoms within family law cases that demonstrate high-conflict issues). *See generally* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 11–13 (2004) (discussing the numerous definitions of high conflict within the legal arena). The need to address particular issues of abuse in domestic-violence cases aside from typical high-conflict issues is a growing concern of the legal community. *See* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 12 (proposing a distinction between abuse-related violence and conflict-related violence and the application of different remedies to the problems).

types of cases monopolize and stress the law office.[35] They often involve excessive telephone calls, e-mails, letters and responses, and many motions and hearings.[36] High-conflict cases often are those cases that cause the judge and court personnel to groan in frustration when the case is called.[37]

Because there is no clear definition of normal behavior in divorce, viewing conflict on a continuum of internal characteristics and external behaviors has allowed for the identification of typical high conflict indicators.[38] These internal indicators include:

35. The unique nature of the family law office exists because the clients carry their relationships into the office rather than detached legal issues. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 968 (2007) (concluding issues in this area of law are not "'transactions or occurrences,' but people" thus resulting in more complications and emotional implications of the case); *see also* Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 248–49 (2011) (citing the limited solutions available to a family with few resources and unsatisfied interests as issues contributing to the stress of a family matter in the law office); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 421–22 (1994) (pointing to increased demands and questions from a family law client). *But see* Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 495–500 (2009) (advocating that attorneys should act as "peacemakers" and detailing the methods to use in highly contentious cases).

36. *See* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (commenting on the typical client involved in a high-conflict case). The influx of communication requests from the client often stem from confusion and uncertainty. *See* Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 246–47 (2011) (acknowledging that the court is unable to handle the emotional implications of a high-conflict family law case, therefore, showing a need for clients to receive emotional reassurance from their attorneys). Further, the evolution of family law has led to clients demanding more involvement in their legal matters that pertain to personal relationships. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 421–22 (1994) (noting the modern family law client is more active in their legal representation).

37. *See* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (stating that high-conflict litigation puts significant stress on courts); *see also* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 11 (noting the massive number of cases the judge is responsible for and the lack of resources at the judge's disposal which contributes to the frustration of having to decide a difficult case where two parties are incessantly fighting with one another); Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 246–47 (2011) (stating the courts are incapable of handling highly charged emotional issues within one case). The need for additional guidance for courts deciding high-conflict family law matters is great. *See, e.g.*, GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 11, 80–99 (2004).

38. *See* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (reporting that the identification of specific characteristics in a couple's relationship will enable the lawyer to better assist the client in a personal legal matter); *see also* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS

> History of mental health difficulties, including depression, anger, withdrawal, and non-communicative [behavior].
> History of violent and abusive [behavior].
> A tendency to vilify the other parent.
> Inability to separate the parent's needs from the child's needs.
> Rigid and inflexible thinking about relationships and child development.
> High degree of distrust.
> A tendency toward enmeshment rather than autonomy.
> A poor sense of boundaries.
> A high degree of competitiveness in the marriage and in the separation. . . .
> [V]erbal and physical aggression between the parents.
> A tendency to involve the children in disputes.
> A pattern of alienating the child from the other parent.[39]

Typical external behaviors indicating a high-conflict domestic-relations case include: frequent court hearings;[40] the case is pending unresolved in court for an extended length of time; police involvement;[41] criminal

FOR CONSIDERATION 11, 24–25 (2004) (listing numerous traits of a couple's relationship, ranging from minimal to severe levels of conflict). These identifying factors are essential to the court in providing judges the ability to adequately assess and decide impacting legal matters. *See* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 16–17 (emphasizing the consequences for children involved in these family matters). Upon identifying whether the case is high-conflict, an informed attorney will be able to determine the necessary actions to take. *See generally* Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245 (2011) (proposing that mediation and collaborative law may be suitable avenues to success in particular family law matters).

39. GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 27 (2004); *see also* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (describing the numerous identifying characteristics of a person involved in a high-conflict situation).

40. Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 58 (2010); *see* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 11, 27 (2004) (citing "the number of times a case goes to court" as one of the indicators the matter is high-conflict). The numerous trips to the courtroom in a high-conflict case may be related to assuring the family members are safe from another hostile member of the family. *See* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 28 (describing risk factors of increased violence within a family unit).

41. *See* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 28 (noting the continuous involvement with police indicates a higher risk for severe violence to develop); *cf.* Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 58 (2010) (stating the danger to children is greater in cases involving high-conflict levels); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24 (mentioning the involvement of parents with substance abuse and

convictions; the involvement of child-welfare agencies; several changes in lawyers; and submission of several supporting affidavits.[42] It does not take both parties to cause difficulties in a domestic-relations matter: "It may be that one [party] is driving the conflict, while the other [party] is suffering the consequences of the other [party's] wrath."[43]

The percentage of cases that reach the high end of the conflict continuum is also difficult to determine. Estimates show that up to "half of all marriages end in divorce."[44] It has been estimated that as many as 30% of these divorces are considered high conflict.[45] These families get

psychological issues when they are engaged in a high-conflict dispute). It is logical to conclude that those convicted of multiple crimes will often have increased police involvement in the personal life of the family. *See* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 11, 27 (2004) (providing the typical external indicators of a high-conflict couple).

42. GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 27 (2004); *see* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at11, 12 (highlighting the factors that indicate a family is at high risk of experiencing violence, thus providing additional markers to be aware of in the high-conflict dispute).

43. Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24.

44. Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24; *cf. Divorce Rate*, DIVORCERATE, http://www.divorcerate.org (last visited Apr. 18, 2012) (noting that the 50% divorce rate statistic in America may appear accurate, but the actual divorce rate depends on different characteristics such as age, gender, whether it is a person's first, second, or third marriage, or whether the couple has children). *Compare* Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 2 (2003) ("Despite sobering statistics that suggest that more than half of the marriages entered into in any year will end in divorce, most people who marry believe that their own marriages will defy the odds and last for a lifetime." (citing Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993))), *with* Domenico Zaino, Jr., *The Practical Effect of Extending Revocation by Divorce Statutes to Life Insurance*, 2 CONN. INS. L.J. 213, 214 n.10 (1996) ("The United States has one of the highest divorce rates in the world."), *and* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: BIRTHS, DEATHS, MARRIAGES, AND DIVORCES 98 (131st ed., 2012), *available at* http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf (showing that in 2009, roughly 6.8 people per 1,000 got married and 3.4 people per 1,000 got divorced). *But see Divorce Rate*, DIVORCE.COM, http://www.divorce.com/article/divorce-rate (last visited Feb. 9, 2012) (stating that while the divorce rate has been on the rise since 1970, studies show that it appears to be decreasing).

45. Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventive Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)"*, 10 FLA. COASTAL L. REV. 263, 268 (2009) (citing Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 567–68 (2000)); *see* JANET R. JOHNSTON ET AL., IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 4 (Springer Publ'g Co. 2009) (1997) ("About one[-]fourth to one[-]third

"stuck in separation or divorce" and resolution of the divorce issues requires frequent intervention by the legal system.[46] This conflict does not necessarily end with judgment on the initial claims.[47] One-third of these families will remain in conflict regarding child rearing for another three-to-five years.[48] The parties,[49] the attorneys, and the courts[50] are all

of divorcing couples report high degrees of hostility and discord over the daily care of their children many years after their separation and well beyond the expectable time for them to settle their differences." (citing ELEANOR MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 141 (1992))); *cf.* PAUL R. AMATO & ALAN A. BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 220 (1997) (noting that a minority of marriages between 1980 and 1992 ended in high-conflict divorce).

46. GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 1 (2004).

> [W]ith one parent or both intent on maintaining such a degree of conflict and tension . . . it becomes impossible to resolve parenting and property decisions without a great deal of intervention from legal and mental health professionals. The incidence of such divorces is estimated at between 10 and 20 % of the divorcing population. Virtually everyone involved in family law agrees that the conflict between many of these couples is so intractable that there is never likely to be a legal remedy for their problems. These are couples who perpetuate their conflict regardless of developments in the lives of their children, their own remarriage[,] and prohibitive legal expenses.

Id. at 1 (alteration in original) (quoting SPECIAL JOINT COMM. ON CHILD CUSTODY & ACCESS, PARLIAMENT OF CAN., FOR THE SAKE OF THE CHILDREN: REPORT OF THE SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS 87 (1998), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031529&Language=E&Mode=1&Parl=36&Ses=1).

47. *See* CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE 44 (1995) (illustrating that, for most couples, conflicts subside by the third year); *see also* Janet R. Johnston, *High Conflict Divorce*, 4 FUTURE OF CHILD.: CHILD. & DIVORCE, Spring 1994, at 165, 167, *available at* http://futureofchildren.org/futureofchildren/publications/docs/04_01_09.pdf ("[O]ne quarter of divorces were highly conflicted at an average of three and one-half years after the separation, by which time almost all couples had obtained their final decree."); Elena B. Langan, *"We Can Work it Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 252 (2011) ("[S]tudies reveal the process of divorcing causes many long-lasting deleterious effects suffered by children when marriages fail."); Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventive Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren),"* 10 FLA. COASTAL L. REV. 263, 264 (2009) ("[S]ome major divorce effects may not be felt for many years and may be transmitted intergenerationally." (quoting Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083, 1091 (2002)) (internal quotation marks omitted)); Kenneth S. Mitchell-Phillips Sr., *Five Steps to a Healthy Divorce: A More Supportive Legal Approach to Post-Divorce High-Conflict Relationships*, 6 WHITTIER J. CHILD & FAM. ADVOC. 147, 159 (2006) ("[A]lmost one-third of divorced families still remain hostile in child-rearing conflicts three to five years after separation." (citing Hildy Mauzerall et al., *Protecting the Children of High Conflict Divorce: An Analysis of the Idaho Bench/Bar Committee to Protect Children of High-Conflict Divorce's Report to the Idaho Supreme Court*, 33 IDAHO L. REV. 291, 310 (1997))).

48. *See* Kenneth S. Mitchell-Phillips Sr., *Five Steps to a Healthy Divorce: A More Supportive*

affected by the conflict, but the greatest casualties are the children involved.[51] These harmful effects can lead to "major social, economic,

Legal Approach to Post-Divorce High-Conflict Relationships, 6 WHITTIER J. CHILD & FAM. ADVOC. 147, 159 (2006) (emphasizing that almost one-third of families going through a divorce will continue to experience hostility for several years after the initial separation); *cf.* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 197 (2008) ("[P]aternity, parenting time, and child support . . . determinations have prolonged consequences for the parties when children are involved and the court orders some type of continuing relationship between the parties."); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 25 (declaring that couples involved in high-conflict divorces may be more invested in prolonging litigation than resolving it).

49. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 968 (2007) (establishing that "a client's emotions and attitudes are central to problem solving and planning"); Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 565 (2000) (finding that high-conflict divorce is a major source of "legal and interpersonal woe" for the parties involved); *see also* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 197 (2008) ("[R]epresentation can be especially beneficial since an attorney is more removed from the emotions and hurt feelings experienced by the parties."); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 25 ("[P]arents who are involved in intensely conflicted divorces are . . . at [an] elevated risk for development of psychological difficulties and substance abuse.").

50. *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, 395 (2000) ("The judiciary's role in divorce related child custody disputes has been transformed in the latter half of the twentieth century in response to the changing characteristics of American families, changing perceptions of the needs of children, and an overwhelming case load increase."); *see also* Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 25 ("[H]igh-conflict divorces place considerable strain on the family courts and pose significant management challenges to the attorneys who represent the parties.").

51. *See* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J., Fall 2003, at 11, 13 ("Interparental conflict leads to children's increased distress, anger, and aggression."); Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 969 (2007) ("The persons most affected by the dispute are least likely to have a right to be directly involved as parties (consider children in divorce actions . . .)."); *see also* Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 57 (2010) ("The effects of chronic conflict on children of either gender also subject the child to 'a feeling of chronic stress, insecurity, and agitation; shame, self-blame, and guilt; a chronic sense of helplessness; fears for their own physical safety; a sense of rejection, neglect, unresponsiveness, and lack of interest in the child's well[-]being.'" (quoting Elizabeth Ellis, *What Have We Learned from 30 Years of Research on Familes in Divorce Conflict?*, FAMILY LAW WEB GUIDE, http://www.familylawwebguide.com.au/library/spca/docs/Families%20in%20Divorce%20Conflict.pdf (last visited Apr. 20, 2012))); Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 567 (2000) ("Children of high-conflict divorce may lose a parental relationship entirely and may spend substantial periods of time without adult supervision, which increases the risk of delinquency, school failure, teenage pregnancy, violence, and substance use."); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 25 (referring to the detrimental

and public health problem[s]."[52] This is a reality that remains unnoticed by the public.[53]

With these unique challenges, providing full representation in domestic-relations matters is no easy task.[54] However, competent full representation by an experienced attorney should, and often does, lead to resolution without extensive court involvement.[55] Some matters, however, involve ongoing judicial intervention. Although 95% of all divorce cases eventually settle, it is often the remaining 5% that do not settle that drives the system.[56] Whenever ongoing litigation is involved,

consequences high-conflict divorce has on children, and that research indicates divorce has negative social, emotional, and academic effects).

52. Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 565 (2000); *see* Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 57 (2010) ("Children of divorce have 'a tendency toward lower rates of education, early marriage, living together before marriage, and a group of behaviors which can be described as: lower commitment to marriage, infidelity, problems with anger management, feelings of insecurity, neediness, demandingness, denial and blame, contempt, and poor conflict resolution skills.'" (quoting Elizabeth Ellis, *What Have We Learned from 30 Years of Research on Familes in Divorce Conflict?*, FAMILY LAW WEB GUIDE, http://www.familylawwebguide.com.au/library/spca/docs/Families%20in%20Divorce%20Conflict.pdf (last visited Apr. 20, 2012))).

53. *See* Elizabeth Barker Brandt, *The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases*, 22 U. ARK. LITTLE ROCK L. REV. 357, 364 (2000) ("[F]amily law tends to be a low-status specialty in which the additional training necessary to be effective is rarely undertaken."); *see also* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 974 (2007) (clarifying that evidence exists to support a contention that the legal profession cares little about improving the field of family law).

54. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 966–67 (2007) (illustrating the unique nature of family law, its origin in the ecclesiastical courts, and its procedural and substantive differences—i.e., the laws of property, contracts, and torts are applied differently when families are involved); Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. FAM. STUD. 1, 3 (2003) (proposing the notion that family law has a unique involvement with other aspects of the law); *see also* Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 n.2 (1994) (expressing the varied issues that affect a client and their ability to move on after divorce).

55. *See* Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 293–94 (2008) (indicating that "veteran family law practitioners[']" efforts to avoid the "growing contentiousness and incivility" in litigating family law matters led to a "quest for a more humane alternative" to litigation and ways to resolve matters outside of court (citations omitted)); *see also* Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 490 (2009) (indicating that more than 95% of divorce cases settle). *But cf.* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 66 (2010) (stating that the results of a particular study of tax cases indicated that "[t]he presence of an attorney was not associated with better outcomes in settled cases").

56. Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 490 (2009).

the case is likely to involve complex legal and emotional issues that can best be addressed by an experienced family law attorney.[57] With the cost of legal representation increasing, unbundled legal services were viewed as a possible alternative.

III. UNBUNDLED LEGAL SERVICES

A. *Definition*

The concept of "unbundled legal services" can best be understood by examining what tasks are typically included in the "full bundle" of tradition legal representation.[58] In any attorney–client relationship, the client retains assistance of counsel to obtain a goal.[59] While the client maintains primary control over determining the goals of the representation, the attorney is responsible, after consultation with the client, for planning and accomplishing the means to obtain the goals.[60]

57. *See* Brief for American Bar Ass'n as Amici Curiae Supporting Petitioner at 9–10, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 118266 (showing that a claimant's chances of success are directly related to counsel's knowledge and ability to present the applicable claims and defenses (citing Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 413–14, tbl. 18 (1995))); *see also* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 40 (2010) (noting "the importance of having not just any advocate, but of having a skilled advocate with knowledge and expertise relevant to the proceeding"); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 197 (2008) ("In matters such as [paternity and child support], representation can be especially beneficial."). *But see* Laura Cooper, *Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised Is a Question of Law?*, 64 MINN. L. REV. 1107, 1170 (1980) (stating that some litigants "represented by attorneys generally did not do any better than recipients without attorneys").

58. *See* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1108 (2002) ("A client might hire a lawyer for trial representation, but not for court filings, discovery, and negotiations. Unbundled services can take many forms, including telephone, Internet, or in-person advice; assisting clients in negotiations and litigation; assistance with discovery; or limited court appearances."); *see also* Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422–23 (1994) (illustrating an additional definition of unbundling); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 202–03 (2008) (indicating what actions a lawyer may take as unbundled services).

59. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."); *see also* Eli Wald, *The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2057 (2010) (contending that agency is the relationship between an attorney and the client, and the lawyer serves the client's interests, but does so within the scope of the law and the duties owed to the public).

60. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002); *see* Eli Wald, *The Great Recession*

During the initial consultation, the attorney uses fact-gathering and communication skills to define goals and objectives, assesses their reasonableness, and determines whether there is a factual and legal basis for the objective.[61] During the representation, the attorney is legally and ethically responsible to plan all means and carry out all tasks necessary to achieve the goal.[62] The tasks typically include: "(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court."[63] Representing clients in litigation involves the obligation to zealously assert efforts to obtain the desired goal.[64] It is the attorney's duty to continue to assess the likelihood of obtaining the goal and to devise new or alternative means and tasks for doing so.[65] The attorney must also keep the client informed of the continued viability or reasonableness of the objective while the matter is pending.[66]

and the Legal Profession, 78 FORDHAM L. REV. 2051, 2057 (2010) (affirming the relationship between attorney and client and the lawyer's duty to that client); *see also* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 21 ("The conventional statement of the duty of loyalty requires that, if the client so demands, the lawyer pursue the representation to the 'bounds of the law.'" (quoting MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1981))).

61. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4, cmt. 5 (2002) ("The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."); *see also id.* R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .").

62. *See id.* pmbl. para. 2 ("As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others."); Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994) (noting that the means and plans for the attorney's services may vary from the amount of information conveyed, the difficulty of the job, the financial limitations of the client, and the client themselves); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 4 (2002) ("[A] lawyer should carry through to conclusion all matters undertaken for a client.").

63. Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994).

64. MODEL RULES OF PROF'L CONDUCT pmbl. para. 9 (2002).

65. *Id.* pmbl. para. 2, R. 1.4; *see also id.* R. 1.3 cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition . . . and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

66. *Id.* R. 1.4(a); *see* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422–23 (1994) (listing the typical services an attorney provides when fully

All of these separate tasks are "sticks" that together make up the "bundle" of services typically expected, required, and performed in full representation.[67] Unbundling occurs when the sticks are separated and each stick, or task, is seen as a separate service that can be offered to clients.[68] The client is able to choose one or more tasks that will involve legal representation and can choose to pay only for legal services related to those specific tasks.[69]

Unbundling can be either horizontal or vertical.[70] Horizontal unbundling includes limiting the representation to tasks necessary to accomplish one objective in the pending matter, such as obtaining child support.[71] Vertical unbundling occurs when the attorney is retained to perform only one or more tasks from the bundle, such as offering advice or drafting a pleading.[72] Within each task, the client can also limit the "depth or extent" of the attorney's involvement. "For example, a client may want representation at trial, but may want to handle court filings, discovery, and negotiations without the lawyer."[73] The client may also retain one lawyer for one task and a different lawyer for another.[74]

representing a family law client); *cf.* Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 573 (2007) (recognizing that a reasonableness standard also applies to a lawyer's limited representation of a client (citing MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002))).

67. *See* Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994) (stating that unbundling the "sticks" will allow the client to select which services the client wants, without receiving full service).

68. *See id.* (citing examples of services a client may wish to separate from the "bundle" and handle without assistance from counsel).

69. *See id.* at 507 (noting that lawyers will now be able to offer their expertise to those who might otherwise go unrepresented at a fraction of the cost it would take for a full-service package). With unbundled legal services, a client can contract with the attorney regarding what services the client wants to attorney to perform. *Id.* at 423; *see also* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 303 n.1 (2005) ("By 'unbundling' legal services, litigants can 'pay for and receive advice or discrete services for the separate phases of litigation,' allowing pro se litigants to avoid assuming the financial burden of full representation." (quoting BOS. BAR ASS'N REPORT OF THE BBA TASK FORCE ON UNREPRESENTED LITIGANTS 61 (1998))).

70. Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 506 (2009).

71. *See id.* (noting that horizontal unbundling involves a single issue).

72. *See id.* (asserting that, at any time, a lawyer may convert to full representation from an unbundled attorney).

73. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994).

74. *See id.* ("[A] client may seek the advice and support of a family lawyer in negotiating a settlement, but may choose to . . . retain another attorney for actual court representation.").

Offering unbundled legal services is nothing new in nonlitigation matters.[75] Corporate clients often use limited representation to divide tasks between in-house counsel and private counsel.[76] Transactional attorneys are frequently retained to identify a legal problem but not to do the work to resolve the problem.[77] Other forms of limited representation routinely provided include giving a second opinion,[78] drafting a contract after the parties agree to the terms,[79] and reviewing a purchase and sale agreement.[80]

Unbundled legal services in matters involving litigation, however, were not traditionally offered.[81] If the needs of the client require an ability to

75. *See* Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5, 6 ("In transactional matters, it is not unusual for the client to decide whether to act, whether a professional is required, and, if so, what type of professional should be retained."); *see also* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 425 (1994) (explaining that with the availability of legal clinics in the 1970s, unbundling became a more widespread phenomenon). *But see* STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 6 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf ("Until recently, neither the court system nor the legal profession has been fully prepared to embrace a model in which lawyers provide some, but not all, of the services of value to a litigant.").

76. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 5–6 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (expressing that corporate clients will retain "outside specialists, such as tax, real estate, or corporate finance lawyers, to provide specific advice on specific questions").

77. Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5, 6; *see* Jeffrey P. Justman, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 MINN. L. REV. 1246, 1250 (2008) ("For many years limited[-]scope representation remained largely a transactional phenomenon."); *cf.* Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 654 (2006) ("The concept [of unbundled legal services] is far less established and common in the litigation context.").

78. Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 507 (2009).

79. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 5 (2003) (explaining that a lawyer's only responsibilty may be to draft a document detailing the agreement negotiated between the parties) (citing Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998), *available at* http://www.cobar.org/index.cfm/ID/386/subID/1822/CETH/Ethics-Opinion-101:-Unbundled-Legal-Services,-01/17/98;-Addendum-Issued-2006/)).

80. *Id.* at 29.

81. *See* Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5, 6 ("[I]n litigation matters, lawyers historically have provided full[-]service representation because of the complexity of the procedural rules, as well as the rules of evidence, at trial."); *see also* Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 654 (2006) (espousing that limited-scope representation has not been widely used in litigation). "Two major barriers currently exist which limit lawyer availability for unbundled legal

navigate and comply with the complex procedural and evidentiary rules, full representation is justified, if not required.[82] Strict regulation of attorney conduct and responsibilities in litigation has also discouraged, if not prohibited, limiting attorney involvement in cases pending in court.[83] To date, federal courts are still reluctant to accept the concept of limited representation in litigation.[84]

B. *The Traditional Use of Unbundled Legal Services in Domestic-Relations Cases: Support for Mediation, Collaboration, and Negotiation*

Using limited representation in domestic-relations matters to provide a means for resolving cases without litigation is also not a new concept.[85] Domestic-relations attorneys often contract with clients to limit the scope of their services to assistance in mediation or collaboration,[86] specifically

services to [pro se] litigants: malpractice exposure and pejorative attitudes of lawyers, court-staffs, and judges toward [pro se] litigants." Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 430 (2009).

82. Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5, 6.

83. *See* STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf (suggesting a change in procedure to ease concerns attorneys have with regard to pro se litigants); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2002) ("The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client."); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 430–31 (2009) (discussing *Nichols v. Keller*, a California case, where an attorney was found liable for malpractice for not advising the client about an ancillary claim, even though the attorney had established a limited representation relationship with the client (citing Nichols v. Keller, 19 Cal. Rptr. 2d 601, 610 (Ct. App. 1995))).

84. *See* John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15–16. ("[J]udges, both state and federal, are compelled to act when procedural errors threaten to impinge on substantive rights, whether committed by seasoned counsel . . . or [pro se] litigants. With the latter category, the procedural errors threaten substantive rights with unremitting regularity.").

85. *See* Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, 29 COLO. LAW., Jan. 2000, at 5, 6 (noting the unbundling of legal services has been around a long time in order to increase access to legal services by the public); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 425 (2009) (recognizing that an increased demand for limited representation began in the 1970s for the general public, and with that family law cases as well).

86. *See* Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 276 (2011) (remarking that attorneys had become disillusioned with how acrimonious divorce law had become, and developed a new method which incorporated interest-based negotiation tactics into traditional litigation, referring to the practice as "collaborative divorce"); *see also* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 27–29 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (explaining the procedure involved in collaborative lawyering); Dori Cohen, Note, *Making Alternative Dispute Resolution (ADR)*

excluding attorney involvement in court proceedings.[87] It is a common practice among family law attorneys to review a final agreement reached between the parties in mediation before submission for court approval.[88] This task is usually done with the understanding that the goal is to make sure the client understands the agreement and not to second-guess the work done in mediation.[89]

The use of unbundled legal services has been encouraged by the legal profession and the courts.[90] In one of the few decisions addressing the use of unbundled legal services in domestic-relations matters, a New Jersey appellate court provided peace of mind to attorneys providing review of mediated agreements.[91] In *Lerner v. Laufer*,[92] the husband and wife, after working with a mediator during several sessions, reached an agreement that

Less Alternative: The Need for ADR As Both a Mandatory Continuing Legal Education Requirement and a Bar Exam Topic, 44 FAM. CT. REV. 640, 641–44 (2006) (discussing the increase in mediation and collaborative law procedures in the context of family law); Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 574 (2007) (providing that, so long as the clients have a good understanding of the procedures involved, it may be reasonable to serve merely in an assistant capacity for the purposes of mediation).

87. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 27 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf ("The parties and lawyers agree that if either party pursues litigation, both lawyers will be disqualified."); Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1116–17 (2002) (describing the practice of ghostwriting as a controversial method whereby the attorney drafts the court documents but has contracted with their client to not appear on the client's behalf (citing Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business As Usual or the End of the Profession As We Know It?*, 84 MINN. L. REV. 1315, 1334–35 (2000); John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2689 (1999))).

88. *See* Lerner v. Laufer, 819 A.2d 471, 473–74 (N.J. Super. Ct. App. Div. 2003) (stating that the scope of this representation is limited to making sure the client understands the agreement and not to undo what was done); MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 25 (2003) ("[T]he client often asks the lawyer to review a proposed, but not yet final agreement.").

89. *See Lerner*, 819 A.2d at 483 (holding that "it is not a breach of the standard of care for an attorney under a signed precisely drafted consent agreement to limit the scope of representation to not perform such services in the course of representing a matrimonial client that he or she might otherwise perform absent such a consent").

90. *See id.* at 482–83 (remarking that voluntary settlements are expressly encouraged by the courts (citing Harrington v. Harrington, 656 A.2d 456 (N.J. Super. Ct. App. Div. 1995); Pascarella v. Bruck, 462 A.2d 186 (N.J. Super. Ct. App. Div. 1983))). *See generally* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421 (1994) (endorsing limited representation in the context of family law cases).

91. *See Lerner*, 819 A.2d at 483 (holding that it is not improper to limit services in a domestic-relations case).

92. Lerner v. Laufer, 819 A.2d 471 (N.J. Super. Ct. App. Div. 2003).

included provisions for the distribution of marital property.[93] The agreement provided that the husband would be awarded the interest in a business that was part of the marital estate.[94]

The wife retained an attorney for the limited purpose of reviewing the agreement and obtaining a divorce judgment incorporating the agreement.[95] The attorney drafted a letter of representation expressly limiting the scope of the representation to these tasks and expressly excluding the attorney's obligation to perform other tasks typically involved in full representation, such as conducting discovery, reviewing discovery responses, obtaining appraisals of the assets, and reviewing information regarding the family finances.[96] The letter specifically stated that the attorney was in no position to make recommendations or determinations as to whether the agreement was fair and reasonable. The wife signed the letter.[97]

At an uncontested hearing on the divorce, the wife testified in the colloquy that she reached the agreement as a result of mediation, signed the letter limiting the scope of the representation, relied on representations made by her husband and the mediator, understood her attorney's limited role, and was satisfied with her attorney's services.[98] Shortly after the divorce, the wife learned that the business the husband was awarded was proceeding to an initial public offering that would substantially increase the value of the assets awarded to the husband in the divorce.[99] The wife moved to set aside the judgment and filed complaints against the mediator and the attorney.[100] In the malpractice claim against her attorney, the wife alleged the attorney was negligent by failing to conduct discovery, obtain experts, and evaluate and determine appropriate support and property distribution amounts.[101] Over one year later, and after extensive discovery, depositions, and the involvement of an expert, the trial court

93. *Id.* at 473.

94. *See id.* at 476 (noting that the parties acknowledged a public offering of the business had been contemplated, and that the value of the stock could increase significantly in the event of an initial public offering).

95. *See id.* at 473–74 (detailing the contents of a letter between the wife and the attorney that explained the nature of their attorney–client relationship).

96. *Id.*

97. *Id.* at 474.

98. *Id.* at 474–75.

99. *Id.* at 476.

100. *See id.* (claiming that representations had been made during the mediation regarding a decision not to take the company public).

101. *See id.* at 476–77 (alleging that the attorney was also negligent in negotiating and preparing the agreement).

granted summary judgment for the attorney.[102]

Explicitly limiting the holding to the facts of the case,[103] the appeals court affirmed the summary judgment and stated that it was not a breach of an attorney's standard of care "to limit the scope of representation" in a "precisely drafted consent agreement" and to exclude the performance of services usually provided to a client in a divorce action.[104] Recognizing the clash of values inherent in limited- and full-scope representation, the court emphasized the need to encourage the resolution of disputes through mediation where the clients maintain more control over the matter.[105]

Although this case is often used to calm attorneys' fears of malpractice or ethical claims when limiting the scope of representation,[106] the case also provides important words of caution:

> We necessarily confine our ruling to the facts of this case. No genuine issues of material fact raised a dispute relating to [the wife's] competence, her general knowledge of the family's financial and personal affairs, or the voluntariness of her actions in submitting to mediation, in approving the mediator, or in seeking the approval of the [Property Settlement Agreement] by the court. [The wife] expressly denied that she had been subjected to any domestic violence. There is no contention that any term of the [Property Settlement Agreement] violated any law, any expression of public policy endemic to family disputes generally, failed to protect the best interests of the children, or fostered non[]disclosure of the family's affairs to appropriate taxing authorities.[107]

This case and the scant number of other opinions regarding the use of

102. *Id.* at 480.

103. *Id.* at 484.

104. *Id.* at 483.

105. *See id.* at 482 (recognizing that limited representation supported the use of mediation in court-sponsored programs and acknowledging deference judges give to mediated agreements when incorporating them into judgments). The courts, in approving a mediated agreement, do not judge their fairness but only that the parties voluntarily entered into the judgment and that the parties themselves believe the agreement to be fair and reasonable. *Id.* at 483; *see also* Gould v. Gould, 523 S.E.2d 106, 109 (Ga. Ct. App. 1999) (opining that mediation is better suited to resolve family law disputes than the court system); Hendershott v. Westphal, 253 P.3d 806, 811 (Mont. 2011) (discussing the success of mediation in creating parenting plans, and informing that a particular statute was passed to encourage mediation in family law issues); Cayan v. Cayan, 38 S.W.3d 161, 166 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (discussing the public policy desires for mediated agreements to be enforceable, the purposes of the statute to encourage settlement agreements, and the unfavorable alternatives that would be faced if mediated agreements were not generally enforced).

106. *See Lerner*, 819 A.2d at 483 (holding that the limited representation in this case was allowable under the state's counterpart to Model Rule of Professional Conduct 1.2 (c)).

107. *Id.* at 484.

unbundled legal services provide no peace of mind to attorneys using unbundled services in contested cases involving litigation.[108]

C. *The Trend Toward Use in Contested Domestic-Relations Matters Involving Litigation*

While providing unbundled legal services in mediation, collaboration, or negotiation of domestic-relations matters was nothing new to the family law attorney, the continued increase in pro se litigants[109] in family courts across the country sparked an interest in using limited legal services in pending contested matters. The reasons for the "pro se phenomenon"[110] in family courts are mainly financial, but they also relate to emotional and societal factors.[111] Studies show the percentage of pro se litigants is the highest in domestic-relations matters.[112]

108. *See id.* (holding that the attorney acted properly in the limited scope of representation of the client, but confining the ruling to the facts of the case); *see also In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 373 (3d Cir. 2007) (acknowledging that clients and attorneys may "limit the scope of" representation, and that furthermore, no requirement exists to construe "the scope of a joint representation more broadly than the parties to it intend."); Fitzgerald v. Linnus, 765 A.2d 251, 259 (N. J. Super. Ct. App. Div. 2001) ("The role of an attorney can be circumscribed by the terms of his or her engagement by the client."); Young v. Bridwell, 437 P.2d 686, 690 (Utah 1968) (showing that where no agreement had been reached regarding representing the client on appeal, the attorney was under no obligation to do so).

109. Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 194 (2008); *see* Chief War Eagle Family Ass'n & Treaty of 1837 & 1917 Reinstatement v. United States, 81 Fed. Cl. 234, 234–35 (2007) (exhibiting the difficulty in addressing the claims of a pro se party where the party's actions would constitute an unauthorized practice of law); *In re* Family Law Rules of Procedure, 663 So. 2d 1049, 1053 (Fla. 1995) (acknowledging the large number of pro se family law litigants and the need to simplify the rules surrounding pro se proceedings). *See generally* Miles v. Bellfontaine Habilitation Ctr., 481 F.3d 1106 (8th Cir. 2007) (per curiam) (highlighting the difficulties that pro se litigants face in trying actions on their own). A pro se litigant is "[o]ne who represents oneself in a court proceeding without the assistance of a lawyer." BLACK'S LAW DICTIONARY 1341 (9th ed. 2009).

110. *See* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 374 (2005) (defining the rise in pro se litigants as "the pro se phenomenon").

111. *See* Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1016 n.188 (2007) ("[T]he increase in pro se litigation can be attributed to a variety of financial, societal, and psychological factors."); *see also* Howard M. Rubin, *The Civil* Pro Se *Litigant v. the Legal System*, 20 LOY. U. CHI. L.J. 999, 999 (1989) (indicating that people in rural areas may be forced to go it alone due to a lack of legal aid in these areas); Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378–79 (2005) (listing a variety of reasons, other than economic, as to why people proceed pro se, including "an anti-lawyer sentiment" and "a mistrust of the legal system" (citations omitted)).

112. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 441 (2009) ("Based on data from the early [1990s], it has been determined that [67%] of domestic-relations court litigants on one side or the other proceeded without counsel in California. In Maricopa County, Arizona, a pro se litigant appeared in [88%] of divorce cases in 1990."); Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12

The increase in pro se litigants raised serious concerns in family courts; administrators and judges were challenged by large numbers of unrepresented litigants who were inexperienced with court rules and procedures.[113] The litigants, who decided to seek justice alone, faced a system that requires knowledge of intricate procedural and evidentiary rules they are seldom able to understand.[114] The family law attorneys were concerned about the possibility of lost revenue if potential clients decided to go it alone.[115] The ABA responded with suggestions for

J.L. & FAM. STUD. 57, 58 (2010) ("[M]any divorce cases involve at least one [pro se] litigant." (citing STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, RESPONDING TO THE NEEDS OF THE SELF-DIVORCE LITIGANT 6–8 (1994))); Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L.373, 376 (2005) ("The number of unrepresented litigants in [domestic-relations] cases has surged nationwide, especially in family law cases.").

113. *See* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L 373, 384 (2005) ("[Pro se litigants] are believed to be unduly burdensome on judges, clerks, and court processes; many pro se litigants require additional time at the clerk's office and in the courtroom because they do not understand the procedures or the limitations of the court."); *see also Chief War Eagle*, 81 Fed. Cl. at 234–35 (showing the difficulty of the courts in fairly treating pro se litigants and maintaining legal structure); *In re Family Law Rules of Procedure*, 663 So. 2d at 1053 (looking to the Family Court Steering Committee to create rules more conducive to the large numbers of pro se litigants found in family courts). *See generally* Miles v. Bellfontaine Habilitation Ctr., 481 F.3d 1106 (8th Cir. 2007) (showing the ability of pro se litigants to occasionally meet the procedural demands of the law, but conveying the difficulty that pro se litigants encounter in the complex court system); Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 993 (2007) ("[T]he self-represented 'are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim.'" (quoting Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 114 (2002))). Although many courts see pro se litigants as a drain on resources, this is not always the case; often "[p]ro se litigants are less likely than attorneys to request continuances, and are less likely to have hearings or trials," which means that cases are resolved more quickly. Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 196–97 (2008).

114. *See* Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5, 6 (discussing how attorneys' have handled the full scope of litigation because of the complexities of the court system); *see also* Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (showing the complexities of the court system and holding that the court below incorrectly held pro se litigant to an unfairly high standard); Boykin v. KeyCorp, 521 F.3d 202, 214 (2d Cir. 2008) (acknowledging that a pro se litigant should not be held to the standards of a licensed attorney); Brown v. District of Columbia, 514 F.3d 1279, 1283 (D.C. Cir. 2008) (opining that a pro se litigant should be treated less strictly than an attorney); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005) ("Many pro se litigants require additional time at the clerk's office and in the courtroom because they do not understand the procedures or the limitations of the court."); John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 16 (stating that the worst problem for courts in dealing with pro se litigants is their "lack of competence in understanding and using the rules of evidence").

115. *See* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 314 (2005)

encouraging the use of limited representation in contested family law cases[116] and, following the lead of several jurisdictions, suggested changes in ethical and procedural rules to alleviate the concerns of attorneys willing to provide some services to pro se litigants.[117]

D. *Pro Se Litigants in Domestic-Relations Matters*

The pro se phenomenon had the harshest effect on courts hearing family law matters.[118] Pro se litigants hail from a variety of backgrounds, "ranging from indigent to upper class and from high school dropouts to the most educated members of society."[119] A 1994 study found that the percentage of households that had domestic-relations issues was very similar among lower and moderate incomes.[120] In some states, as many as

("The more litigants that represent themselves—with the help of sympathetic judges and self-service centers—the fewer paying clients are available to attorneys."); *see also* Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 294 (2008) (discussing the action of divorce litigants to avoid legal fees by proceeding pro se). *But see* Forrest S. Mosten, *Lawyer As Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 507 (2009) (theorizing that once clients proceed pro se on legal matters and experience frustration, they will "be more willing to pay" attorneys requested retainers and fees).

116. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf.

117. *See id.* at 8 (discussing that lawyers already provide limited services in some instances, and that rules should be passed to both regulate and encourage limited representation for clients unable to afford full-scope legal representation).

118. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440–41 (2009) (indicating that the percentage of pro se litigants is highest in domestic cases and that this percentage has quadrupled over the past ten years); *see also* CONSORTIUM ON LEGAL SERVS. & THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 19 (1994), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf (the percentage of low-income individuals seeking "formal" action, meaning civil justice proceedings, is highest in family and domestic matters). The increase in people seeking court assistance to resolve family conflicts is "out of proportion to increases in the population." Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodations in Litigation*, 54 AM. U. L. REV. 1537, 1542 n.28 (2005) (citing Raul V. Esquivel, III, *The Ability of the Indigent to Access the Legal Process in Family Law Matters*, 1 LOY. J. PUB. INT. L. 79, 80–81 (2000)).

119. Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases,* 21 J. AM. ACAD. MATRIM. LAW. 193, 194 (2008); *see* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 979 (2009) ("[I]ndividuals of ordinary means often cannot effectively access the legal system because they cannot afford to hire private counsel but make too much money to qualify for assistance from legal service organizations."); Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 445 (2009) (noting that one study revealed "that [70%] of pro se litigants in the Northern District of California sample did not seek to proceed *in forma pauperis*").

120. *See* CONSURTIUM ON LEGAL SERVS. AND THE PUB., AM. BAR ASS'N LEGAL NEEDS AND

80% of cases in family court involve at least one unrepresented party.[121] The combination of increased family law issues and legal fees, along with decreased financial resources and funding for free or low-cost legal aid created a perfect storm of needy, unrepresented litigants seeking justice on their own.[122]

1. Reasons for the Increase of Unrepresented Litigants in Family Courts

The rise in unrepresented parties in domestic-relations matters was sparked by an increase in divorce rates beginning in the 1970s.[123] This increase in divorce can be tied to several factors, including the availability of no-fault divorce, increased mobility, and more women in the work

CIVIL JUSTICE: A SURVEY OF AMERICANS 14 tbl. 1 (1994) (indicating that in 1992, 6% of moderate-income households had domestic-relation legal needs while 8% of low-income households needed similar legal services).

121. *See* Judith L. Kreeger, *To Bundle or Unbundle? That Is the Question*, 40 FAM. CT. REV. 87, 87 (2002) (noting that in Florida, "by the time of final hearing, more than [80%] [of litigants] represent themselves"). In some jurisdictions, the percentage of family law cases involving at least one pro se litigant can exceed 90%. Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376 n.24 (2005). In California, 75% of family law cases involve at least one pro se litigant. ELKINS FAMILY LAW TASK FORCE, JUDICIAL COUNCIL OF CAL., FINAL REPORT AND RECOMMENDATIONS 10 (2010), *available at* http://www.courts.ca.gov/documents/elkins-final report.pdf.

122. *See* CONSURTIUM ON LEGAL SERVS. AND THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 19 (1994) (discussing the high need of low-income individuals taking part in domestic civil actions); Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440–41 (2009) (showing the growing occurrence of pro se litigation in family courts due to the inability to afford legal fees); Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 382 (2005) (indicating that the amount of pro bono work by attorneys has made little impact on "reliev[ing] the need for legal services"); Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 563 (2007) ("Budgetary and subject-matter restrictions on the Legal Services Corporation[], along with cutbacks in social services and benefits, have substantially affected the availability of free or affordable legal assistance for the nation's poor." (citations omitted)); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 194 (2008) (explaining that members from every class of society are requiring legal assistance with domestic cases in increasing numbers).

123. *See* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 63 (2010) (discussing the increasing availability of the no-fault divorce, which led to increasing divorce rates and eventually larger numbers of pro se divorce litigants); *see also Divorce Rate*, DIVORCERATE.ORG, http://www.divorcerate.org (last visited Feb. 9, 2012) (noting that divorce has been on the rise since the 1970s). *But see Divorce Rate*, DIVORCE.COM, http://www.divorce.com/article/divorce-rate (last visited Feb. 9, 2012) (stating that, while the divorce rate has been rising since 1970, studies show that the rate actually appears to be decreasing).

force.[124] Many of these new litigants opt to represent themselves pro se for three main, and at times, interconnected reasons: finances;[125] the desire to retain control over the process;[126] and the availability of self-help resources.[127]

The first and most often cited reason for the increase in unrepresented litigants is financial need. Many litigants simply cannot afford an attorney.[128] It is not just the poor, however, who are unable to obtain

124. Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 62–63 (2010); *see* Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 166 (2002) (arguing that the push towards more divorce and more instances of mediation has been driven by the passing of no-fault divorce laws). *But see* Lisa Milot, Note, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701, 706 (2001) ("One text reports succinctly that divorce rates 'dramatically accelerated upward' in the 1960s and 1970s while most of the shift to no-fault divorce laws occurred in the early 1970s and 1980s, '*after* the largest increases in divorce rates had already occurred.'" (emphasis added) (quoting IRA MARKELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 221 (3d ed. 1998))).

125. *See* CONSORTIUM ON LEGAL SERVS. & THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 19 (1994) (discussing low-income individuals' presence in the pro se court process); Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 443 (2009) (pointing to high legal fees as a reason for litigants to proceed pro se); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541 (2005) ("'[A]n uncontested divorce that does not go to court will cost around $16,500, whereas a contested divorce that proceeds to trial could cost more than $150,000.'" (quoting Amy C. Henderson, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 UMKC L. REV. 571, 573 (2003)) (internal quotation marks omitted)); *see also* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW 193, 194 (2008) (acknowledging that all classes of society may have difficulty with the fees involved in court proceedings).

126. *See* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases,* 21 J. AM. ACAD. MATRIM. LAW. 193, 195 (2008) (discussing the advent of technological means that support a litigant's desire to maintain greater control over the divorce process); *see also* Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 182 (2002) (showing the desire of litigants and attorneys to maintain control over the divorce process); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 421–22 (1994) (discussing the divorce litigant's desire to maintain control over the divorce process); *cf.* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 379 (2005) (acknowledging that one reason people represent themselves is due to an "increased sense of individualism and belief in one's own abilities").

127. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 18–23 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (recognizing the need for centers, hotlines, and websites as self-help measures for those in need); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 (1994) (discussing the divorce litigant's use of self-help in the divorce process); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases,* 21 J. AM. ACAD. MATRIM. LAW. 193, 195 (2008) (discussing the use of online forms to aid the pro se divorce litigant in the legal process).

128. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541 (2005). It is thought that

legal representation. The middle class, or "individuals of ordinary means,"[129] are also frequently unable to afford legal representation.[130]

The average hourly rate for an attorney is over $295 per hour[131] and continues to increase despite hard economic times.[132] Even if the hourly rate is acceptable, increases in retainer amounts required in advance of any representation can place legal services out of reach for parties with limited liquid assets.[133] The average cost of a divorce has been estimated to be as high as $20,000, with the cost of a contested divorce involving trial being as high as $150,000.[134] The cost of litigation is not limited to attorney's fees and court costs. Litigants suffer additional financial consequences as a result of missing time from work, having to arrange for childcare, and

all pro se litigants "would have an attorney if only they could afford one." *Id.* Courts faced with high numbers of unrepresented parties have been called "poor people's court" with their participation being deemed "coerced." *Id.* at 1541 n. 19 (quoting Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2027 (1999))).

129. Sande L. Buhai, *Access to Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 979 (2009); *see* John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 15 ("[L]awyers continue to increase the gap between cost and value of services. Not only have the poor been left behind . . . [,] they are being joined in alarming numbers by . . . the middle class."). *But see* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L.373, 378 (2005) (noting that in a survey of pro se litigants, "[a]lmost half implied that they had the necessary funds to hire an attorney, but chose not to").

130. *See ALM Legal Intelligence Releases 2011 Survey of Billing and Practices for Small and Midsize Law Firms*, ALM PRESS ROOM (Feb. 10, 2011), http://www.alm.com/pressroom/2011/02/10/alm-legal-intelligence-releases-2011-survey-of-billing-and-practices-for-small-and-midsize-law-firms/ ("Law practices around the country are starting to make the slow climb back from the depths of the recession. The national average hourly billing rate for attorneys rose 4.6[%] . . . in 2010."); *see also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541–42 (2005) ("[M]any issues that require judicial intervention will never be litigated due to . . . costs. When they do litigate, they are involuntarily forced to represent themselves.").

131. *ALM Legal Intelligence Releases 2011 Survey of Billing and Practices for Small and Midsize Law Firms*, ALM PRESS ROOM (Feb. 10, 2011), http://www.alm.com/pressroom/2011/02/10/alm-legal-intelligence-releases-2011-survey-of-billing-and-practices-for-small-and-midsize-law-firms/.

132. *See id.* (showing that, despite the continuance of national economic woes, the average billing rate for attorneys rose in 2010). *Compare id.* (indicating an average hourly billing rate for 2010 is $295), *with* Michael Kao, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. REV. 825, 846 n.144 (2004) (informing that the average hourly rate in 2003 decreased to $240 (citing ALTMAN WEIL, INC., THE 2000 SURVEY OF LAW FIRM ECONOMICS 90 (2000))).

133. *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1542 (2005) (discussing the difficulty of affording an attorney, especially when thousands of dollars in fees must be paid up front as a retainer).

134. *Id.* at 1541; *see also* Leah Hoffman, *To Have and to Hold on to*, FORBES.COM (Nov. 7, 2006), http://www.forbes.com/2006/11/07/divorce-costs-legal-biz-cx_lh_1107legaldivorce.html (finding that the cost of a two day trial can run as much as $25,000).

incurring travel expenses.[135] These costs, coupled with the lack of pro bono assistance,[136] often leave self-representation as the only option.[137]

As the cost and need for legal services increased, the availability of low- or no-cost legal aid decreased.[138] Low- or no-cost legal assistance traditionally comes from the government, bar-sponsored programs, or pro bono services.[139] Traditionally, these services have proven inadequate to meet the needs of those requiring assistance.[140] Drastic reductions in

135. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541 (2005) (citing Raul V. Esquivel, III, *The Ability of the Indigent to Access the Legal Process in Family Law Matters*, 1 LOY. J. PUB. INT. L. 79, 84–85 (2000)).

136. *See id.* at 1545–46 ("It is a national disgrace that civil legal aid programs now reflect less than 1% of the nation's legal expenditures. It is a professional disgrace that pro bono service occupies less than 1% of lawyers' working hours" (quoting Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 62 (2003)) (internal quotation marks omitted)); *see also* Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1042 (2006) (pointing out that one commentator suggests most of the pro bono work "is donated to friends, relatives, or matters designed to help attract paying clients"); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 201 (2008) (suggesting that one role the bar can play in helping pro se litigants is to increase the availability of pro bono work).

137. *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541–42 (2005) (explaining that when issues are necessarily litigated, some litigants must proceed pro se because of the high cost of hiring an attorney). The general public supports the idea of legal representation for the poor, but is not willing to pay for it, so those unable to afford legal representation must often litigate matters themselves. *Id.* at 1544–45.

138. *Id.* at 1542–43; *see* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 9 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf ("The drastic reduction in funding for civil legal services has resulted in significantly fewer attorneys serving low-income individuals and is a significant contributing factor. For those with lower incomes, the impact of escalating costs of litigation can be presumed to encourage self-representation." (quoting CONFERENCE OF STATE COURT ADMINISTRATORS, POSITION PAPER ON SELF-REPRESENTED LITIGATION 1 (Gov't Rel. Office ed. 2000)) (internal quotation marks)); Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1043 (2006) ("[T]hrough regulations and appropriations governing the L[egal] S[ervices] C[orporation], Congress has imposed severe restrictions on access to legal representation for lower-income persons.").

139. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1542–43 (2005); *see* Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1438 (2009) ("Rule 6.1 of the ABA's current Model Rules of Professional Conduct asks that lawyers 'aspire' to provide at least fifty hours of pro bono work each year. . . ." (citing MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002))).

140. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1542–43 (2005); *see* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1107–08 (2002) ("[L]egal services budgets continue to be cut and thousands of potential clients are turned away each year." (citing Mary Helen McNeal,

funding for legal service programs and increased restrictions on the cases and clients that can be served by these programs have left the majority of low income and middle class individuals' legal needs unmet.[141] A 2010 study by The Legal Service Corporation reported a disappointing finding: "Nationally, on average, only one legal aid attorney is available to serve 6,415 low-income individuals."[142] Increases in the number of individuals requiring services from legal aid were particularly high in the domestic-relations area.[143] Likewise, budget cuts in state court funding led to fewer court appointments of counsel in civil cases even when court appointments were allowed.[144] The recent recession has led to a severe decrease in the availability of Interest on Lawyers Trust Account (IOLTA) funds, which have traditionally served as the primary source of funding for legal service programs.[145]

Private attorneys offer little help because they often fail to volunteer their services through pro bono work. As stated by one professor, "the performance of the profession as a whole remains at a shameful level."[146]

Redefining Attorney–Client Roles Unbundling and Moderate Income Elderly Clients, 32 WAKE FOREST L. REV. 295, 297–98 (1997))).

141. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1543 (2005).

> Less than 1% of the nation's legal expenditures go to fund legal aid for the poor. The lack of funding has resulted in four-fifths of the legal needs of the poor and two to three-fifths of the legal needs of the middle class being unmet. The net result is that there is only one lawyer available to serve approximately 9,000 low-income persons, and that, in the mid-1990s, approximately 9.1 million Americans' legal needs were unmet. It has been estimated that it would take three to four billion dollars a year to meet merely the minimal civil legal needs of low-income Americans; ten times the $300 million now being spent.

Id. at 1543–44; *see also* Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 310 (1989) ("[I]n a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills [pro bono publico] is manifest.").

142. ABA MODEL ACCESS ACT § 1B (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

143. *Id.*

144. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1544 (2005).

145. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104: MODEL ACCESS ACT OF 2010, at 4–5 (rev. ed. 2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf; *cf.* Dru Stevenson, *Rethinking IOLTA*, 76 MO. L. REV. 455, 459 (2010) (noting that the economic downturn has caused serious depletion of IOLTA funds).

146. Deborah J. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 59 (2003); *see also* Deborah J. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 54 (2003) ("Legal services can handle less than a

With little or no chance of receiving free or affordable legal assistance, low- and middle-income litigants are forced to either proceed into the legal system on their own or not use the system at all as a means to resolve their legal issues.[147]

Lack of financial resources is not the only reason for the "pro se phenomenon." A 1994 ABA report on the needs of the self-represented divorce litigants found "that 20% of the pro se litigants studied said they could afford a lawyer."[148] However, the desire to maintain control over their own family matter led many to avoid legal representation.[149] A mistrust of lawyers contributed to this desire.[150] Some participants perceived lawyers as predators motivated only by the desire to bill.[151] Additionally, delays in progress or resolution of these important family issues were blamed on the lawyer.[152] Without an understanding of the

fifth of the needs of eligible clients.").

147. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 10 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (analyzing a study that shows only approximately 30% of low-income households with legal issues used the legal system to resolve them); *see also* Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 53 (2003) ("Not only are Americans ambivalent about ensuring legal assistance, they are ill-informed about the assistance that is currently available. Almost four-fifths of Americans incorrectly believe that the poor are now entitled to legal aid in civil cases, and only a third thinks that they would have a very difficult time obtaining assistance. Such perceptions are wildly out of touch with reality." (citation omitted)); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation In Litigation*, 54 AM. U. L. REV. 1537, 1543–44 (2005) (reporting statistics that show that very few low- and middle-income households get their legal needs met).

148. Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 58 n.4 (2010) (explaining that pro se litigants choose self-representation for both financial and non-financial reasons).

149. *See* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 195 (2008) (suggesting that many choose self-representation to avoid complicating simple family matter issues); *cf.* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 383 (2005) (stating that "the desire to handle the problem on their own" has led some people to forego pursuing any court remedy at all).

150. *See* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 379 (2005) (citing "a mistrust of the legal system" as one reason people choose to represent themselves); Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 991 (2007) (identifying a "mistrust of the legal system" and the profession as a reason for many litigants to proceed pro se); *see also* Michael P. Forrest et al., *Updated Lessons in Conducting Basic Legal Research By Pro Se Litigants Who Cannot Afford an Attorney*, 11 SCHOLAR 1, 4 (2008) ("Others choose self-representation for a variety of reasons, such as mistrust of the legal system . . . .").

151. *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1568 (2005) (proposing that judges should be more involved in protecting the pro se litigant against the ever-predatory and malicious attorney).

152. *See* Dori Cohen, Note, *Making Alternative Dispute Resolution (ADR) Less Alternative: The*

detailed procedural and evidentiary rules governing family matters, some clients believed their attorney was making a relatively simple matter more complicated.[153]

For litigants wanting to maintain control of their own case, the increase in self-help resources fueled the perception that attorneys may be unnecessary.[154] An Internet search provides access to the information needed to prepare any case, including "statutory and case law, rules of practice and procedure, legal forms, and 'how-to' guides."[155] Armed with this information, litigants believed they were at least capable of getting before the judge who would then guide them through the process and grant them the justice they deserve.[156]

Whatever the reason, once a decision to proceed pro se is made, the unrealistic perceptions of one's own abilities and the role of the judge hindered the workings of the legal system.[157] The litigants, the courts,

Need for ADR As Both a Mandatory Continuing Legal Education Requirement and a Bar Exam Topic, 44 FAM. CT. REV. 640, 640 (2006) (commenting that family lawyers have generally been seen as aggravating the already adversarial nature of divorce proceedings); *cf.* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 379 (2005) (indicating that some believe that litigation is simple, dispensing with the need to hire an attorney).

153. *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541–46, 1574–76 (2005) (explaining the reasons that prompt litigants to represent themselves).

154. *See id.* (stating that some litigants "belie[ve] that litigation has been simplified to the point the attorneys are not needed"); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 195 (2008) (indicating that some litigants proceed pro se because they "want[] to maintain control of their situation").

155. Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 992 (2007); *see* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 22–23 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (discussing various strategies for using the Internet for assistance to pro se litigants). *But see* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 205–06 (2008) (noting that some online resources may provide incorrect or inaccurate information to potential pro se litigants).

156. *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1566–67 (2005) (proposing that the judge owes a duty to assist pro se litigants in presenting their case).

157. *See* Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 381 (2002) (pointing out that pro se litigants are routinely described as pests and blamed for clogging up the legal system); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005) (suggesting that the increase in self-representation has led to a disruption in the courts' efficiency, has caused delays, and has overburdened judges); *see also* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 445 (2009) (explaining that the American "'Home Depot' do-it-yourself" notion applies even in the legal arena and that, in the Internet era, an amateur can do as well as an expert).

and the attorneys are forced to deal with the challenges pro se presents.

2. Effect on the Courts

As one author explained, pro se litigants are "non-professionals in a professional system."[158] Self-represented litigants challenge not only the court system as a whole, but also present serious concerns for individual judges, clerks, and other court personnel.[159] These challenges remain today and have been exacerbated by the recent financial crisis.[160] Ironically, states faced with serious revenue deficits have had to reduce funding to those courts now flooded with litigants seeking to protect their homes, families, and incomes from the effects of the economic downturn.[161]

Pro se litigants attend scheduled hearings expecting substantial assistance from court personnel and they expect to have their matter heard.[162] Their first encounter is usually with a court clerk.[163] Clerks report that they may spend up to 50% of their time trying to provide assistance to pro se litigants.[164] Clerks are often unable to provide the

158. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449 (2009).

159. *See* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384 (2005) (suggesting that not having legal representation is generally perceived negatively and results in inefficiency); Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 993 (2007) (reiterating the fact that pro se litigants take up more time of judges and clerks due to their lack of understanding of legal customs, becoming burdensome).

160. *See* AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104: MODEL ACCESS ACT OF 2010, at 4 (rev. ed. 2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf (lamenting that due to the recent recession there has been an increase of pro se litigants because of their loss of employment and their inability to afford legal representation).

161. *See id.* (describing the state budget challenges that have led to a decrease in legal aid funds, resulting in an increase of pro se litigants).

162. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 451 (2009) (citing JONA GOLDSCHMIDT ET AL., AM. JUDICATURE SOC'Y, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 53 (1998)); *see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1563–71 (2005) (discussing the ways in which court personnel may be able to assist pro se litigants).

163. *See* Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 994 (2007) (explaining the difficulties faced when clerks are solicited for advice by pro se litigants).

164. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449 (2009) (discussing a poll in which 11% of the clerks that responded reported that more than 50% of their time is devoted to pro se litigants); Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 993 (2007) (noting that pro se litigants are likely to take up an inordinate amount of the clerk's

assistance requested because of the ethical prohibition against the unauthorized practice of law.[165] Hearings typically need to be rescheduled because pro se litigants, who are inexperienced with court proceedings and ignorant of the court procedural rules, are often not adequately prepared.[166] This leads to escalating frustration and affects the litigants' attitudes toward court personnel and their behavior in the courtroom, making it even more difficult for court personnel to function.[167]

Further, pro se litigants cause two competing challenges for judges. Judges are concerned with the efficient management of the docket, but they also must remain impartial.[168] "Pro se litigants are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim."[169] Judicial efficiency is reduced because of the time it takes a

time).

165. *See* Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 994 (2007) (explaining that court clerks "are prohibited from giving 'legal advice'" because the clerks are not attorneys). *But see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1569 (2005) ("At least one proponent argues that prohibitions against the unauthorized practice of law should not apply to clerks . . . , as they would be giving legal advice for free and under the auspices of the court . . . .").

166. Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 993 (2007); *see also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1561 (2005) ("The complex procedure and rules minefield often cause pro se litigants to 'lose on procedural technicalities, not on the merits of their cases.'" (quoting Candice K. Lee, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1264 (2003))).

167. *See* Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 993 (2007) (stressing that due to their unfamiliarity with legal procedures and customs, pro se litigants are sometimes considered burdensome to court personnel); *see also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1558 (2005) ("Judges and court staff, restricted in their ability to assist the pro se litigant, 'find themselves feeling frustrated by the pro se litigant's inability to grasp legal concepts or to comply with the rules of civil procedure.'" (quoting Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 306 (2002))).

168. *See* Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 993–94 (2007) (asserting that pro se litigants' unfamiliarity with the legal system creates a dilemma for judges who are supposed to remain impartial but should offer assistance to those litigants); *see also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005) (expressing a concern that pro se litigants gain an advantage because of their status, requiring and often receiving more assistance from court personnel).

169. Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384 (2005)

judge to explain the issues and proceedings to each pro se litigant in the courtroom.[170] The goal of clearing the docket is delayed and the administrative costs escalate.[171]

Without clear guidance on how to balance the administration of justice when pro se litigants are involved, judges struggle with how much assistance is too much.[172] There are no clear standards governing how judges should deal with pro se litigants.[173] While pro se pleadings are generally not held to the same standard as those filed by attorneys,[174] the

(quoting Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 114 (2002)) (internal quotation marks omitted); *see* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 306 (2005) (noting that pro se litigation often causes delays in the progression of the case); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 195 (2008) (noting that proceedings must be postponed and continuances granted when improper paperwork is filed).

170. *See* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 307–08 (2005) (explaining that judges tend to bend over backwards to ensure pro se litigants understand the proceedings); *see also* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 113 (2001) (recounting that judges must spend a disproportionate amount of time on guiding pro se litigants).

171. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449 (2009); *see* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 113 (2001) ("In high volume courts, and family law courts are among the highest in volume, judges feel tremendous pressures to 'move' cases quickly through the system. Yet their ability to do so may be greatly hampered in cases where one or both of the parties lack counsel.").

172. *See* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 114 (2001) (stating that judges who responded in a survey indicated "they experienced difficulty maintaining impartiality in cases where one, but not both of the parties appeared without counsel"); Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 994 (2007) (discussing that offering too much assistance to pro se litigants could compromise judges' impartiality).

173. Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 995 (2007); *see also* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 114–15 (2001) ("[T]he line between appropriate assistance and the improper giving of legal advice is a very hazy one.").

174. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); *see* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 307 (2005) (explaining that although judges hold lawyers to a strict standard, they are less willing to sanction a pro se litigant); *see also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1567 (2005) ("In reviewing the pleadings [of pro se litigants], proponents argue that judges should ensure that they reflect the pro se litigant's goals, and allow them to modify them if they are legally insufficient.").

standard is unclear once the litigant is before the court.[175] Some judges "bend over backwards" to provide instruction or to protect an unrepresented party, but many judges hold the pro se litigant to the same standards as attorneys.[176] While pro se litigants may expect to receive substantial assistance from the judge, they will rarely receive it,[177] resulting in further confusion and frustration.

3. Effect on Attorneys

Attorneys should view every pro se litigant as a source of income. But this is not the case.[178] Instead, pro se litigants affect attorneys in three ways. First, attorneys view pro se litigants as an unfortunate, but acceptable result of the legal system[179] that offers few income-producing opportunities. Some view them as "pests" or even as voluntarily choosing

175. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 450 (2009) ("[T]hroughout the country, courts deal with unrepresented litigants in an [ad hoc] manner. This has yielded strikingly inconsistent treatment of such parties."); *see also* Howard M. Rubin, *The Civil* Pro Se *Litigant v. The Legal System*, 20 LOY. U. CHI. L.J. 999, 1002 (1989) ("Appellate courts . . . have failed to provide a clear message to the trial judge regarding the proper exercise of this discretion" of the standard to which pro se litigants are to be held); *cf.* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1564 (2005) (explaining that many times judges give pro se litigants no special consideration and treat them as they do lawyers).

176. Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 308 (2005); *see also* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 196 (2008) (explaining that pro se litigants are often frustrated because they are not held to a lower standard than lawyers).

177. Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 995 (2007).

178. *See* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 57 (2010) (characterizing the influx of pro se litigants not as lost potential clients but as undesirable unprofitable business); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005) (expressing a negative view held by many lawyers and judges against pro se litigants). *But see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541 (2005) (noting that many believe that if pro se litigants could afford an attorney, they would hire one).

179. *See* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 57–58 (2010) (pointing out the rationalization of lawyers of the loss of potential clients who decide to represent themselves). *But see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1570 (2005) ("[A]ttorneys . . . resist changes to the traditional adversarial rules and roles because any change that helps pro se litigants prevail more often, damages attorneys financially.").

to proceed on their own in order to gain an advantage in the system.[180] Because they cannot afford an attorney, pro se litigants are assumed to have less income and fewer assets, fostering the conclusion that their family law issues are an appropriate subject for self-help and available free resources.[181]

Secondly, family law attorneys cannot escape these litigants because they often appear on the other side of their case.[182] An attorney opposing a pro se litigant usually needs to explain to his or her client the escalating legal cost caused by the unprepared individual on the other side.[183] Pro se litigants are known for filing superfluous or even frivolous motions and pleadings yet are seldom sanctioned by the court.[184] The represented client is charged for the attorney's response to these motions and any hearings scheduled as a result.[185] Frequently the represented litigant is financially forced out of a represented status to that of a pro se litigant.[186]

180. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005).

181. *See* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 57–58 (2010) (concluding that because pro se litigants have little money, they have less to lose and will opt for a do-it-yourself option).

182. *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541 (2005) (reporting that the largest increase in pro se litigation is in the area of family law); *see also* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 57 (2010) (pointing out that because pro se litigants commonly have no financial resources to hire a lawyer, they will conclude that a self-help divorce is a good idea); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 194 (2008) (noting that between 55% and 80% of the cases in domestic-relations matters have at least one pro se party).

183. *See* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 308 (2005) (explaining that because judges tend to bend over backwards to ensure pro se litigants understand the proceedings, this increases the cost are increased for the represented party, who is paying an hourly rate); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 200 (2008) ("When an attorney is opposing a pro se litigant, the attorney should consider having a conversation with the client about . . . some of the differences that may arise in a dispute with a self-represented opponent, including potential delays that may arise . . . .").

184. Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 306–07 (2005); *see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005) (emphasizing that some pro se litigants clog the legal system with illogical motions and pleadings, and are sometimes more intent on pursuing personal grudges than arguing the case).

185. *See id.* at 307–08 (explaining that costs to a represented party increase when judges spend extra time to ensure a pro se litigant understands the proceedings).

186. *See* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 308 (2005) (stressing that "pro se litigation [only] breeds more pro se litigation" because represented parties are

Thus, the attorney loses another paying client.

Finally, as the number of pro se litigants increases, so do the services that assist the unrepresented.[187] This may further threaten the need for attorneys: "[T]he increasing assistance from judges and self-service centers diminishes the demand for affordable attorneys by helping those that would otherwise employ those attorneys. The availability of all these resources may increase attorneys' concerns about the need for their services at all.[188]

4. Effect on Litigants

Judges and attorneys have been able to clearly articulate the direct effect of the pro se phenomenon, but those most negatively affected, the litigants themselves, may not fully understand the impact of their pro se status.[189] Because of the unique legal and emotional challenges inherent in domestic relations matters, pro se litigants dealing with family matters may be harmed the most. Their ability to obtain a just outcome is threatened "by the difficulties of navigating complex, confusing[,] and often convoluted legal procedures without the assistance of counsel."[190]

A pro se litigant before a family court does not have the right to counsel but is expected to adhere to the same procedural and evidentiary rules as an

encouraged to represent themselves given the extra time courts spend on pro se litigants).

187. *See* STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4–5 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf (detailing the programs courts and states have implemented in response to the increase in pro se litigation); *see also* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 195 (2008) ("[T]he number of litigants who are trying to 'go it alone' instead of seeking traditional legal services has increased dramatically in recent years. These pro se litigants are finding resources from other sources, seeking the advice of the judiciary and court personnel, visiting self-help centers, signing up for prepaid and unbundled legal services, finding local legal assistance services[,] and utilizing the Internet.").

188. *See id.* (describing lawyers' concerns that because of sympathetic judges and self-help centers, the number of pro se litigants are increasing and the attorneys' services might no longer be needed); *see also* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 426 (2009) ("The profession is beginning to recognize its vulnerability in the marketplace as clients are increasingly self-representing, turning to nonlawyer providers, or just living with a recognized legal need."). *But see* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 314 (2005) (asserting that pro se litigation is increasing because of a lack of affordable lawyers).

189. *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548–49 (2005) (acknowledging that although judges and lawyers frequently view the pro se litigant negatively, the effect that being pro se has on the litigant is often overlooked).

190. Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 115 (2001).

attorney.[191] Even when pleading requirements are relaxed for pro se litigants, the litigant enters a system replete with complex pretrial procedural rules.[192] Even if the litigant avoids the "procedure and rules minefields" during pretrial proceedings, the case will most likely not succeed when the litigant is required to follow evidentiary rules during trial.[193] The result is devastating to domestic-relations litigants who may "lose on procedural technicalities, not on the merits of their cases."[194] Such a result undermines confidence in the legal system because pro se

191. *See* Caruth v. Pinkney, 683 F.2d 1044, 1048 (7th Cir. 1982) ("[T]here is no constitutional right to appointed counsel in a civil case."); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1564 (2005) (explaining that many times judges hold pro se litigants to the same standards as lawyers); *see also* Howard M. Rubin, *The Civil* Pro Se *Litigant v. the Legal System*, 20 LOY. U. CHI. L.J. 999, 1001 (1989) ("Illinois courts have long held that persons who choose to represent themselves must comply with the procedures of the court and are not to expect favored treatment by a court." (citing Biggs v. Spader, 103 N.E.2d 104 (Ill. 1952))). *But see* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 308 (2005) (stating that some judges are willing to spend extra time to ensure pro se litigants are not prejudiced, holding them to a lower standard than lawyers).

192. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1560–61 (2005). An illustration of these complexities can be found in a California case, in which a pro se litigant, Mr. Elkins, failed to follow a family law local rule regarding the marking of exhibits prior to his divorce trial. ELKINS FAMILY TASK FORCE, JUDICIAL COUNCIL OF CAL., FINAL REPORT AND RECOMMENDATIONS 9 (2010). The court excluded thirty-four out of thirty-six of his exhibits at trial. *Id.* The result was an order dividing "the marital property substantially in the manner requested by [his] former spouse." *Id.* Mr. Elkins challenged the local rule by filing a writ with the California Supreme Court, which held that the local rule conflicted with the rules governing other civil trials and that marital cases should be consistent with the rules governing other civil matters. *Id.* Acknowledging the increasing number of pro se litigants and the challenges the family courts face with limited resources, the court noted that family law litigants should not be subjected to "'second class status or deprive[d] . . . of access to justice.'" *Id.* (quoting Elkins v. Superior Court, 163 P.3d 160, 177 (Cal. 2007)). The court recommended that the Judicial Council of California establish a task force to ensure the access to justice for pro se litigants in family matters. *Id.* As a result, the Judicial Council adopted the recommendations made by the task force. JUDICIAL COUNCIL OF CAL., NEW STATEWIDE REPORT PROPOSES MAJOR REFORMS FOR FAMILY LAW COURT 1 (2010).

193. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1561 (2005); *see* John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 16 (suggesting that no amount of permissiveness by the judge is sufficient to overcome a lack of knowledge of the rules of evidence); *see also* Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 312 (2005) ("[A] lack of legal knowledge . . . contribute[s] to the tendency of pro se litigants to lose . . . .").

194. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1561 (2005) (quoting Candice K. Lee, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1264 (2003)) (internal quotation marks omitted).

litigants' satisfaction with the legal system is tied to the feeling that they have been treated fairly.[195]

Poor pro se litigants are most likely to reach this disappointing result.[196] It has been stated that the poor are 'more likely to suffer distress and injustice than those better off" and are more likely to need access to the legal system to help them resolve their issues.[197] Although all pro se litigants have difficulty navigating the procedural hurdles, it is the poor who have the most difficulty because they are also more likely to "encounter greater geographical, literacy, cultural, and language barriers" in the legal system.[198] The result is that "those most in need of legal assistance must overcome the greatest obstacles to obtain that assistance."[199]

Most would acknowledge that litigants, courts, and attorneys are better served when parties are represented.[200] Recognizing the need for increased access to justice for low-income litigants, the ABA took action in

195. *See* Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 483 (2010) (detailing a study showing that perceived court legitimacy is determined by perceived procedural fairness); *see also* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 195 (2008) (explaining that pro se litigants are often frustrated because of their inability to find affordable representation and for being held to the same standard as lawyers); *cf.* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 379 (2005) (indicating that some people choose to represent themselves because they believe "the court will do what is right whether the party is represented or not").

196. *See* Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1039 (lamenting that the poor are more likely to suffer injustices so they need the help of the judicial system when unable to afford legal representation); *see also* Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 194–96 (2008) (arguing that the poor and even the middle-class often cannot afford legal representation and as a consequence are left to represent themselves, often resulting in frustration as they attempt to navigate the complex legal system).

197. Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1039 (quoting JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 24 (1986)) (internal quotations marks omitted).

198. *Id.*

199. *Id.* at 1040.

200. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 12 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf ("[I]n the great majority of situations some legal help is better than none."); STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 6 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf. (discussing that pro se litigants need the direction and support that only attorneys can provide as a means of optimizing their results, and that "judges would no doubt prefer fully represented litigants").

2006 by passing a resolution urging governments "to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake."[201] Included in the list of basic human needs are those "involving shelter, sustenance, safety, health[,] or child custody"[202]—all matters heard on a daily basis in family law courts throughout the country. There remains, however, essentially no right to counsel in family matters,[203] and the notion that limited representation in cases involving litigation is better than none reigns supreme.[204]

IV. UNBUNDLED LEGAL SERVICES TO THE RESCUE: MIXED MESSAGES

Acknowledging that full representation provides the best means of fair and effective access to justice,[205] both the ABA and individual court

201. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 112A, at 1 (2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf; *accord* CAL. GOV. CODE § 68651(a) (Deering 2011) (providing for counsel appointment for low-income litigants for "issues affecting basic human needs."); Sarah Dina Moore Alba, Comment, *Searching for the "Civil* Gideon*": Procedural Due Process and the Juvenile Right to Counsel in Termination Proceedings*, 13 U. PA. J. CONST. L. 1079, 1089 (2011) (discussing some state bar associations' similar initiatives).

202. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 112A, at 1 (2006); *see* Mimi Laver, *Promoting Quality Parent Representation Through Standards of Practice*, 26 CHILD. L. PRAC. 1, 1 (2007) (acknowledging the special issues parents involved in the child welfare system face, such as unsuitable housing and poverty).

203. *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) ("[T]he Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year).").

204. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 1, 12 (2003) ("[I]n the great majority of situations some legal help is better than none, . . . [and a] partially-represented litigant is more effective than a wholly unrepresented litigant."); *accord* Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 211 (1991) (emphasizing that the rendition of legal services require "the professional judgment of a lawyer" (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1981)) (internal quotation marks omitted)); Rachel Brand & Terri Harrington, *Save Money Using Limited Scope Representation,* BRADFORD'S BLOG (Dec. 15, 2011), http://blog.bradfordpublishing.com/bradford-publishing-news-updates/save-money-using-limited-scope-representation/ (noting that "some legal counsel is much better than none").

205. ABA MODEL ACCESS ACT § 2 cmt 3–4 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf; *accord* Michele Struffolino, *Mixed Messages: Can Offering Unbundled Legal Services in Contested Domestic Relations Matters Provide Fair Access to Justice to Those Most in Need?*, SALTLAW (May 9, 2011) http://www.saltlaw.org/blog/2011/05/09/mixed-messages-can-offering-unbundled-legal-services-in-contested-domestic-relations-matters-provide-fair-access-to-justice-to-those-most-in-need/ ("Even with the American Bar Association's recognition in their Basic Principles of the Right to Counsel in Civil Cases that full representation is the best way to provide fair and equal access to justice, the current economic climate is likely to increase the number of individuals who

systems took initiatives to encourage the use of limited representation in contested matters in courts "saturated" with pro se litigants.[206] While many of these litigants benefit from the availability of court assistance programs and online resources, other litigants still need attorneys.[207] Judges, who welcome a court appearance from an attorney in any case, would prefer limited representation over no representation at all.[208] Many attorneys view offering limited representation to some of these litigants as a way to increase profits and build clientele.[209]

Beginning in 2000, the ABA spearheaded a two-pronged effort to encourage the use of unbundled legal services in litigation.[210] The ABA amended its existing ethics rules to allow limited representation,[211] and

cannot afford full representation.").

206. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4–5 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf. *See generally* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1999) (acknowledging that pro se litigants are "flooding the courts"); Monica A. Fennell, *Using State Legal Needs Studies to Increase Access to Justice for Low-Income Families*, 48 FAM. CT. REV. 619, 626 (2010) (discussing various states' initiatives on the matter).

207. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4–5 (2009); *cf.* Catherine J. Lanctot, *Attorney–Client Relationships in Cyberspace: The Perils and the Promise*, 49 DUKE L.J. 147, 166 (1999) (recognizing that online resources offer "legal services to people who cannot otherwise afford them"). *See generally* Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 557 (1993) (exposing some of the challenges a pro se litigant may face when "self-help kits are inadequate").

208. *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, 1988 (1999) (illustrating the dissatisfaction of judges among others about pro se representation). It is important to note that unbundling can increase the public's access to civil counsel without reducing billable hours or majorly impacting the practitioner's pocketbook. *Unbundle Your Practice: Increase Profits by Coaching Clients*, UTAH B.J. (Mar. 4, 2003, 9:15 AM), http://webster.utahbar.org/barjournal/2003/03/unbundle_your_practice_increas.html.

209. MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 1, 11 (2003). *Contra* David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 974 (1998) (explaining that an unbundling of legal services may actually decrease clientele).

210. MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 1, 7 (2003); *accord* MADELYNN M. HERMAN, NAT'L CTR. FOR STATE COURTS, PRO SE: SELF-REPRESENTED LITIGANTS TRENDS IN 2003: LIMITED SCOPE LEGAL ASSISTANCE: AN EMERGING OPTION FOR PRO SE LITIGANTS (2003), *available at* http://www.ncsconline.org/WC/Publications/KIS_ProSe_Trends03.pdf (detailing the timeline of developments of national policies on unbundled legal services).

211. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 7 (2009); *see* Dennis Carlson, *Amendments to Rules Facilitate Unbundling of Legal Services*, NEB. LAW., Nov.-Dec. 2008, at 1, 35,

individual states examined and adopted analagous rules.[212] As a result of these efforts, the determination of whether unbundled legal services could be ethically provided was laid solely on the shoulders of the domestic-relations attorney.[213]

A. *The 2002 Amendment to Model Rule of Professional Conduct 1.2(c)*

In 2002, the ABA amended Model Rule of Professional Conduct 1.2(c) to explicitly allow limited-scope representation and to provide a mechanism for regulating the use of this service.[214] The goal of the amendment was to encourage attorneys to provide some assistance to low- and moderate-income litigants who could not otherwise afford full representation.[215] Prior to the amendment, the rule stated: "A lawyer may limit the *objective* of the representation if the client *consents after consultation*."[216] The language of the rule permitting truncated

available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/nebraskalawyerunbundling.authcheckdam.pdf (mentioning the amendments).

212. *See* STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 5–6 (2009) (listing the changes to the state ethics rules regarding limited representation, and listing by state the changes to court procedural rules allowing limited representation in cases involving litigation); *see also* MADELYNN M. HERMAN, NAT'L CTR. FOR STATE COURTS, PRO SE: SELF-REPRESENTED LITIGANTS TRENDS IN 2003: LIMITED SCOPE LEGAL ASSISTANCE: AN EMERGING OPTION FOR PRO SE LITIGANTS (2003) (briefly noting the amendments that Florida, New Mexico, Maine, Washington and other states undertook as a result of the 2002 amendments).

213. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423–24 (1994) (remarking that family law attorneys will have to do some "major rethinking about the lawyer-client relationship" when offering unbundled services); *see also* Rachel Brand & Terri Harrington, *Save Money Using Limited Scope Representation*, BRADFORD'S BLOG (Dec. 15, 2011), http://blog.bradfordpublishing.com/bradford-publishing-news-updates/save-money-using-limited-scope-representation/ (advocating that simple divorces are good candidates for limited-scope representation).

214. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009); *accord* MADELYNN M. HERMAN, NAT'L CTR. FOR STATE COURTS, PRO SE: SELF-REPRESENTED LITIGANTS TRENDS IN 2003: LIMITED SCOPE LEGAL ASSISTANCE: AN EMERGING OPTION FOR PRO SE LITIGANTS (2003) (recounting the sequence of changes regarding unbundled services policies); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 460 (2011) (discussing the 2002 ABA amendments).

215. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009); *see* Amendments to the Rules Regulating the Fla. Bar & the Fla. Family Law Rules of Procedure (Unbundled Legal Servs.), 860 So. 2d 394, 394 (Fla. 2003) ("We conclude that the intent of the proposed amendments, which is to increase effective, efficient, and meaningful access to justice for otherwise unrepresented litigants, is consistent with the [c]ourt's objectives, particularly in cases involving children and families.").

216. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS

representation appeared to allow limiting the ultimate goal of the representation, but not the means or tasks necessary to carry out the goal.[217] Rule 1.2(c), as amended, now explicitly references the scope of the representation: "A lawyer may limit the *scope of the representation* if the limitation is *reasonable under the circumstances* and the client gives *informed consent*."[218] Additionally, Rule 1.2(c) does not require that the informed consent be in writing and, although most states recommend written limited-scope representation agreements,[219] many states follow the rule.[220] This change appears to provide some comfort to attorneys considering whether to furnish such services to domestic-relations clients.[221] Closer examination, however, exposes Rule 1.2(c)'s confines and calls into question whether limited legal representation is ever appropriate in domestic-relations cases involving ongoing litigation.[222]

OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009) (emphasis added) (quoting MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1998)). The "objectives" of the representation are to be determined by the client, while the means of accomplishing the objectives are to be carried out by the attorney after consultation with the client. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002); *id.* R. 1.2(a) cmt. 1.

217. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (lacking any reference to an ability to limit the means or manner of carrying out limited representation)*; cf.* Elliot A. Anderson, Note, *Unbundling the Ethical Issues of Pro Bono Advocacy: Articulating the Goals of Limited–Scope Pro Bono Advocacy for Limited Legal Services Programs*, 48 FAM. CT. REV. 685, 689 (2010) (addressing Indiana's changes to its rules of professional conduct in an attempt to clarify the modalities of unbundled legal services). *But see* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2002) (providing some guidance on the methods of limiting representation by explaining that a "brief telephone consultation" might be a reasonable means of limited representation in certain circumstances).

218. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002) (emphasis added); *see In re* Egwim, 291 B.R. 559, 571 (Bankr. N.D. Ga. 2003) (reiterating the requirements of limited-scope representation under Rule 1.2(c)).

219. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009).

220. *Id.* Not requiring a written limited representation agreement supports the use of such services for providing quick reference or a onetime contact for informational purposes only and is certainly not advisable when limiting representation for a client involved in litigation. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 72 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (pointing out that the best practice is require a written record of agreements limiting representation).

221. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 424 (1994) (observing that "unbundling has its roots in several sources [including] . . . the precarious economics of family law practice."); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 460 (2011) (conducting an analysis on the delivery of unbundled legal services and noting that some representation is most useful in family law as well as housing law situations).

222. *See* Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 464 (2011) ("The ethical duties of competence, diligence, and zeal pose challenging issues for a lawyer providing unbundled legal

B. *Determining Whether Providing Limited Representation Is Ethical*

One thing is clear: the attorney bears the burden of determining the propriety of whether limited legal representation services are appropriate.[223] An attorney providing limited representation is not excused from providing competent representation[224] and must analyze the benefits and dangers of limiting the scope of the representation. This duty involves a careful examination of the ethics rules regarding both limited and competent representation. Even with the acknowledged goal of enabling attorneys to provide some assistance to pro se litigants, little guidance exists for an attorney seeking to give more than mere "mechanical" document preparation services or advice to a client on a common, uncomplicated issue, despite the push for further assistance to pro se litigants.[225]

1. Limited Representation Must Be Competent Representation

In any attorney–client relationship, the attorney must have the "legal knowledge, skill, thoroughness[,] and preparation reasonably necessary for the representation."[226] Competent representation requires an inquiry into

services . . . ."); *cf.* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 (1994) (explaining that even after litigation, family law matters require continued client attention, such as future child custody hearings or retirement benefits hearings, by that the family law attorney).

223. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 92 (2003) ("[V]irtually all lawyers regularly make judgments about the potential value to clients of services they *could* provide to them, and their clients regularly make service choices in response to their advice."); *see also id.* at 72 (reiterating that it is the attorney's contractual right to use his discretion and limit the scope of representation).

224. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(2) (2000) ("To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must . . . act with reasonable competence and diligence . . . ."); *cf.* David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 961–62 (1998) (noting that "the professional responsibility rules are skewed toward champagne representation when many clients are on a beer budget").

225. *See* STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 10–11 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf (addressing the issue of unbundled legal services and the Model Rules' requirement of competency). Even an attorney's ability to provide basic legal information triggers competency considerations; while a document preparation service is allowed to give general legal information, an attorney cannot provide such information without a factual and legal analysis of the issues. *Id.*; *accord* Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 460 (2011) (listing some tasks a lawyer performs pursuant to an unbundling agreement).

226. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

the facts and circumstances of each case and an analysis of the possible legal issues.[227] This obligation does not change when providing limited representation.[228] By explicitly referencing each other, the comments to the rules governing competency and limited representation indicate that limited representation might somewhat relax the duty to make inquiries and investigate.[229] Here again, however, it remains unclear how much of an inquiry is necessary. The commentary on "thoroughness and preparation" indicates that the level of inquiry and analysis will differ depending on the consequences associated with the case and the complexity of the issues.[230] While the comment to the rule governing competency explicitly references the fact that the scope of the

227. *Id.* R. 1.1 cmt. 5; *see In re* Egwim, 291 B.R. 559, 571 (Bankr. N.D. Ga. 2003) (emphasizing that under Georgia Model Rule 1.2(c) a lawyer may not limit representation so much as to prohibit competent representation). Some variables that determine the scope of representation when a lawyer offers unbundled services include: (1) the client's personality; (2) the resources and costs that are available both to the lawyer and his client; (3) the extent of the task's complexity; and (4) "the extent and accuracy of information given to the client making a choice." Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 442 (1994).

228. *See* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 917 (1998) ("The codes allow lawyers and clients to limit the scope of representation by agreement, but not to the extent of limiting 'competence' . . . ."); *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998), *available at* http://www.cobar.org/index.cfm/ID/386/subID/1822/CETH/Ethics-Opinion-101:-Unbundled-Legal-Services,-01/17/98;-Addendum-Issued-2006/ (concluding that Colorado attorneys may offer unbundled representation, but must still perform all the tasks that are required to provide competent representation).

229. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2002) ("An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible"); *id.* R. 1.2(c) cmt. 7 (speaking to Rule 1.1, and explaining that "[a]lthough an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness[,] and preparation reasonably necessary for the representation").

230. The Model Rules seem to contemplate a flexible approach to the issue of investigation:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. . . . The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

Id. R. 1.1 cmt. 5; *see* Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 467 (2011) (questioning what thoroughness exactly requires the attorney to do in a limited arrangement); Michele Struffolino, *Mixed Messages: Can Offering Unbundled Legal Services in Contested Domestic Relations Matters Provide Fair Access to Justice to Those Most in Need?*, SALTLAW (May 9, 2010) http://www.saltlaw.org/blog/2011/05/09/mixed-messages-can-offering-unbundled-legal-services-in-contested-domestic-relations-matters-provide-fair-access-to-justice-to-those-most-in-need/ (reiterating the special concerns that the family law attorney face when attempting to interpret the rule).

representation may be limited,[231] it makes no mention of an ability to limit the level of inquiry into, or analysis of, the client's problems.[232]

Furthermore, the comment does not discuss any ability to limit the level of thoroughness and preparation when handling the matters for which the attorney is retained.[233] The comment directly states that the attorney is not excused from providing competent representation, but the fact that the scope of the representation is limited is a factor to consider should the attorney's competency be ethically challenged.[234] The realities involved in performing only limited tasks in cases involving litigation may complicate this after-the-fact analysis. The attorney's competence may be constrained by the work the client has done on his or her own.[235] For example, the success of an attorney arguing a motion prepared by the client stands at the mercy of the information contained therein. Conversely, the client's ability to present the motion in court dictates the motion's success, regardless of the fact that it was prepared by an attorney.[236]

231. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2002); *see* Vincent R Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 778 (2003) ("[L]awyers and clients have great leeway in tailoring the range of the work that attorneys will perform.").

232. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2002) (failing to allow for any limitation in competent representation even with limited representation).

233. *Id.*; *accord* Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 559 (1993) ("Neither the [Model Code of Professional Responsibility] nor the [Model Rules of Professional Conduct] adequately address the conduct of an attorney providing information in public divorce clinics or classes, nor in situations where the attorney handles only specific parts of a case."); Elliot A. Anderson, Note, *Unbundling the Ethical Issues of Pro Bono Advocacy: Articulating the Goals of Limited-Scope Pro Bono Advocacy for Limited Legal Services Programs*, 48 FAM. CT. REV. 685, 687 (2010) (suggesting that a definition of "the practical goals of unbundling for limited legal services programs may help ensure that competent services are performed").

234. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2002); *cf.* Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 467 (2011) (questioning whether attorneys may adequately represent a client when relying only on the client's factual accounts).

235. *See* N.Y.C. BAR ASS'N, REPORT AND RECOMMENDATIONS ON "UNBUNDLED" LEGAL SERVICES (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/nymiddleincomereport.authcheckdam.pdf (recommending that when the client prepares a pleading and the attorney then reviews it, the litigant should disclose to the court that the pleading was reviewed by a lawyer). Indiana seems to have acknowledged this issue and is currently in the process of amending its Model Rules to create "parameters for the lawyer's role in document preparation." Elliot A. Anderson, Note, *Unbundling the Ethical Issues of Pro Bono Advocacy: Articulating the Goals of Limited–Scope Pro Bono Advocacy for Limited Legal Services Programs*, 48 FAM. CT. REV. 685, 689 (2010).

236. Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1112 (2002). *But see* MADELYNN M. HERMAN, NAT'L CTR. FOR STATE COURTS, PRO SE: SELF-REPRESENTED LITIGANTS TRENDS IN 2003: LIMITED SCOPE LEGAL ASSISTANCE: AN EMERGING OPTION FOR PRO SE LITIGANTS

Determining the availability of competent limited representation that can be provided is just one of many conclusions an attorney must make before providing unbundled legal services.[237] Once it is determined that the potential client seeks more than just information, the attorney must then determine whether offering limited representation is "reasonable under the circumstances" and whether the attorney can obtain the client's "informed consent."[238] The timing of the inquiry is complicated by this determination, which usually occurs, and should occur, during the initial intake.[239] For those potential clients with contested family matters, these two considerations often occur at a time of strained emotions and bitter conflict.[240] Investigating what is reasonable and the ability to obtaining informed consent must be accomplished in light of the client's emotional state as well as his or her legal situation.[241]

(2003), *available at* http://www.ncsconline.org/WC/Publications/KIS_ProSe_Trends03.pdf (explaining that California amended its Rules of Professional Conduct thereby allowing an attorney who assists a client with document preparation not to disclose his involvement).

237. *See* Vincent R. Johnson, "*Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 779 (2003) (recommending that before an attorney has to determine what he needs to do to provide adequate representation he must "first ascertain the nature of assignment."); *see also* N.Y.C. BAR ASS'N, REPORT AND RECOMMENDATIONS ON "UNBUNDLED" LEGAL SERVICES (2002) ("[N]o lawyer should enter into an agreement for limited representation if the effect is providing less than competent and zealous representation."); *cf.* Elliot A. Anderson, Note, *Unbundling the Ethical Issues of Pro Bono Advocacy: Articulating the Goals of Limited–Scope Pro Bono Advocacy for Limited Legal Services Programs*, 48 FAM. CT. REV. 685, 686 (2010) (discussing the Indiana Rules of Professional Conduct pertaining to limited-scope representation).

238. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002); *accord* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (1) (2000) (providing that lawyer must "proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation").

239. *See* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 79 (1979) (explaining that at the beginning of the relationship, the lawyer and client have unequal information about the needs of the relationship and the possible structure). "[A] client often comes to a lawyer because he lacks such information. At least at the beginning of the relationship, therefore, the buyer[–]client cannot realistically be expected to tell the seller-lawyer what decisions he wants to control." *Id.* (footnote omitted); *cf. In re* Egwim, 291 B.R. 559, 571 (Bankr. N.D. Ga. 2003) ("First, the attorney must consult with the client about the limited representation that will be provided.").

240. Michele Struffolino, *Mixed Messages: Can Offering Unbundled Legal Services in Contested Domestic Relations Matters Provide Fair Access to Justice to Those Most in Need?*, SALTLAW (May 9, 2010), http://www.saltlaw.org/blog/2011/05/09/mixed-messages-can-offering-unbundled-legal-services-in-contested-domestic-relations-matters-provide-fair-access-to-justice-to-those-most-in-need/; *see* N.Y.C. BAR ASS'N, REPORT AND RECOMMENDATIONS ON "UNBUNDLED" LEGAL SERVICES (2002) (advising against unbundling of legal services in litigated matters).

241. *See In re Egwim*, 291 B.R. at 572 (citing *In re* Castorena, 270 B.R. 504, 531 (Bankr. D. Idaho 2001)) ("For a limitation on services to be valid, 'that limitation must be carefully considered and narrowly crafted, and be the result of educated and informed consent.'" (quoting *In re* Castorena, 270 B.R. 504, 531 (Bankr. D. Idaho 2001))). *See generally* RESTATEMENT (THIRD) OF THE LAW

2. Limited Representation Must Be Reasonable Under the Circumstances

The circumstances in contested domestic-relations matters often prove less than optimal. Determining what is reasonable under these circumstances is a difficult task. A lawyer must ask whether a reasonably prudent and competent attorney would limit the scope of the representation in each situation.[242] Factors fueling this decision include: the nature of the matter; the time needed to address the issue; and other resources available to the client.[243] This investigatory obligation continues after the nature and scope of the limited representation are set.[244] Throughout the representation, the attorney must recognize when the limits are no longer reasonable. Simple matters may become more complex or the client's ability to assist may fall short of expectations.[245]

The example given in the comments to Rule 1.2 of what may be "reasonable under the circumstances" presents a situation that few attorneys would struggle with: providing a brief telephone consultation for a client with an uncomplicated legal issue.[246] An agreement to provide even this limited form of representation may not be reasonable, however, if the attorney is asked for legal advice for anything other than a "common and typically uncomplicated legal problem."[247] Further examination leads

GOVERNING LAWYERS § 19 cmt. c (2000) (detailing the analysis of reasonableness of circumstances in limited-scope representation agreements including a consideration of the reasonableness of the client).

242. MODEL RULES OF PROF'L CONDUCT R. 1.0(h) (2009).

243. *See* Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. LEGAL ETHICS 563, 574 (2007) (suggesting an attorney first assess the merits of the case and then the client's capacity for pro se assistance before choosing to unbundle services).

244. MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 12 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf.

245. *Id.*

246. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2002); *cf.* Elliot A. Anderson, Note, *Unbundling the Ethical Issues of Pro Bono Advocacy: Articulating the Goals of Limited–Scope Pro Bono Advocacy for Limited Legal Services Programs*, 48 FAM. CT. REV. 685, 690 (2010) ("For a client who is receiving unbundled legal services, though he or she may understand that the service provided is limited, it may be difficult for the client to refrain from over-contacting the program that provided services.").

247. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2002); *accord* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 60 (2003) (discussing the importance of considering the complexity of the legal matter when determining whether limited representation is appropriate); *see In re* Egwim, 291 B.R. 559, 562 (Bankr. N.D. Ga. 2003) (holding that the general rule in bankruptcy cases is "an attorney representing a [C]hapter 7 debtor may not limit the scope of representation . . . ."); *In re* Collmar, 417 B.R. 920, 924 (Bankr. N.D. Ind. 2009) (stating that counsel cannot limit the scope of representation to exclude the

to examples of the appropriate use of limited representation with domestic-relations clients involved in litigation.[248] However, these examples involve clients with limited assets, no children, and parties who are capable of communicating with one another.[249] The legal issues involved in contested domestic-relations matters often fall outside the common or uncomplicated category, thus it is often the inability of the parties to communicate that keeps the matter in a contested status.[250]

Lawyers learn that a careful assessment of whether it is reasonable to offer limited representation requires consideration of two main factors. The first factor asks whether the client has the ability to handle the balance of the case without legal assistance.[251] The client needs to be capable of

complicated process of reaffirmation).

248. MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 29–30 (2003) (discussing a divorce case handled completely by limited service attorneys); *accord* L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999), *available at* http://www.lacba.org/showpage.cfm?pageid=431 (approving a coaching agreement between lawyer and client for litigation action "so long as the limited[-]scope of representation is fully explained and the client consents to it"); STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, UNDISCLOSED LEGAL ASSISTANCE TO PRO SE LITIGANTS 1 (2007), *available at* http://www.nlada.org/DMS/Documents/1185213796.98/ABA%20ghostwriting%20opinion%206-07.pdf ("A lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.").

249. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 29–30 (2003) (commenting on a no-contest divorce of a couple who have little shared property); *see also* Stephanie L. Kimbro, *The Ethics of Unbundling*, 33-FAM. ADVOC. 27, 30 (2010) (stating that uncontested divorces are particularly popular for unbundled legal services); David Narkiewicz, *A 21st Century Blueprint for Providing Legal Services to the Middle Class*, PA. LAW., Aug. 26, 2004, at 20, 25 (reporting that the middle class is increasing its use of unbundled legal services for simple divorce cases); Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel,* 42 FAM. CT. REV. 655, 656 (2004) (reporting that many pro se divorce litigants "considered their cases simple because there was little conflict, property . . . could easily be divided, . . . and [they had] 'no children'").

250. *See* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of the Therapeutic Jurisprudence to Family Law,* 17 UCLA WOMEN'S L.J. 215, 216 (2008) (stating the biggest challenge for family law attorneys is changing the family's perception of divorce as "a continuing contested battle"); Elena B. Langan, *"We Can Work it Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes,* 30 REV. LITIG. 245, 253 (2011) ("Acrimonious litigation polarizes parents, making co-parenting difficult.").

251. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 60 (2003) (explaining the basic characteristics a successful pro se litigant possesses, such as the absence of mental disorders and the ability to read and communicate in English); John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 16 (commenting that attorneys must decide whether a client can handle unbundled services, because "[r]epresenting a client means that the scope of needed services is determined by the person who performs the services, not the uninitiated beneficiary"); *see also* Stephanie L. Kimbro, *The Ethics of Unbundling*, 33 FAM. ADVOC. 27, 27 (2010) (noting that many individuals "comfortable handing some of the footwork of

performing legal tasks such as: filling out basic court forms; compiling, analyzing, and understanding financial information; making difficult but necessary decisions; and accomplishing these tasks in a timely and organized fashion.[252] The second factor concerns the complexity of the legal matter at issue.[253] Parties in an uncontested divorce involving limited assets and no children are more likely to accomplish the legal tasks involved on their own.[254] Yet, as the complexity of the issues increases, such as with child custody or property distribution issues, so does the need for legal assistance.[255]

their own legal matters" for cheaper fees have done their own research instead of consulting with a traditional law firm).

252. M. SUE TALIA, A CLIENT'S GUIDE TO LIMITED LEGAL SERVICES 13–19 (1997); *see* John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15, 16 (discussing the numerous skills needed for effective representation, such as questioning witnesses, fact gathering, and drafting documents); *see also* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 60 (2003) (finding most pro se litigants equipped with a basic intelligence level and literacy skills can represent themselves); Stephanie L. Kimbro, *The Ethics of Unbundling*, 33 FAM. ADVOC. 27, 29 (2010) ("Knowing whether your firm's clients are sophisticated enough to handle some of the footwork of their cases is an important consideration for the firm."); *cf.* Minix v. Gonzalez, 162 S.W.3d 635, 640 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (Frost, J. concurring) (noting that while federal courts will review pleadings drafted by pro se litigants under "less stringent" standards, Texas courts will typically judge the papers of pro se and represented litigants equally (citing Mansfield State Bank v. Cohn, 573 S.W.2d 181, 183–84 (Tex. 1978))).

253. MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 61 (2003); *see* Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel,* 42 FAM. CT. REV. 655, 656 (2004) ("[Fourty-five percent] of divorce litigants chose self-representation because the felt their cases were simple and could handle them on their own."). *But see* Stephanie L. Kimbro, *The Ethics of Unbundling*, 33 FAM. ADVOC. 27, 29 (2010) ("There are clearly some matters that should not be unbundled."); Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440–42 (2009) (comparing the burgeoning numbers of pro se matters in domestic and criminal-defense appeals and commenting on the particularly low rate of success for criminal matters).

254. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 61 (2003) (finding uncontested divorce cases with no children or significant property issues need very little service from attorneys); *see also* Steven K. Berenson, *A Family Law Residence Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 120 (2001) ("[A] survey indicate[s] that many people feel competent to handle simple family law cases . . . ."); Stephanie L. Kimbro, *The Ethics of Unbundling*, 33 FAM. ADVOC. 27, 29 (2010) (asserting that some areas of law, such as simple family matters, "naturally lend themselves to unbundling"); Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel,* 42 FAM. CT. REV. 655, 656 (2004) (stating that almost half of pro se divorce litigants believe they do not need an attorney due to their lack of children and property to be divided).

255. *See* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 1 (2004), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/pdf/2004_1.pdf ("[W]ith one parent or both intent on maintaining such a degree of conflict and tension . . . it becomes impossible to resolve parenting and

When weighing these factors, the attorney should also consider the judge who will likely be involved in the case and the availability of other no-cost services.[256] Is the judge likely to hear the case known to explain procedural and evidentiary rules to pro se litigants[257] or is the judge known for treating pro se litigants the same as those represented by counsel?[258] Is the client likely to receive further assistance from programs offered through the family court when unrepresented?[259]

property decisions without a great deal of intervention from legal . . . professionals."); MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 61 (2003) (indicating much more coaching and assistance is required for divorce cases dealing with abuse issues and complex finances); Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 248 (2011) (stating divorce has become an adversarial process mandating lawyer assistance due to "changes in social and economic status" during a marriage).

256. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 63 (2003) (stressing judge assistance to litigants with limited legal assistance has been effective and helpful); *see also* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 113 (2001) ("[J]udges vary a great deal in the amount of leeway that they are willing to provide self-represented parties in terms of strict compliance with procedural rules, as well as in the amount of assistance that they are willing to provide self-represented parties in pre-trial and trial practice.").

257. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 63 (2003) (commenting how Minnesota has developed a program advising judges to "explain the process" in simple terms for pro se cases); *see also* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 113 (2001) (stating some judges are willing to guide pro se litigants through court procedures); Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel*, 42 FAM. CT. REV. 655, 662 (2004) (reporting some judges "help[] self-represented litigants as they see fit"). *But see* Green v. Kaposta, 152 S.W.3d 839, 841 (Tex. App.—Dallas 2005, no pet.) ("A pro se litigant is held to the same standards as licensed attorneys and must comply with applicable laws and rules of procedure." (citing Strange v. Cont'l Casualty Co., 126 S.W.3d 676, 677 (Tex. App.—Dallas 2004, pet denied))).

258. *See Green*, 152 S.W.3d at 841 (holding pro se litigants to the same procedural and legal standards as an attorney); Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel*, 42 FAM. CT. REV. 655, 662 (2004) (stating that some judges "follow a strict neutrality strategy," which treats pro se litigants the same as those represented by counsel); *see also* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 448 (2009) ("Many judges . . . look upon pro se-friendly procedures with a jaundiced eye."); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodations in Litigation*, 54 AM. U. L. REV. 1537, 1564 (2005) ("Many times judges effectively ignore the fact that pro se litigants do not have counsel, force them to abide by the same rules and procedures that govern represented parties, and will do nothing to assist them during litigation.").

259. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 62 (2003) (detailing additional supportive services such as hotlines and [pro se] assistance programs which will reduce client costs); Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 992 (2009) (pointing to the Los

These determinations must be made during the initial interview or soon thereafter when, in family matters, emotions run high and one or more of the indicators of conflict manifest themselves.[260] The importance of making the appropriate assessment of reasonableness in the initial consultation is amplified by the fact that the conditions that existed at the initial consultation will govern any later reasonableness inquiry. If the assessment is later challenged, the reasonableness will most likely be determined based on the circumstances in existence at the time of the initial agreement.[261] Even if offering limited representation appears reasonable under the circumstances, the attorney must address the next ethical roadblock—obtaining the client's informed consent to the limited representation.

3. Limited Representation Must Be Based on Informed Consent

The difficulty in satisfying the informed consent requirement is twofold: (1) the attorney needs to determine what information the client should know; and (2) the attorney needs to determine the validity of the consent given.[262] Interestingly, the term "informed consent" was created by

Angeles Family Law Information Center and the New York State CourtHelp Program as two programs that help unrepresented individuals through the court process); Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 304–05 (2005) (reporting California and New Mexico have initiated programs and clinics "that educate pro se litigants regarding court procedures and provide assistance in obtaining, filling out, and filing court documents").

260. *See* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of the Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 216 (2008) (stating regardless of the time period, bitterness and anger will control some divorcing couples' emotions); *see also* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 1 (2004) (comparing the high emotions of divorce to a war zone).

261. MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 91 (2003); *cf.* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 141 (2001) (commenting how many attorneys fear unbundling services after meeting with a client even if the client consents to certain services not being provided); Rachel Brill & Rochelle Sparko, Current Development, *Limited Legal Services and Conflicts of Interest: Unbundling the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 555 (2003) (stating unbundled legal services will create a relationship not intended to go beyond the "initial[] limited consultation"); Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 987 (2009) (stating that the informed consent must always be reasonable, and recommending written, informed consent be obtained from the initial consultation).

262. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2002) (requiring an attorney to determine whether limiting services of a client is reasonable and, if so, thoroughly explaining the terms of the representation); *see also* STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, ETHICAL CONSIDERATIONS IN COLLABORATIVE LAW PRACTICE 3 (2007)),

lawyers for use in the medical malpractice area—it sets the standard for the appropriate allocation of decision making authority between the doctor and the patient.[263] As a result of years of litigation in the medical malpractice area, it is not difficult to find cases interpreting and clarifying the rules governing a physician's obligation to obtain informed consent.[264] An attorney seeking to determine the meaning of informed consent in the attorney–client relationship, however, does not benefit from the clarity gained through years of common law analysis.[265] As with the medical profession, where the patient clearly maintains control over the ultimate decisions,[266] the ethics rules governing lawyers clearly state that the client only maintains control over the decisions regarding the ultimate purpose of the legal representation.[267] Despite this ultimate control, the

available at http://www.collaborativelaw.us/articles/Ethics_Opinion_ABA.pdf ("Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of reasonably available alternatives to the limited representation."); Erin Talati, *When a Spoonful of Sugar Doesn't Help the Medicine Go Down: Informed Consent, Mental Illness, and Moral Agency*, 6 IND. HEALTH L. REV. 171, 171 (2009) (commenting that in the medical context, informed consent can be an ethical inquiry on whether consent was proper and the information sufficient).

263. Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 42–44 (1979); *see* Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent,* 58 MD. L. REV. 346, 356 (1999) (noting informed consent is the "current legal doctrine concerning medical decision making").

264. *See* Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent*, 58 MD. L. REV. 346, 370–81 (1999) (analyzing the caselaw evolution of the informed consent doctrine); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 44 (1979) (stating that during the 1960s courts began redefining the consent doctrine based on communication given by the doctor); *see also* Erin Talati, *When a Spoonful of Sugar Doesn't Help the Medicine Go Down: Informed Consent, Mental Illness, and Moral Agency*, 6 IND. HEALTH L. REV. 171, 174–82 (2009) (discussing the historical development of the informed consent doctrine and the cases interpreting the doctrine in the physician–patient relationship).

265. *See, e.g.*, Flatow v. Ingalls, 932 N.E.2d 726, 729 (Ind. Ct. App. 2010) (observing that Indiana's version of Model Rule 1.2(c), which "allows 'the scope and objectives of the representation' to be limited 'if the limitation is reasonable under the circumstances and the client gives informed consent,' . . . has not been addressed in any substantive way by the appellate courts" (quoting IND. RULES OF PROF'L CONDUCT R. 1.2(c) (2005))).

266. *See* Erin Talati, *When a Spoonful of Sugar Doesn't Help the Medicine Go Down: Informed Consent, Mental Illness, and Moral Agency*, 6 IND. HEALTH L. REV. 171, 181 (2009) (discussing the importance of voluntary consent from the patient); *see also* Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent*, 58 MD. L. REV. 346, 377 (1999) (commenting that patient has final decision-making power, and when consent is lacking, there is an actionable tort); Julia E. Hanigsberg, Essay, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 387 n.72 (1995) (stating doctors cannot perform surgery without their patient's informed consent").

267. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) ("[A] lawyer shall abide by a client's decisions concerning the objectives of the representation and . . . shall consult with the client

attorney has discretion in determining the means for achieving the client's purpose.[268] As stated above, the amendment to Rule 1.2(c) allows for limiting the scope of representation to a specific goal or to a means of achieving that goal.[269] Therefore, it would seem that although the allocation of responsibility is clear, the requisites necessary to satisfy the explicit requirement of informed consent are not.

a. Obtaining and Providing Information

Some general clarification does exist regarding the sufficiency of information aquired from and given to the client before offering limited-scope representation in mediation[270] and in collaborative law.[271]

as to the means by which they are to be pursued."); *see also* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 922 (1998) ("The [Model Rules] also reserve to the client the right to make substantive decisions about the representation . . . ."); Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 573 (2007) (describing the Model Rule's requirement that attorneys obtain an agreement from the client on available legal alternatives).

268. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & cmt. 1 (2002) (affording attorneys the authority to take necessary action for representation); *see also* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1115 (2002) ("A trained attorney is more qualified to recognize and analyze legal needs than a lay client, and, at least in part, this is a reason a party seeks out and retains an attorney to represent and advise him or her in legal matters." (quoting Nichols v. Keller, 19 Cal. Rptr. 2d 601, 608 (Ct. App. 1993)) (internal quotation marks omitted)).

269. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002); *id.* R. 1.2 cmt. 6.

270. *See* Lerner v. Laufer, 819 A.2d 471, 482 (N.J. Super. Ct. App. Div. 2003) (upholding the use of limited-scope representation in mediation, stating: "the law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them"); *see also* Puder v. Buechel, 874 A.2d 534, 535 (N.J. 2005) (binding plaintiff to her settlement that she deemed "acceptable" and a "fair compromise of the issues"); Gorjuice Wrap, Inc. v. Okin, Hollander & Deluca, LLP, No. L-2150-07, 2009 WL 8027471, at *1 (N.J. Super. Ct. Law Div. Mar. 1, 2009) (citing *Pruder*, 874 A.2d 554) (prohibiting a plaintiff from recovering for legal malpractice arising from the conduct when a prior claim of malpractice was previously settled).

271. *See* Alaska Bar Ass'n, Ethics Op. 2011-3 (2011), *available at* https://www.alaskabar.org/servlet/content/11_3.html (stating that using limited-scope representation in collaborative law is not per se unethical, but informed consent to the representation must be obtained in a separate meeting between counsel and the client). The opinion cites the ABA ethics decision defining informed consent:

> Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation. The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.

However, few specifics are available regarding what information must be provided when the decision involves future or pending litigation.[272] State ethics opinions have found that there is nothing per se unethical in providing limited representation in litigation as long as the attorney properly admonishes his client and obtains informed consent.[273]

Because the term informed consent appears several places in the ethics rules,[274] it is logical that the Model Rules provide a definition of the term: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[275]

STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, ETHICAL CONSIDERATIONS IN COLLABORATIVE LAW PRACTICE 3 (2007)), *available at* http://www.collaborativelaw.us/articles/Ethics_Opinion_ABA.pdf; *see also* Elena B. Langan, *We Can Work it Out: Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 283 (2011) (asserting that even though limiting the representation in collaboration to settlement negotiations is appropriate, the limits imposed in a disqualification agreement may raise ethical concerns).

272. *See* L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999), *available at* http://www.lacba.org/showpage.cfm?pageid=431 ("There is nothing per se unethical in an attorney limiting the professional engagement to the consulting, counseling, and guiding self-representing lay persons in litigation matters, providing that the client is fully informed and expressly consents to the limited[-]scope of the representation." (quoting L.A. Cnty. Bar Ass'n, Formal Op. 483 (1995)) (internal quotation marks omitted)); Or. State Bar, Formal Op. No. 2011-183, at 584 (2011), *available at* http://www.osbar.org/_docs/ethics/2011-183/pdf (stating state rules would permit unbundled legal representation for a unique case).

273. *See* L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999) (internal quotation marks omitted) (approving the use of unbundled legal services in litigation if the client is fully informed and expressly consents expressly); Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998), *available at* http://www.cobar.org/index.cfm/ID/386/subID/1822/CETH/Ethics-Opinion-101:-Unbundled-Legal-Services,-01/17/98;-Addendum-Issued-2006/ (finding that the rules "allow [for] unbundled legal services in both litigation and non-litigation matters.").

274. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2002) ("Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person . . . before accepting or continuing representation or pursuing a course of conduct."); *id.* R. 1.2(c) (defining informed consent); *id.* R. 1.6(a) (2003) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . . ."); *id.* R. 1.7(b)(4) (2002) (requiring attorneys to obtain informed consent in writing before representing clients with conflicting interests).

275. *Id.* R. 1.0(e) (2009); *see* Or. State Bar, Formal Op. No. 2011-183, at 548 (2011) ("Obtaining the client's informed consent requires the lawyer to explain the risks of a limited[-]scope representation."); STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, ETHICAL CONSIDERATIONS IN COLLABORATIVE LAW PRACTICE 3 (2007) (discussing actions attorneys make take to obtain informed consent); Dean R. Dietrich, *Obtaining Informed Consent*, 80 WIS. LAW. 22, 23 (2007) (interpreting the Rule's definition of informed consent, and stating the most important element is "the requirement that lawyers communicate to client's the alternatives that clients should consider before making a final decision").

To educate the client of the risks and alternatives to limited representation, the attorney must first obtain an understanding of the issues and the client's circumstances.[276] To accomplish this, the attorney should obtain data and material beyond merely the facts, such as information necessary to understand the factors that may influence the client's decision making.[277] Because judging the adequacy of the information provided to the client will depend on the client's understanding of the legal situation, the attorney should also inquire into the client's experience with the law or the legal system, with making decisions regarding the legal matter, and whether the client has other legal representation.[278]

The attorney generally obtains this information from the client in the initial interview when it is ordinarily difficult for even a skillful interviewer to obtain a full understanding of the client's situation.[279] Clients seeking

276. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 6 (2002); *accord* Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998) ("Thoroughness and preparation requires the lawyer to make the factual inquiry necessary to understand the client's legal situation and provide competent advice.").

277. Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 80, 109 (1979) (recommending attorneys consider how their clients make basic, daily life decisions and their clients' expectations); *e.g.*, Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 988 (2009) (providing an example of when an emotional situation, such as in domestic violence cases, where outside influences would affect independent decision making); *see* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 60 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (asserting a clients motivation and the presence of emotional and mental disorders will influence the ability of the clients to help themselves).

278. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2002). Client consultation and decision-making often becomes taxing by virtue of the client's inexperience and lack of familiarity with the legal system. Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 80, 109 (1979). These difficulties are compounded further in light of one of the natural consequences of unbundled legal services—multiple attorneys. Lawyers should "be especially wary of clients . . . who involve multiple lawyers in different aspect of the same unbundled case." Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 988 (2009). In light of these pitfalls, "[t]he ABA suggests that attorneys considering limited scope of representation take into account the client's capacity to understand the procedures, complexity of the matter involved, and other factors, including availability of their representation." Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 574 (2007); *see* Dean R. Dietrich, *Obtaining Informed Consent*, 80 WIS. LAW. 22, 22 (Sept. 2007) ("In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent." (quoting WIS. RULES OF PROF'L CONDUCT R. 1.0 cmt. (2007)) (internal quotation marks omitted)).

279. *See* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal*

legal assistance are stressed and may not fully understand their legal issues associated with their case.[280] The scope of the representation necessarily limits the nature and extent of further contact with the client, thus amplifying the need for the attorney to obtain a thorough understanding of the client's situation in the initial interview.[281] Once this has been obtained, the information the lawyer needs to communicate to the client must be determined.[282]

The attorney should provide "reasonably adequate" information to allow the client to make an informed decision about whether to obtain only limited representation.[283] Information that is reasonably adequate should include an explanation of the material advantages and disadvantages of limited representation, and a discussion of the alternatives

Profession, 128 U. PA. L. REV. 41, 79 (1979) (explaining the difficulties that arise during client interviews); *see also* M. SUE TALIA, A CLIENT'S GUIDE TO LIMITED LEGAL SERVICES 38 (1997) (stressing that stating clear and thorough communication during the initial interview, although difficult, will save numerous ambiguities on each parties' legal responsibilities); Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 989 (2009) (discussing how clients may believe they have a simple issue easily handled by unbundled legal services, only later to discover the complexity and their need for further assistance).

280. Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 109 (1979).

281. *See* MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 25 (2003) (recommending a limited representation interview be at least as thorough as in full representation). Even lawyers offering an advice-giving consultation should obtain as much information as would be sought in a full representation interview: "'Unlike a full representation case, if . . . the limited service lawyer miss[es] a critical issue in the initial interview [the lawyer] will generally not get another chance to pick up the pieces later in the case.'" *Id.* app.

282. *See generally* Model RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2002) ("[T]he most fundamental legal skill consists of determining what kind of legal problems a situation may involve . . . ."); MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 66 (2003) (proposing after an attorney conducts an initial limited representation interview, the attorney identifies the problems and devise strategic options the client can choose from); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 67 (1979) (stating it is the lawyers duty to determine and disclose what information is material to their client's matter).

283. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2002). Even reciting back the facts and explaining the circumstances learned by the attorney from the client may be necessary because, although the attorney has no obligation to inform the client of facts of circumstances already known to the client, he is admonished that he "assumes the risk that the client . . . is inadequately informed." *Id.*; *see* Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998), *available at* http://www.cobar.org/index.cfm/ID/386/subID/1822/CETH/Ethics-Opinion-101:-Unbundled-Legal-Services,-01/17/98;-Addendum-Issued-2006/ (stating the attorney must communicate "information reasonably sufficient to permit the client to appreciate the significance of the matter in question"); L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999), *available at* http://www.lacba.org/showpage.cfm?pageid=431 ("The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention.").

available to the client.[284]

Obvious risks that should be communicated include disclosure of difficulties the client may have performing the tasks or parts of the case in which it will be unrepresented.[285] The two alternatives—the client proceeds with full representation or no representation at all—should also be discussed. A discussion of the financial implications associated with alternatives and the likelihood of success may also be required.[286] The factors considered in determining what information to obtain from the client are also relevant when determining how much information need be provided.[287] Clients with more experience making legal decisions, with

284. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2009); *see* Dean R. Dietrich, *Obtaining Informed Consent*, 80 WIS. LAW. 22, 22 (2007) (detailing the requirements for informed consent set out in the new Model Rules of Professional Conduct).

285. Or. State Bar, Formal Op. No. 2011-183, at 548 (2011), *available at* http://www.osbar.org/_docs/ethics/2011-183.pdf. A discussion of risks may include disclosing that "the matter is complex and that the client may have difficulty identifying, appreciating, or addressing critical issues when proceeding without legal counsel." *Id.*; *accord* L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999) (explaining that an attorney has a duty to advise a client "of the consequences of the attorney providing only 'behind the scenes' legal counsel and advice . . . including the difficulties which the client may encounter in appearing in court on his or her own behalf or at depositions"). The Colorado Bar has articulated the risks of incomplete information, stating:

> Examples of the 'inevitable risks entailed in not being fully represented in court' include the [pro se] litigant's inability to introduce facts into evidence due to a lack of understanding of the requirements of the rules of evidence; the [pro se] litigant's failure to understand and present the elements of the substantive legal claims or defenses; and the [pro se] litigant's inability to appreciate the ramifications of court rulings entered or stipulations offered during the proceedings.

Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998).

286. L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999); *see* MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2002) (discussing that attorneys may need to explain "the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives"); J. Timothy Eaton & David Holtermann, *Limited Scope Representation Is Here*, 24 CBA REC. 36, 40 (2010) (indicating that lawyers need to fulfill their duty to clients to inform them of what issues will and will not be within the scope of the limited representation); *see also* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks,* 67 FORDHAM L. REV. 1987, 1988 (1999) (pointing out that the court deems unrepresented parties informed while they really did not have "the opportunity to make informed choices").

287. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2009) (clarifying that an attorney need not discuss "facts and implications already known to the client," but the attorney assumes the risk and should discuss the client's options and alternatives); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 133–34 (1979) (indicating that the lawyer should initiate discussions to further decision-making and ascertain what information is relevant or material to the client); Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 574 (2007) (stating that an attorney needs to assess the complexity of the situation and the client's understanding of the

more knowledge of the legal system, and representation by counsel in other aspects of the matter will generally need less information.[288]

Alerting the client to other "foreseeable collateral problems" that may arise in litigation is also necessary for informed consent.[289] An attorney owes a duty of care to the client, which includes advising the client of existing legal rights.[290] Failure to identify and advise the client of collateral matters may breach this duty.[291]

What collateral matters need to be identified and explained to the client in domestic-relations matters will depend on the facts and circumstances of each case. Due to the lack of interpretation of this requirement in domestic-relations matters, attorneys are drawn toward decisions in other areas of the law for guidance.[292] The decision in *Nichols v. Keller*[293] is a cautionary early precedent for those attorneys considering offering limited representation. In *Nichols*, two attorneys found themselves defending legal malpractice claims made by a client who admittedly retained the attorneys only for representation regarding a worker's compensation claim.[294] The fee agreements expressly limited the scope of the representation to the

procedures, issues, and alternatives).

288. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2009). A lawyer does not need to take measures to inform a client of facts or implications already known to a client or third party, but the lawyer assumes the risk of the client or third party not being adequately informed, making the consent then becomes invalid. *Id.* An attorney can base the need for disclosure on the client's experience and knowledge in legal matters, and on whether they are independently represented by other counsel in the matter. *Id.*

289. MO. BAR BD. OF GOVERNORS, REPORT OF THE SPECIAL COMMITTEE ON LIMITED SCOPE REPRESENTATION 3 (2007), *available at* http://www.courts.mo.gov/file.jsp?id=5847; *accord* L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999) ("The attorney has a duty to . . . inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation.").

290. *See* Nichols v. Keller, 19 Cal. Rptr. 2d 601, 608 (Ct. App. 1993) (noting that when an attorney's retention is expressly limited, that attorney may nevertheless have "a duty to alert the client to legal problems which are reasonably apparent" that fall outside the limited scope of representation); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002) ("A lawyer may limit scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."). This can further implicate informed consent in that an attorney "must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." *Id.* R. 1.0 cmt. 6.

291. *See* L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999); (explaining that the attorney may be breaching the standard of care if he or she fails to inform the client of relevant collateral issues); *see also Nichols*, 19 Cal. Rptr. 2d at 610 (advising that to fulfill the duty of care owed, the attorney must alert their client to other legal issues and clearly indicate the limitations of representation).

292. *See Nichols*, 19 Cal. Rptr. 2d at 610–11 (Ct. App. 1993) (finding that the attorney had a duty to inform the client of a third-party claim because the need was reasonably apparent even though representation was limited to a workers' compensation claim).

293. Nichols v. Keller, 19 Cal. Rptr. 2d 601 (Ct. App. 1993).

294. *Id.* at 604–05.

workers' compensation issue.[295] The malpractice claim did not allege a failure to provide a broader scope of representation, but centered the argument on the client not being fully informed of a collateral matter: the possibility of a third-party claim.[296] The trial court granted the attorneys' motions for summary judgment and stated that an attorney offering limited representation had no duty to advise the client of "all possible alternatives."[297] In reversing the trial court's summary judgment, the appellate court directly addressed the obligation an attorney has to inform the client of the existence of collateral matters when providing limited representation—even though the scope of representation can be limited, the duty to provide advice is not.[298]

The attorneys were obligated to identify and provide information and advice regarding collateral matters that were reasonably apparent even though they were not obligated to represent the client on these matters if outside the scope of the representation.[299] The appellate court stressed the importance of the attorney's advice-giving role: "Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives."[300] The trial court indicated that an attorney need not provide a client with information regarding remote or tenuous alternatives.[301] However, the appellate court clarified that a client should be advised of any collateral matters that "may result in adverse consequences if not considered."[302] As between the attorney and the client, the attorney "is more qualified to recognize and analyze the client's legal needs."[303] This rationale is particularly relevant

295. *Id.* at 604.

296. Plaintiff claimed that failure to advise him of a possible third-party claim, of the applicable statute of limitations, and to refer him to an attorney who could handle the third-party claim breached the duty to provide "sound advice in furtherance of the client's best interest." *Id.* at 606.

297. *Id.* at 609.

298. *See id.* at 610 (concluding that attorneys must make clear to clients the limits of representation, but at the same time owes the client a "duty of care to advise on available remedies" which may arise outside the limited scope of representation).

299. *Id.* at 608, 610 ("However, even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention.").

300. *Id.* at 608.

301. *Id.* at 609.

302. *Id.* at 608.

303. *Id.*; *see* Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 574 (2007) (discussing the factors an attorney should evaluate when determining if limited representation is reasonable for the client and the client's

in contested domestic-relations matters due to the emotional and legal difficulties inherent in such cases.[304]

Attorneys have few ways to protect themselves from claims that the information provided was inadequate. Even though Rule 1.2 does not require written limited representation agreements,[305] lawyers are advised to clarify and memorialize both the information provided and the exact nature and scope of the representation.[306] The retainer agreement should serve three functions: "1) identifying the legal problem for which [the] lawyer will provide services; 2) describing the remedial measures the lawyer will take; and 3) identifying the services the lawyer will provide in the process."[307] In addition, clarifying in writing what services will not be supplied can help avoid claims that information provided was not adequate.[308] However, even written agreements limiting the scope of the representation to specific matters may not protect the attorney from inadequate disclosure claims by the client.[309]

situation).

304. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 966–67 (2007) (explaining that family law is different than other areas of the law in both procedural and substantive aspects, but also in that family law is quite localized); Tonya Inman et al., *High-Conflict Divorce: Legal and Psychological Challenges*, HOUS. LAW., Mar. 2008, at 24, 24, *available at* http://www.thehoustonlawyer.com/aa_mar08/page24.htm (emphasizing the negative impact on children, parents, and the court system by high-conflict divorces in which the parties want to battle); *see also* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 (1994) ("[F]amily lawyers generally offer a full[-]service package of discrete tasks that encompass traditional legal representation.").

305. Nothing in the Model Rules requires a limited-scope agreement to be in writing. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002) (stating that informed consent and reasonable circumstances are required for limiting representation, but not mentioning a written agreement is not even mentioned). While a writing is preferred as a matter of "good practice," Rule 1.2 stops short of requiring one to avoid unduly burdening certain limited legal services such as telephone hotlines, for which obtaining a written and signed agreement is not practical. *Id.* R. 1.5(b); MODEST MEANS TASK FORCE, AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 72 n.230 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf.

306. Without a written agreement explicitly stating the attorney is limiting the scope of the representation, the attorney may be placed in a "he said she said" dilemma if the client later denies the oral limited-scope representation agreement. *See* Smith v. Statewide Grievance Comm., CV94-053-98-40, 1995 WL 231108, at *1, *4 (Conn. Super. Ct. Apr. 7, 1995) (upholding the grievance committee's finding that the clients never consented to limiting the scope of the attorney's representation in a telephone conversation despite the attorney's testimony otherwise).

307. MO. BAR BD. OF GOVERNORS, REPORT OF THE SPECIAL COMMITTEE ON LIMITED SCOPE REPRESENTATION 3 (2007).

308. Jones v. Bresset, 47 Pa. D. & C.4th 60, 72 (Pa. Com. Pl. 2000) (quoting 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.3, at 96 (4th ed. Supp. 1999)).

309. *See* Benet v. Schwartz, No. 93 C 7295, 1995 WL 117884, at *4–5, (N.D. Ill. Mar. 15, 1995) (ruling in favor of attorney–defendants in a motion for summary judgment but first reiterating

b. Obtaining Informed Consent May Be Impossible in Contested Domestic Relations Matters

Based on the ethical requirements associated with limited representation, it is not surprising that informed consent in some complex legal matters is presumed impossible to obtain.[310] Bankruptcy is one such complex matter.[311] In one case, *In re Egwim*,[312] an attorney who limited the scope of representation to exclude adversarial or contested matters found himself before a federal bankruptcy court to show cause as to why sanctions should not be imposed for failing to represent the debtors in two hearings.[313] Recognizing that limiting the scope of representation had become a common practice among bankruptcy attorneys, the judge found that the attorney acted in good faith, but the judge took the opportunity to warn bankruptcy attorneys seeking to limit the scope of representation in the future.[314] Applying Georgia Rule of Professional Conduct 1.2(c),[315] the court focused on the information that the client would need to understand to give informed consent to limited representation.[316] Because even experienced bankruptcy attorneys can be surprised by issues that arise in a simple bankruptcy case, "[t]he ability to adequately explain the lay of the bankruptcy landscape, including all its variations, contingencies[,] and permutations, in order to obtain a truly informed consent is suspect."[317] Recognizing that the standards set forth in the

that "[t]he retainer agreement therefore cannot prevent [a client] from asserting that defendants owed her a duty of disclosure arising out of" the rule that allows limited representation).

310. *See* Deborah B. Langehennig & R. Byrn Bass, Jr., *Being Retained and Paid in a Chapter 13 Case*, 28-4 AM. BANKR. INST. J. 46, 72 (2009) (stating that competent and diligent representation is required by ethical rules and that for bankruptcy proceedings, the general rule is that limited representation is not acceptable).

311. *See id.* (reiterating that the general rule for bankruptcy "is that an attorney representing a debtor may not limit the scope of the representation and must represent the debtor in all aspects of the case that involve the debtor's interests, absent special circumstances").

312. *In re* Egwim, 291 B.R. 559 (Bankr. N.D. Ga. 2003).

313. *Id.* at 563.

314. *Id.* at 579–81. "There may be an unusual case where an informed debtor could make a reasonable and intelligent decision to engage an attorney to file a [C]hapter 7 bankruptcy petition on a limited basis that excludes [certain] services. . . ." *Id.* at 581. It appears that the decision not to impose sanctions was due to the attorney's "good faith belief" that the limitation was acceptable, but more importantly, the client did not suffer adverse consequences. *Id.* at 581.

315. GA. RULES OF PROF'L CONDUCT R. 1.2(c) (2001) ("A lawyer may limit the objectives of the representation if the client consents after consultation.").

316. *In re* Egwim, 291 B.R. at 571. "In order to make an informed decision, the client must understand what might be faced in the bankruptcy, and the risks associated with representing himself in handling those contingencies." *Id.* at 563 (quoting *In re* Castorena, 270 B.R. 504, 529 (Bankr. D. Idaho 2001)).

317. *Id.* at 571 (emphasis omitted) (quoting *Castorena*, 270 B.R. at 529).

ethics rules must be viewed "in the context of real clients facing real issues,"[318] the judge stated that attorneys representing Chapter 7 debtors may not ordinarily limit the scope of representation without violating the rules of professional conduct and subjecting themselves to disciplinary proceedings.[319] Litigants in bankruptcy proceedings, like those in family court, are stressed financially and have hopes of obtaining the best possible outcome in a sub-optimal situation.[320] Thus, the court instituted the presumption that informed consent cannot be obtained, and that attorneys will have the burden to show the client gave the informed consent intended by the ethics rule.[321] The judge anticipated that attorneys will rarely be able to satisfy this heavy burden.[322]

c. Is the Consent Valid If the Client Has No Other Choice?

Once the attorney has obtained information from and provided information to the client, the attorney must then obtain the client's valid informed consent.[323] As discussed above, informed consent implies that the attorney has explained what limited-scope representation involves, other available options, and the risks associated with each alternative.[324]

318. *Id.* at 566.

319. *Id.* at 572.

320. *See id.* at 566 (noting that a bankruptcy debtor is distressed financially and seeking to eliminate debt and retain assets); *cf.* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 968 (2007) (pointing out that family law implicates many areas of law, such as bankruptcy and tax law, that have an impact on the parties' financial situation).

321. *In re Egwim*, 291 B.R. at 572 (quoting *Castorena*, 270 B.R. at 530) ("Proving competent, intelligent, informed[,] and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required." (quoting *Castorena*, 270 B.R. at 530)).

322. *See id.* (stressing that the attorney in a bankruptcy proceeding "will find it exceedingly difficult to show that [the client] properly contract[ed] away any of the fundamental and core obligations such an engagement necessarily imposes" (quoting *Castorena*, 270 B.R. at 530)).

323. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2009) (delineating what information the attorney needs from the client and what information the attorney needs to provide to the client for effective informed consent); *id.* R. 1.2(c) & cmt. 7 (2002) (discussing that an attorney and client can agree to limit the representation in a manner reasonable under the circumstances as long as the competency of the attorney to provide proper advice is not compromised).

324. *See id.* (2009) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 378 (2008) (explaining "knowing and voluntary" waiver in the context of informed consent as defined by the Model Rules); Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 573 (2007) (reiterating that "informed consent reflects the idea that clients must be appropriately informed of the

The client's consent obtained after learning this information would then be considered voluntary.[325] However, considering, that the majority of litigants in family matters are seeking limited-scope representation because they cannot afford full representation, the litigants' consent may not be the result of a voluntary choice made after carefully weighing the options and risks.[326] The client will be required to handle some part of the case on her own and, because of the lack of financial resources, may have no choice but to forgo full representation for whatever partial assistance she can afford.[327] As one author indicates, although these litigants are presumed to have chosen to proceed without full representation, the decision may well be more coerced than chosen:

> The operation of many of our courts still depends on an assumption that those without counsel are "choosing" to "self-represent." It also assumes that their choices along the way, such as whether to settle or go to trial, what witnesses and evidence to produce, or on what terms to settle, are "voluntary" if they are understood and not the product of coercion. Yet, in a world with a widely documented shortage of lawyers for the poor in civil cases, courts must recognize that a litigant's appearance without counsel is most often compelled, not voluntary.[328]

This reality adds to existing concerns that attorneys will take advantage of potential clients with limited financial means whose only option is to

risks and benefits of limited representation").

325. *See* Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 386 (2008) (defining voluntary choices as "only the choices made by litigants aware of their options and the advantages and disadvantages of those options").

326. *See* Rachel Brill & Rochelle Sparko, Current Development, *Limited Legal Services and Conflicts of Interest: Unbundling the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 567 (2003) (stating that sometimes people have no choice except but to represent themselves because they simply cannot afford full legal services); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 386 (2008) (calling for recognition of the fact that many civil litigants are compelled to represent themselves because of monetary reasons, rather than choosing to do so voluntarily).

327. *See* Rachel Brill & Rochelle Sparko, Current Development, *Limited Legal Services and Conflicts of Interest: Unbundling the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 567 (2003) (discussing how the relaxation of the ethical conflict of interest rule, Rule 6.5, the ethical conflict of interest rule, now allows nonprofit organizations and court-sponsored programs offering limited-scope representation to escape the traditional conflict of interest check requirements). However, this Rule also does not apply to private attorneys or firms who may seek to provide limited representation and, also, that this rule does not address other ethical concern from arising when providing unbundled legal services. *Id.* at 561, 563.

328. Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 386 (2008).

proceed pro se or with limited representation.[329] Attorneys who can benefit from being retained for some part of the case rather than not being retained at all may not fully and fairly explain the risks associated with limited representation or other available alternatives.[330] The fiction of voluntary informed consent is harmful to the litigant and undermines confidence in the legal system.[331]

Although this problem needs to be addressed by the legal system as a whole, it is the attorney who is ethically responsible for reconciling this dilemma.[332] In accordance with the ethics rules, the attorney should determine that informed consent cannot be obtained and limited services cannot be provided.[333] This exemplifies the mixed messages inherent in the ethics rules: proceed with providing limited assistance, but do so only under unclear, and sometimes impossible to meet, ethical obligations.

C. *The Change in the Ethics Rules May Do More Harm Than Good*

The current ethics rules may lead to fewer competent, ethical family law attorneys providing limited representation to clients in contested domestic-relations matters. If clients are not entitled to full representation, "why do the professional norms send signals that lawyers owe the clients more than

329. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 cmt. b (2000) (asserting that, unfortunately, "[n]ot every lawyer who will benefit from the limitation [of services] can be trusted to explain its costs and benefits fairly" to their client).

330. *Id.* Consent to limit the scope of representation at an attorney's suggestion should therefore be viewed as suspect. *Id.*

331. *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, 2024–25 (1999) (comparing the informed consent required in a legal situation to that required in the medical context exposing "the dangers in rubber-stamping as 'knowing, intelligent[,] and voluntary' decisions by unrepresented litigants"); *see also* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 79 (1979) (commenting that the lawyer and client are not on equal footing when it comes to legal knowledge, structuring their relationship, or the decisions involved in doing so).

332. *See* L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999), *available at* http://www.lacba.org/showpage.cfm?pageid=431 ("Even though an attorney may limit the scope of legal services, the attorney is required to discharge professional responsibilities relating to legal services within the scope of representation."); Lerner v Laufer, 819 A.2d 471, 483 (N.J. Super. Ct. App. Div. 2003) ("[I]t is not a breach of the standard of care for an attorney under a signed precisely drafted consent agreement to limit the scope of representation to not perform such services in the course of representing a matrimonial client that he or she might otherwise perform absent such a consent.").

333. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002) (establishing that an attorney may limit the representation if reasonable *and* the client gives informed consent); N.C. State Bar, Formal Ethics Op. 10 (2006), *available at* http://www.ncbar.com/ethics/ethics.asp?page=3&from=1/2006&to=6/2006 (advancing that the rules of professional conduct allow attorneys to limit the scope of their representation).

the retainer specifies?"[334] An interesting answer is suggested. Because the Model Rules of Professional Conduct are client centered, they seek to require ideal, rather than realistic, performance by attorneys: "[L]egal ethics norms expect lawyers to maximize their clients' positions, regardless of whether the clients pay them to do so."[335]

Even with the change to the ethics rules to explicitly allow limited-scope representation, the focus remains on competence, reasonableness, and informed consent—three concepts that are ambiguous and still do not provide sufficient guidance to attorneys.[336] The suggestion is that ethical rules are designed to influence attorneys to provide more even though there is an agreement to provide less.[337] The ethics rules ignore the realistic concerns lawyers face.[338] It is "assumed that a lawyer's adherence

334. Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 918 (1998). Although this Article pre-dates the wording of the amendment to Model Rule of Professional Responsibility 1.2(c), it focuses on a draft of the Restatement of Laws (Third) Regarding Limited Representation. This rule includes the reasonableness and informed consent language included in the 2002 revision. *Id.* at 926; *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2000) (allowing a client and lawyer to limit the duty the lawyer would usually owe to the client if the client is properly informed, agrees, and "the terms of the limitation are reasonable in the circumstances").

335. Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 916 (1998); *see* Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1005 (2007) (noting that unbundled legal services may add little practical value and could potentially raise the risk of "attorney malpractice and courtroom confusion").

336. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2002) (noting that competent representation is still required and must be considered in limiting the scope of representation); Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 574 (2007) (discussing that the limited undertaking must be reasonable considering the client's situation and nature of the legal matter). *See generally* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (illustrating that informed consent has been a difficult concept to fully define and apply for over thirty years).

337. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."); *id*. R. 1.16 (listing reasons for an attorney to decline or terminate representation); *id*. R. 6.1 (demonstrating the importance to the ABA of attorneys rendering pro bono legal services); *see also* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 916–17 (1998) (offering hypothetical situations where "the lawyers do not have the resources or retainers to justify the work").

338. *See* Lerner v. Laufer, 819 A.2d 471, 482–83 (N.J. Super. Ct. App. Div. 2003) (noting that the ethics rules permits limiting the scope of representation and that "what constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service" to which the attorney and client agreed (quoting Ziegelheim v. Apollo, 607 A.2d 1298, 1303 (N.J. 1992)) (internal quotation marks omitted)). *See generally* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915,

to her ethical obligations would take precedence over her need to earn a living."[339] By not addressing reality, the rules appear dishonest; they create a "dissonance between theory and practice" that "stems from reading the [rules] as insisting that lawyers act selflessly against their own [financial] interests . . . ."[340] This dilemma may increase the likelihood that an ethical attorney, who understands the financial implications, will decline to provide limited representation.

The attorney who decides to provide limited-scope representation risks liability on three theories: breach of contract, legal malpractice, and ethics violations with the state disciplinary board.[341] Although the attorney is allowed to provide limited representation, he is not allowed to limit his exposure to these risks.[342] The fear of these risks may lead even a marginally ethical lawyer to try to provide full representation despite being retained for limited services.[343] In fact, this ambiguity and dissonance

916–926 (1998) (tracing the "dissonance between professional ethics and real life practice").

339. Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 925 (1998). Similarly, "we refuse to allow in-house counsel to sue their employer[–]client for damages [for discharging them] because they obeyed their ethical obligations." *Id.* (quoting Balla v. Gambro, Inc., 584 N.E.2d 104, 110 (Ill. 1991)).

340. *Id.* at 945; *see* MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 12 (2002) (referring to a conflict of interest under Rule 1.7 when a lawyer's interest in the fee agreement or duties to others materially limits the lawyer's representation of the client); *cf.* Stephen Gillers, *What We Talked About When We Talked About Ethics*, 46 OHIO ST. L.J. 243, 245 (1985) (recognizing that the proposed Model Rules are uneven going so far as to say that "it is internally inconsistent to the [b]ar's benefit").

341. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 430–33 (1994) (discussing legal malpractice exposure based on the precarious situation *Nichols v. Keller* created for attorneys); Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 918–21 (1998) (exploring the three theories on which a lawyer risks liability).

342. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2002) ("A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement . . . ."); *id.* R. 1.8 cmt. 14 ("[A]definition of scope [of limited representation] that makes the obligations of representation illusory will amount to an attempt to limit liability."); *see also* L.A. Cnty. Bar Ass'n, Formal Op. 502 (1999), *available at* http://www.lacba.org/showpage.cfm?pageid=431 ("[A]n attorney is prohibited from making an agreement with the client to prospectively limit his or her professional liability to the client. Even if the scope of legal representation is limited to specific tasks, that limitation does not . . . [limit] . . . the right of the client to file a disciplinary complaint. . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54 (2007) ("An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable."); Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 920–21 (1998) (stating that lawyers cannot limit their malpractice liability to clients by agreement).

343. *See* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 933 (1998) ("Marginal lawyers . . . will hesitate to agree to limit their performance and[] when they do, will be so afraid of potential discipline that they perform fully despite receiving limited pay."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2002) (commenting on the requisite knowledge and skills required of an attorney).

may result in fewer ethical attorneys providing limited services and more "low-end"[344] or less ethically conscious attorneys willing to provide these limited tasks.[345] Prospective clients without economic resources may only be able to afford less than competent representation, furthering the inequality in access to justice in cases involving the most basic of human needs—the family.[346]

V. BUILDING A CASE FOR LIMITING THE USE OF LIMITED REPRESENTATION AND ENCOURAGING THE USE OF FULL REPRESENTATION IN CONTESTED DOMESTIC-RELATIONS MATTERS

"Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."[347]

Full representation by a domestic-relations attorney in contested domestic-relations matters is the best way to ensure fair and equal access to justice.[348] Most domestic-relations matters pending in courts have one, and many times two, unrepresented parties.[349] Most pro se litigants are

344. Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 933 (1998) (defining "low-end" attorneys as those attorneys who have a high volume of cases focused on representing individuals with small, less complex legal matters).

345. *Id.* at 935–36. For clarity, these less ethically conscious attorneys may be focused on high volume practice where they quickly open and close cases using "minimal effort." *Id.* at 935. Due to their practice model, an attorney may have to compromise performance in some manner to still make money. *Id.* at 935–36.

346. *See* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 111–12 (2001) (reporting that the highest percentage of cases without representation are in area of family law, but also that the number of pro se family law litigants had increased in comparison to other segments of the law); *see also* ABA MODEL ACCESS ACT § 2B (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf (defining "basic human needs" as "shelter, sustenance, safety, health[,] and child custody" and subsequently defining each of those terms).

347. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104: MODEL ACCESS ACT OF 2010, at 9 (rev. ed. 2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf (quoting Justice Wiley Rutledge, Remarks at the Meeting of the ABA (1941)).

348. *See* AM. BAR ASS'N, ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 2–3 (2010), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1282162572Resolution105Summary081010.doc (reiterating the ABA's standard that all juvenile and domestic-relations cases must involve the participation of counsel to ensure fair and just outcomes).

349. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 41 (2010) ("Most family law cases involve at least one party without counsel, and often two."); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 420 (2010) ("Across jurisdictions, one or both parties typically are unrepresented in . . . a majority of

poor, and a disproportionate number are minorities.[350] The matters at stake in the court proceedings are of great personal and societal importance.[351] Therefore, providing full and effective representation not only addresses the challenges facing the litigants, the attorneys, and the courts, but increases public confidence in our judicial system.[352]

Full representation is often needed to obtain a positive outcome in a contested family matter. A positive outcome is one that not only provides immediate satisfaction but also prepares the client for a future emotional[353] and legal relationship with the opposing party. Offering

domestic-relations cases (35% to 95%) . . . .").

350. Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 41 (2010); *see* Brief for Am. Bar Ass'n as Amicus Curiae Supporting of Petitioner at 2–4, Turner v. Rogers, 131 S. Ct. 2507 (2010) (No. 10-10), 2011 WL 118266 at *2–4 (discussing the ABA's position regarding access to representation for low-income individuals). The 2009 update from Legal Services Corporation noted:

> New data indicate[s] that state courts, especially those courts that deal with issues affecting low-income people, in particular lower state courts and such specialized courts as housing and family courts, are facing significantly increased numbers of unrepresented litigants. Studies show that the vast majority of people who appear without representation are unable to afford an attorney, and a large percentage of them are low-income people who qualify for legal aid. A growing body of research indicates that outcomes for unrepresented litigants are often less favorable than those for represented litigants.

LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1–2 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

351. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 453 (2009) ("Failure to recognize and respond to the needs of pro se litigants can fuel not only litigant anger but also social upheaval."); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodations in Litigation*, 54 AM. U. L. REV. 1537, 1542 (2005) ("The inability of a large portion of American society to afford attorney assistance has been deemed one of the glaring failures of our system, straining the principle of equal justice under the law." (quoting Joseph M. McLaughlin, *An Extension of the Right to Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1132–33 (1987)) (internal quotation marks omitted)).

352. *See* ABA MODEL ACCESS ACT § 1 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf (providing the findings of the ABA, with respect to a civil right to counsel in certain cases that show greater judicial efficiency and fairness will result); Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 458 (2009) (arguing that to meet the demands of pro se litigation, "all that is needed is the adoption of a set of best practices that provide them with useful training and respectful treatment of the court"); *see also* Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1010–1015 (2007) (proffering potential solutions to aid the problems associated with pro se litigation, including using the Internet as a potential tool).

353. *See* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1274, 1277–78 (2008) (discussing the results of the court's final decision in the adversarial process and its impact on future

limited representation to assist a client through the system ignores the fact that "the kinds of relationships regulated by family law more often than not continue even after the most significant shift in legal status."[354] In addition, issues in family cases, such as support and parenting plans, are seldom final.[355]

Family law self-help centers are the most frequently used, but still cannot fulfill the needs of the unrepresented.[356] Although early reports show high levels of satisfaction with limited representation offered through court-sponsored programs, but this alone does not adequately measure the effectiveness of limited representation.[357]

Analyzing the actual outcomes in domestic-relations matters requires assessing the effect they will have in the future.[358] Such an analysis is the

family relations); *see also* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 217 (2008) ("One of the most difficult concepts for parties to accept is that the court *cannot*, through its *legal* decision-making, address or alleviate the emotional harm caused by the divorce." (emphasis added)).

354. Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1282 (2008). "Even when the *legal* relationship between the parties is severed—the marital union dissolved, parental rights terminated, legal parentage changed from a birth parent to an adoptive parent—an *emotional* relationship or tie is likely to endure." *Id.* (emphasis added). For example, divorced parents will continue to communicate regarding their children, children placed with relatives may still see their parents whose rights were terminated, and adopted children may remain in touch with biological parents or seek to develop a relationship with them. *Id.* at 1282–83.

355. *See* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 232 (2008) (illustrating that custody and child support can change and be disputed for many years after divorce).

356. *See* Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J. L. & SOC. CHANGE 295, 297 (2010) (asserting that there is not enough evidence to determine when self-help programs or other options are adequate in specific cases); Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 138 (2001) (commenting that pro se clinics are unable to provide complete information and as a result, litigants develop a "false sense of confidence" in the help they receive); Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 67, 73 (2010) (citing that self-help programs are often used in the area of family law and have had some success, but in other areas of the law have not been as effective).

357. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 66–69 (2010) (explaining that self-help programs are currently measured by subjective satisfaction of clients rather than a more objective way of determining their effectiveness); *see also* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 121 (1997) (discussing the limited support services for parties in family law disputes).

358. *See* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 219–20 (2008) ("[a]dvocating what is best *overall* for the client" includes not only attaining the short term goals, but also how "the passage of time may affect [the client's] needs and goals"); Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1281–82 (2008) (stating that decisions in family law proceedings

best way to expose the shortcomings of limited representation.[359] Support for the need to recognize these limits is provided in the ABA's Basic Principles of a Right to Counsel in Civil Legal Proceedings, substantiating the ABA's resolve to establish a nationwide "civil *Gideon*" for basic human needs.[360]

A. *Recognizing the Need for Full Representation by Effective Counsel*

Understanding the importance of legal representation in family law matters requires recognizing the significance of what is at stake.[361] What is more important than the health and viability of the family? Even though measuring the impact of representation in family law matters is more difficult than other legal areas,[362] studies have shown that the availability of a lawyer is a significant, if not the most important, factor in obtaining a successful outcome in a domestic-relations case.[363] Contested

have an impact on the parties' relationships and emotions thereafter); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 123–26 (1997) (reflecting the need to consider the effects of decision making in the adversarial system on the parents and children).

359. *See* Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J. L. & SOC. CHANGE 295, 296–97 (2010) (discussing the need to evaluate the effectiveness of "access to justice tools," including unbundled legal services, to assess when offering such services is appropriate); Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 66–67 (2010) (indicating that family law self-help centers were able to help clients obtain divorces or protection orders, but effectiveness of services in general is still difficult to ascertain).

360. *See generally* AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105 (2010), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1282162572 Resolution105Summary081010.doc (listing the efforts of various states to assess the need for a civil right to counsel for causes of action deemed to involve basic human needs).

361. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 81 (2010) ("Matching appropriate levels of assistance to the power needed for litigants is a crucial starting point in understanding where counsel is most important or where self-help programs might suffice."); *see also* Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventive Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)"*, 10 FLA. COASTAL L. REV. 263, 269 (2009) (highlighting the shortfalls of divorce litigation and its potential for devastating effects on children); Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 565 (2000) ("High[-]conflict divorce is a major social, economic, and public health problem.").

362. Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 54 (2010). It is more difficult to determine "winners" in family law matters and variables, such as gender, violence, conflict, and changing laws, further complicate the analysis. *Id.* at 54–55; *see supra* Part III.D.4 (discussing the effect on litigants).

363. Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal*

cases often involve child-custody issues such as, where the child will live, who will make decisions regarding the child, and the child's access to parents or other caregivers.[364] The ability of the family to survive financially is also at stake when cases include child-support or spousal-support issues.[365] Where the parties will live is also frequently a concern.[366] The value of these issues should be considered when determining the impact legal representation will have on the outcome of the case.[367]

About When Counsel Is Most Needed, 37 FORDHAM URB. L.J. 37, 51, 55 (2010). "[P]arties represented by lawyers are between 17% and 1380% more likely to receive favorable outcomes in adjudication than are parties appearing pro se." *Id.* at 39.

364. *See* Sanford L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL'Y & L. 212, 212 (2011) ("Logistical, as well as personal, barriers arising from the failed parental relation may make it difficult to achieve an optimal resolution of the post[-]separation custodial arrangements."); Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 580–81 (2000) (portraying the negative impacts of child involvement in divorce and custody proceedings); *see also* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86–89 (1997) (discussing the adversarial process and its impact on custody disputes and the child's ultimate welfare).

365. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT 2010 PRELIMINARY REPORT (2011), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2011/reports/preliminary_report_fy2010/ (claiming that in 2010, there were 15.9 million child-support related cases involving 17.5 million children); Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 117 (2001) (noting that "the increase in the proportion of non-custodial parents has led to increased obligations to pay child support"); Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventive Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)",* 10 FLA. COASTAL L. REV. 263, 267, 271–72 (2009) (commenting on the negative financial impact on the parties in divorce litigation).

366. *See* Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventive Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)",* 10 FLA. COASTAL L. REV. 263, 271 (2009) (outlining the financial implications of divorce on living arrangements— that two homes are now needed instead of just one). *See generally* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11 (2003) (discussing high-conflict divorce and custody arrangements with respect to the added complication of abuse and how it affects child custody and living arrangement decisions).

367. *See* Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 105 (2001) (suggesting that the "rise in self-representation in family court has created significant burdens" and often results in a "failure of legal justice for the parties to family law disputes"); Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 74 (2010) (discussing the effect of representation on the outcome in housing, social security, child support, unemployment, and immigration cases); *cf.* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439,

A litigant proceeding with only limited representation will be pro se in some part of the case.[368] This cannot be ignored when assessing the ability to achieve a successful outcome in contested matters before family courts. It is generally agreed that litigants in contested domestic matters often cannot reach a successful outcome on their own.[369] In addition, the challenges that led to encouraging the use of limited representation in litigation remain. The litigant will still be expected to understand the substantive law and abide by the procedural and evidentiary rules.[370] The inability to clearly and adequately articulate her claims will still be present.[371] The increase in favorable outcomes in family law matters is not just tied to the availability of counsel, but is also tied to effective and skilled representation throughout the case: "Skilled counsel is needed . . . to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses,

452 (2009) ("Courts involved in cases with the self-represented may be tempted to assume a paternalistic attitude toward the litigants before them—abandoning adversarial neutrality. . . .").

368. *See* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994) (defining limited representation as an agreement between the client and attorney as to which matters the attorney will handle and which the client may choose to handle themselves or through other avenues); Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, COLO. LAW., Jan. 2000 at 5, 5 (discussing permissible actions of attorneys in assisting pro se clients).

369. *See* Brief for American Bar Ass'n as Amici Curiae Supporting Petitioner at 11 n.11, Turner v. Rogers, 131 S. Ct. 2507(2010) (No. 10-10), 2011 WL 118266, at *11 (quoting Brief for Am. Bar Ass'n as Amicus Curiae Supporting Petitioner at 9, Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18 (1981) (No. 79-6423), 2011 WL 340036 at *9) (explaining the importance of having counsel in litigation and describing a few of the many tasks they perform).

370. *See* Brief for American Bar Ass'n as Amici Curiae Supporting Petitioner at 9–10, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 118266, at *9–10 (suggesting that legal knowledge greatly increases a litigant's chance of prevailing); Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 74–77 (2010) (illustrating the issues surrounding the substantive law, the complexity of the procedures, and the judges' role in cases involving pro se litigants); Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 997 (2007) ("Significantly, although the self-represented are untrained in the procedural and substantive intricacies of the law, they are often held to the same standards as members of the bar."); *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998), *available at* http://www.cobar.org/index.cfm/ID/386/subID/1822/CETH/Ethics-Opinion-101:-Unbundled-Legal-Services,-01/17/98;-Addendum-Issued-2006/ (identifying risks involved when a litigant proceeds to act pro se).

371. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Daae Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 75 (2010) (stressing that "the litigants' inability to articulate their claims, provide[s] a particularly poignant illustration as to why meritorious claims might not be considered by a court"); Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998) (explaining that an attorney assisting a pro se client needs to make sure they are aware that they, the pro se party, have to present the elements of their case, and the facts and evidence supporting it).

[and] make objections and present a record for appeal . . . ."[372] The expectation that a litigant can successfully handle these tasks is inconsistent with the knowledge that the parties cannot adequately perform them on their own.[373]

Representation is also necessary because of interpersonal dynamics associated with a contested family matter.[374] There are two important factors that further the likelihood of a successful or favorable outcome: a balance of power and the ability of the actors to function within the specific decision-making framework.[375] Litigants in family matters can suffer from both a power imbalance within the judicial system and a power imbalance in the relationship with the opponent.[376] A power imbalance can arise due to the fact that unrepresented litigants are often vulnerable; unfamiliar with the forum; have language and literacy barriers; and may have physical or emotional disabilities.[377] A lack of power negatively

372. Brief for American Bar Ass'n as Amici Curiae Supporting Petitioner at 11 n.11, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 118266, at *11 (quoting Brief for Am. Bar Ass'n as Amicus Curiae Supporting Petitioner, *Lassiter*, 452 U.S. at 18). Lawyers provide an advantage to litigant's in that they know the substantive law and procedure required to help the court arrive at the proper result which promotes the public's confidence in the judicial system. *Id.* at 9–10.

373. *See* Russell Engler, *Connecting Self–Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 81–82 (2010) (asserting that in many instances legal representation is needed to level the playing field and protect the rights of the litigant); *see also* Brief for American Bar Ass'n as Amici Curiae Supporting Petitioner at 9–10, *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 118266, at *11 (expressing the belief that it is not realistic to hold pro se litigants to the same level of performance as attorneys).

374. *See* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 988 (2009) (contending that full representation is needed in domestic-violence matters because an individual would be unable to handle facing his or her batterer alone); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047–48 (1999) (recognizing that providing representation for litigants in family law matters can help to rise above the relationships and personal feelings amongst the parties, especially in situations where abuse is the subject of the litigation).

375. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 78–79 (2010) (discussing different balances of power that arise in litigation).

376. *Id.* at 78. "The greater the power opposing a litigant, and the more that litigant lacks power, the greater will be the need for representation" involving "sustenance, safety, health, or child custody" determinations. *Id.* at 40, 44.

377. *See id.* at 79 (expressing how many unrepresented litigants share similar characteristics). This power imbalance arises in part from external and internal indicators of conflict that can create tension among the parties to the case, therefore putting the affected party at a disadvantage. *Cf.* GLENN A. GILMOUR, DEP'T OF JUSTICE CAN., HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION 27–28 (2004), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/pdf/2004_1.pdf (outlining a number external and internal indicators that can lead to varying degrees of conflict in divorce proceedings).

affects the ability to attain favorable outcomes.[378]

Even litigants who know the substantive law or who have the law on their side frequently have problems attaining a favorable outcome.[379] Relational expertise can assist in attaining a positive outcome in family court; in addition to experience with substantive law and procedural rules, having the status of a repeat player in court allows for tailoring a case to a particular judge, and preparing and presenting the case in a manner consistent with the interpersonal dynamics of the particular forum.[380]

Full representation by an experienced family law attorney corrects power imbalances and provides the status of a "repeat player" to the litigant who is likely experiencing his or her first exposure to the legal system.[381] This increases both the chances of substantive accuracy in decisions and the likelihood of a favorable outcome.[382]

Outcomes achieved with full and effective representation are favorable for the courts and the community, as well as the litigants themselves.[383] The adversarial system works best when both parties are represented.[384]

378. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 78–79 (2010) ("[P]owerless litigants across the country suffer harmful outcomes in cases involving basic needs, with devastating consequences for them and their families.").

379. *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, 1988 (1999) (commenting that unrepresented litigants do not have adequate legal advice when litigating pro se, which can lead to decisions that will adversely affect their cases). Unrepresented litigants in contested family cases are "particularly vulnerable to the risk of abuses of power within the court system" due to their lack of knowledge and experience with the judicial system. Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 916 (2010).

380. *Cf.* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 79–80 (2010) (citing REBECCA SANDEFUR, ELEMENTS OF EXPERTISE: LAWYERS' IMPACT ON CIVIL TRIAL AND HEARING OUTCOMES 34–42 (Mar. 26, 2008) (on file with author)) (suggesting that those "players" with more knowledge of the environment in which the litigation takes place have more success in the courtroom).

381. *See id.* at 80 (describing "repeat players" as those advocates with skills such as "general advocacy skills, knowledge of the forum, and knowledge of the law").

382. Brief for American Bar Ass'n as Amici Curiae Supporting Petitioner at 10, Turner v. Rogers, 131 S. Ct. 504 (2010) (No. 10-10), 2011 WL 118266, at *10 (quoting Brief of Retired Alaska Judges as Amici Curiae in Support of Appellee Johnson, Office of Pub. Advocacy v. Alaska Court Sys., No. S–12999, (Alaska Nov. 19, 2008), 2008 WL 5585566 at *14).

383. Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 81–82 (2010).

384. Rich Cassidy, *ABA Resolutions Intended to Adopt Civil Gideon Are Too Narrow*, ON LAWYERING (Sept. 9, 2010) http://onlawyering.com/2010/09/aba-resolutions-intended-to-adopt-civil-gideon-are-too-narrow ("[O]ur adversarial system works well indeed when both sides of a dispute are adequately resourced. It often works well when neither side is adequately resourced. But it normally does not work well when one side is adequately resourced and the other is not.").

Full representation increases judicial efficiency by reducing the number of court "appearances and delays caused by incomplete paperwork or unprepared litigants."[385] Representation decreases the contested issues in family law matters,[386] and the cases are more likely to be resolved with less court involvement when the parties are represented by counsel.[387]

Favorable outcomes furthering the stability of family life are more likely to occur when the parties are adequately represented by experienced family law attorneys.[388] Parents represented by counsel are more likely to embrace joint parenting and decision-making plans.[389] Furthermore, litigants represented by counsel are more likely to receive financial awards, and have a significantly higher chance of obtaining protective orders in domestic violence actions.[390]

The full participation of a family law attorney in contested matters will increase both positive outcomes and public confidence in the family court system.[391] Outcomes should be favorable not only in effect but also in perception.[392] The perception of fairness is increased when attorneys experienced in both family law and the forum are present.[393] The

385. ABA MODEL ACCESS ACT § 1F (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

386. *See generally* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 51–55 (2010) (commenting on a number of studies which reveal that adequate representation in family law matters leads to more positive outcomes).

387 *Cf.* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 983 (2009) (noting that self-represented litigants tend to congest the court system due to a lack of knowledge about time limits and deadlines).

388. *See, e.g.*, Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 51–52 (2010) (demonstrating a higher occurrence rate of joint custody when both parties were represented).

389. *See id.* (identifying various studies that depict parents in family law disputes embracing joint custody and entering mutual decision-making plans when both parents were represented by counsel).

390. *See id.* at 53–54 (discussing further studies on the impact of representation by counsel on family law matters).

391. Brief for American Bar Ass'n as Amici Curiae Supporting Petitioner at 8–9, Turner v. Rogers, 131 S. Ct. 2507 (2010) (No. 10-10), 2011 WL 118266, at *8–9.

392. *Id.* at 11 (quoting Intiana v. Edwards, 554 U.S. 164, 177 (2008)).

393. *See* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 984 (2009) ("[I]t is clear that a lack of legal assistance places the pro se litigant at a fundamental disadvantage and effectively limits his or her access to justice."). One way to promote both fairness and justice within the adversarial system would be to change the traditional rules so as to better enable individual's access to adequate representation. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2022–23 (1999).

perception of fairness increases respect and confidence in the judicial system.[394] Providing full representation in family law matters can create consistency and predictability in family law rulings and can result in important and appropriate family law precedent.[395] The Model Access Act supports this principle.[396] The Act would provide counsel to a financially eligible participant seeking an appeal when a non-frivolous argument exists for "extending, modifying, or reversing existing law or for establishing new law."[397] Implementation of the Model Access Act can help the efforts of the ABA to increase positive outcomes in family issues by providing full representation to litigants when the contested issues involve basic human needs.[398]

B. *Adopting a Civil Gideon: The ABA's Recognition that Full Representation by Experienced Counsel Is Necessary to Achieve Fair and Equal Access*

The ABA recognizes that the stakes in some civil matters are too high to leave litigants with less than full representation when adjudicating these claims.[399] The concept of a civil *Gideon*[400] was unanimously adopted by

394. Brief for American Bar Ass'n as Amici Curiae Supporting Petitioner at 5, 11 *Turner*, 131 S. Ct. 2507 (No. 10-10), 2011 WL 118266, at *11.

395. ABA MODEL ACCESS ACT § 1F (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

396. *See id.* (providing that family law matters will result in fair outcomes and "public confidence in the systems of justice" when parties have legal representation).

397. *Id.* § 3Bii.

398. *Cf.* STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 5–6 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf (arguing that pro se litigants need more than the limited assistance provided by state programs). The Model Access Act recognizes the "substantial, and increasingly dire, need for civil legal services for the poor" which would aid those who find themselves unable to afford representation in family law disputes. ABA MODEL ACCESS ACT § 3Biii (2010). The Act could help provide representation to those parents who are faced with the threat of losing custody to their children due to a lack of knowledge of how the court system works. *See* Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 919–20 (2010) (discussing how the traditional adversary system is unfavorable to those individuals participating in family disputes where child custody is a main issue).

399. ABA MODEL ACCESS ACT § 1C (2010); *accord* AM. BAR ASS'N , ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 1 (2010), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1282162572Resolution105Summary081010.doc (providing that all persons are entitled to legal representation in civil proceedings as a matter of right).

400. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that the Sixth and Fourteenth Amendments to the United States Constitution provide a right to have counsel appointed at public expense in serious criminal cases when the Defendant cannot afford counsel).

the ABA in 2006:

> [T]he American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health[,] or child custody, as determined by each jurisdiction.[401]

To encourage states to implement laws establishing a civil right to counsel, the ABA published two more resolutions in 2010: the Model Access Act[402] and the Basic Principles of a Right to Counsel in Civil Legal Proceedings.[403]

These resolutions embody three concepts, which provide direct support for the need for full representation in contested domestic-relations matters, despite ethics rules that facially allow for limited representation. First, a basic principle of the civil right to counsel is the presumption that adjudication of cases involving basic human needs requires full representation: "The right to counsel . . . applies in adversarial proceedings . . . [and] [i]nherent in the Principle is the strong presumption that full representation is required in all such adversarial proceedings."[404] The Principle explicitly states that limited representation should only be provided "to the extent permitted by Rule 1.2 of the ABA Model Rules of Professional Conduct or the jurisdiction's equivalent, *and* when such limited representation is sufficient to afford the applicant fair and equal access to justice."[405]

401. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 112A, at 1–2 (2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

402. *See* ABA MODEL ACCESS ACT § 1C (2010) (detailing a Model Act for jurisdictions to adopt that will provide for counsel in certain civil cases).

403. *See* AM. BAR ASS'N, ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 1 (2010) (suggesting that governments provide counsel for litigants whose's basic human needs are involved).

404. *Id.* at 3.

405. *Id.* (emphasis added). Because limited representation requires that the applicant still be afforded fair and equal access to justice, it exists as yet another hurdle for the attorney because who must not fail to meet hthe attorney's ethical obligations. *See* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 989 (2009) (recognizing that limited-scope representation can cause a "[l]awyers . . . trained in the ethics of full representation . . . [to] fail to fulfill [his or her] ethical obligations, either intentionally or unintentionally, and therefore may cause more harm than good"). Limited-scope representation allows attorneys to limit his or her participation with the legal problem due to the financial situation of the client, but still requires the attorney to provide the maximum legal and ethical representation as possible. *See* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 916 (1998) (calling limited-scope representation as a paradigm

The second concept directly supporting the need for full representation in contested domestic-relations matters is the recognition that issues frequently involved in these cases fit the definition of basic human needs.[406] The need for shelter includes issues regarding access to, or ability to remain in, the family home.[407] The term "sustenance" involves issues regarding financial support and the preservation of assets.[408] Domestic violence protection orders are covered under the term of "safety."[409] Although not explicitly stated, the term "health" could be defined to include issues regarding an obligation to provide health insurance or to contribute toward uninsured medical expenses for family members.[410] Finally, matters covered under the term "child custody" comprise both private actions seeking termination of parental rights, and actions by one parent to terminate or substantially limit another parent's time with the children or decision-making abilities regarding the children.[411]

When contested family matters are at stake, the third concept of a civil *Gideon* directly acknowledges the idea that representation of an

in which "legal ethics norms expect lawyers to maximize their clients' positions, regardless of whether the clients pay them to do so").

406. ABA MODEL ACCESS ACT § 1C (2010). As discussed previously, the ABA Report and Model Access Act defines the term "basic human need," which includes "shelter, sustenance, safety, health[,] and child custody." *Id.* § 2B.

407. *See id.* § 2Bi ("'Shelter' means a person's or family's access to or ability to remain in a dwelling, and the habitability of that dwelling.").

408. *Id.* § 2Bii ("'Sustenance' means a person's or family's ability to preserve and maintain assets, income or financial support, whether derived from employment, court-ordered payments based on support obligations, government assistance including monetary payments or 'in kind' benefits ([e.g.], food stamps) or from other sources.").

409. *See id.* § 2Biii ("'Safety' means a person's ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm, including proceedings to obtain or enforce protection orders because of alleged actual or threatened violence, and other proceedings to address threats to physical well being.").

410. *See id.* § 2Biv ("'Health' means access to health care for treatment of significant health problems, whether the health care at issue would be financed by government programs ([e.g.], Medicare, Medicaid, VA, etc.), financed through private insurance, provided as an employee benefit, or otherwise.")

411. *See id.* § 2Bv ("'Child custody' means proceedings in which: (i) the parental rights of a party are at risk of being terminated, whether in a private action or as a result of proceedings initiated or intervened in by the state for the purposes of child protective intervention, (ii) a parent's right to residential custody of a child or the parent's visitation rights are at risk of being terminated, severely limited, or subject to a supervision requirement, or (iii) a party seeks sole legal authority to make major decisions affecting the child. This definition includes the right to representation for children only in proceedings initiated or intervened in by the state for the purposes of child protective intervention.").

experienced family law attorney is required.[412] Principle Seven of the ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings ensures that counsel provided to litigants will have the experience and training in the specific type of issues involved.[413] This requirement not only addresses competency concerns[414] but is also consistent with the finding that involvement of full and experienced counsel is a primary factor supporting positive outcomes in contested family law matters.[415] These ABA resolutions can be viewed as support for challenging the perception that only limited representation can provide fair access to justice in contested family matters.

VI. THE NEXT STEP: INCREASING FAIR AND EQUAL OUTCOMES ONCE THE LIMITS TO LIMITED REPRESENTATION IN CONTESTED FAMILY MATTERS ARE REALIZED

An obvious step toward addressing the needs of litigants in contested domestic-relations matters is to not only adopt a nationwide civil *Gideon* to provide counsel to litigants but to also broaden the class of litigants who would qualify for appointed representation.[416] The drafters of the Model Access Act recognize the reality of current budgetary restraints and the difficulty legislatures will encounter obtaining the funding necessary to

412. *See* AM. BAR ASS'N, ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 8 (2010), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1282162572Resolution105Summary081010.doc (providing that representation for litigants should have appropriate training an experience to handle specific issues).

413. *See id.* at 9 (noting that the attorney appointed pursuant to the Model Access Act should have "the relevant experience and ability, receives appropriate training, is required to attend continuing legal education, and is required to fulfill the basic duties appropriate for each type of assigned case. Counsel's performance is evaluated systematically for quality, effectiveness[,] and efficiency according to nationally and locally adopted standards.").

414. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) (setting out the competence requirements); *see also supra* Part IV.B.1 (discussing competent legal representation and Model Rule 1.1).

415. *See* Brief of Retired Alaska Judges as Amici Curiae in Support of Appellee Johnson at 14, Office of Pub. Advocacy v. Alaska Court Sys., No. S-12999, (Alaska Nov. 19, 2008), 2008 WL 5585566, at *14 ("[T]he impact of a lawyer is an impact on winning. Those with counsel win more."). Unfair results exists where an unrepresented litigant goes up against a represented party due to the power the lawyer provides to the represented litigant, whether from knowledge of the law, experience with the forum, or through general advocacy skills. Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 79–80 (2010).

416. *Cf.* Rich Cassidy, *ABA Resolutions Intended to Adopt Civil* Gideon *Are Too Narrow*, ON LAWYERING (Sept. 9, 2010), http://onlawyering.com/2010/09/aba-resolutions-intended-to-adopt-civil-gideon-are-too-narrow/ (warning that the ABA resolutions might not be the fairest solution because they might still leave some individuals without legal representation).

institute civil access to justice programs.[417] These efforts, however, should not stop here.[418] The movement toward improving access to justice in family matters should continue through research, education, and, eventually, increased legislative action.[419] Until this is a reality, the judicial system should acknowledge that limited representation is not appropriate in contested domestic-relations matters and that a system-wide approach to providing access to justice should be available to all individuals who need it.[420] Keeping aspirational long-term goals while working on more realistic short-term objectives can help fill the gap left by limited-scope representation.[421]

417. *See* ABA MODEL ACCESS ACT § 2Biv (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf (leaving flexible standards for individual jurisdictions regarding the implementation of appointment of counsel programs by individual jurisdictions).

418. *See id.* (detailing the progress of different jurisdictions in allowing access to the courts in civil litigation).

> Since adoption of Recommendation 112A in 2006, a number of states have taken steps to implement a state-funded civil right to counsel in civil cases involving basic human needs. Perhaps the most significant progress to date has been in the State of California which, with enactment of the *Sargent Shriver Civil Counsel Act*, directed the development of one or more pilot projects in selected courts to "provide representation of counsel for low-income persons who require legal services in civil matters involving housing-related matters, domestic abuse, and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child. . . ."

Id.

419. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104: MODEL ACCESS ACT OF 2010, at 4 (rev. ed. 2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf (noting that individual states may need to compile further data in order to effectively address the unmet needs of those residents unable to afford legal representation).

420. *See* Judith L. Kreeger, *To Bundle or Unbundle? That is the Question*, 40 FAM. CT. REV. 87, 90 (2002) (arguing that justice could be best served if litigants in domestic-relations disputes could afford full-service legal representation). However, there is still support for the idea that limited-scope representation is the best way to address these concerns. *Compare* Judith L. Kreeger, *To Bundle or Unbundle? That is the Question*, 40 FAM. CT. REV. 87, 90 (2002) ("If lawyers are permitted by rules of professional responsibility to reasonably limit the scope of their representation . . . [,] [then] [t]he client . . . and the court and the other side know the boundaries of the representation."), *with* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 987 (2009) (arguing that limited-scope representation "is most helpful in less complex matters, such as family law").

421. *Cf.* AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104: MODEL ACCESS ACT OF 2010, at 6 (rev. ed. 2010) (attempting to establish "a statutory right to counsel" for those facing adversarial proceedings in which the issues revolve around basic human needs); Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 985 (2009) (advocating for an alteration of the judicial system "to make it less dependent upon attorneys and more accessible to pro se litigants"). However, because all indigents should be afforded the right to have access to counsel, states should acknowledge the Model

A. *A Lofty Goal: Broadening the Categories of Basic Human Needs and the Financial Eligibility Requirements for Access to Full Representation in Contested Domestic-Relations Matters*

The ability to expand both the definition of basic human needs and the class of individuals that may be eligible for free legal representation was anticipated in the Model Access Act.[422] The basic human needs listed in the Act are the "most basic of needs" and are neither exhaustive nor inflexible.[423] Broadening the definition of child custody to include visitation issues is an example of how a jurisdiction may want to expand the applicability of the Model Act. Each jurisdiction should carefully consider the issues frequently involved in the contested matters in their family courts and draft definitions or commentaries to address these issues when adopting similar "civil access to justice" acts.

Expanding the eligibility requirements to consider the family's financial situation both at the time assistance is sought and post judgment is needed to accomplish the goal of adopting a civil *Gideon* in domestic-relations matters.[424] The Model Access Act is designed to allocate available funds to those least able to afford representation.[425] Commentary to this provision, however, clarifies that the Model Act includes the minimum income eligibility requirements and that jurisdictions may contemplate increasing the income eligibility by considering various factors such as the

---

Access Act's effort to provide equal justice to all by and providing legal representation so individuals untrained in the law do not have to face the judicial system alone.

422. *See* ABA MODEL ACCESS ACT § 2 cmt. (2010) (noting that jurisdictions adopting the Model Access Act may want to make certain changes "based on the unique circumstances applicable in their communities," and based on the resources and representation available in their areas).

423. *See id.* (recognizing that what qualifies as "basic human needs" may differ among jurisdictions, therefore allowing for the list to be expanded on depending on the situation).

424. Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 926 (2010) ("[E]qual justice under law cannot exist where some parents are denied meaningful access to the courts because they cannot afford counsel."). By altering the financial eligibility standards provided by the Model Access Act, states will be able to provide legal services to those individuals who need representation the most, especially where basic human needs, such as the right to child custody, are at issue.

425. ABA MODEL ACCESS ACT § 3A (2010). Those with a household income at or below 125% of the federal poverty level would be eligible for representation. *Id.* § 3D. To that effect, the Model Act states:

> In order to ensure that the scarce funds available for the program are used to serve the most critical cases and the parties least able to access the courts without representation, eligibility for representation shall be limited to clients who are unable to afford adequate legal assistance as defined by the Board, including those whose household income falls at or below 125% of the federal poverty level.

Id.

family's assets and ongoing extraordinary expenses, depending on the importance of the issues and the basic human needs involved.[426] Using these comments to tailor eligibility requirements for litigants in contested family law cases will assist legislators in adopting laws that most directly meet the needs of family courts.[427] A party may not fall below the income threshold at the time eligibility is sought but may fall below this level soon after eligibility is denied.[428] Scarce family resources that could be used for basic needs may be depleted on legal fees, placing the family in further financial crisis.[429] The ABA urges those jurisdictions considering assets in determining financial eligibility requirements to exclude the following from the calculation: "resources needed to fund necessities of life, assets essential to generate potential earning, and home ownership."[430] As stated by one proponent of expanding eligibility requirements, those most in need are not just the "technically poor" but are also "those who are in fact too poor to afford counsel."[431]

One component of the Model Access Act that is essential for providing fair access to justice in domestic-relations is the need for judges and other members of the legal system to identify early when a litigant cannot attain a just outcome without full representation.[432] Under the Model Access Act, if a judge in a contested family matter realizes a litigant cannot obtain a fair hearing without full representation, the litigant could be referred to

426. *See id.* § 3 cmt. (warning that the proposed requirements may prevent individuals from being eligible for legal services and suggesting that states may tailor the requirements to address the problem of unrepresented litigants in their court systems).

427. *See id.* § 3 (suggesting possible requirements for eligibility of appointed counsel in civil cases).

428. *See* Dax J. Miller, Comment, *Applying Therapeutic Jurisprudence and Preventive Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)",* 10 FLA. COASTAL L. REV. 263, 271–72 (2009) (demonstrating the financial impact on both spouses due to the need to provide two homes instead of just one). Both spouses suffer significant financial consequences as a result of a divorce judgment, even if they reach the resolution by agreement. *Id.*

429. *Cf. id.* at 271 (discussing how the children of divorce are moved to a different house, neighborhood, and school district because of the financial decline resulting from the divorce).

430. AM. BAR ASS'N, ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 4 (2010), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1282162572Resolution105Summary081010.doc.

431. Rich Cassidy, *ABA Resolutions Intended to Adopt Civil* Gideon *Are Too Narrow*, ON LAWYERING (Sept. 9, 2010), http://onlawyering.com/2010/09/aba-resolutions-intended-to-adopt-civil-gideon-are-too-narrow/.

432. *See* ABA MODEL ACCESS ACT § 2 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf (recognizing that a goal of the legal profession is to ensure that equal protection is provided for all).

the State Access Board to assess eligibility under the existing state law.[433] The importance of determining the need for full representation early in an adversarial proceeding is an inherent underlying principal of the Model Act.[434] Until the right to counsel in a contested domestic-relations matter involving critical family issues is a reality, requiring all participants in the legal system to identify when a party is underrepresented can be a small step toward attaining fair and just outcomes.

B. *Realistic Short Term Goals*

A basic principle of the Model Access Act is that society is responsible for providing equal and fair access to justice.[435] It is the obligation of those involved in the system to educate the public and law makers on the importance of achieving fair and equal access to justice, even when it is at the public's expense.[436] In these tough economic times, with many jurisdictions in financial crises, obtaining support for increased public funding is difficult, if not impossible.[437] In the meantime, the case for a civil *Gideon* can be prepared through research and education.[438] In many

433. *Id.* § 3C.

> [A]ny state trial or appellate court judge, any state administrative judge or hearing officer, or any arbitrator may notify the Board in writing that, in his or her opinion, public legal representation is necessary to ensure a fair hearing to an unrepresented litigant in a case believed to involve a basic human need as defined in Section 2.B. Upon receiving such notice, the Board shall timely determine both the financial eligibility of the litigant and whether the subject matter of the case indeed involves a basic human need. If those two criteria are satisfied, the Board shall provide counsel as required by this Act.

Id.

434. *See* AM. BAR ASS'N, ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 5–6 (2010) (emphasizing that many national legal organizations recognize the need for early appointment of counsel in specific civil cases).

435. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104: MODEL ACCESS ACT OF 2010, at 9 (rev. ed. 2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

436. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 112A, at 2 (2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

437. *See* Rich Cassidy, *ABA Resolutions Intended to Adopt Civil* Gideon *Are Too Narrow*, ON LAWYERING (Sept. 9, 2010), http://onlawyering.com/2010/09/aba-resolutions-intended-to-adopt-civil-gideon-are-too-narrow/ (mentioning how the current recession has left the majority of the country in serious fiscal difficulty to the point that the increased funding suggested in Reports 104 and 105 will not be adopted by state governments anytime soon).

438. *See generally id.* (arguing that there will come a time when the economy improves and the government will be in a position to adopt new spending proposals, such as the ABA's "Civil *Gideon*" Policy, and that the future policy will evolve).

contested family matters, it must be recognized and communicated that full representation is appropriate and in the public's best interest.[439] It is time to begin gathering data supporting the need and benefits associated with providing full representation to families in crisis and to begin educating the public.[440] Time spent preparing to address the "why" and "how" of a civil *Gideon* will further increase the chances of success when the time is right.

Studies on the inappropriateness of limited representation in contested domestic-relations matters should focus on measuring the actual long-term outcomes rather than just relying on reports of satisfaction.[441] The most effective outcome is one that promotes family stability and decreases family conflict.[442] Assessing results in contested matters requires testing orders and judgments over time.[443] Identifying when limited representation does not lead to positive or just outcomes can provide valuable information from which to assess cases in the future.[444] Judges and court personnel can then be trained to identify when full representation is needed.

It has yet to be determined exactly how funding will be obtained to provide full representation to a broader class of litigants than anticipated in

439. *Cf.* Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295, 298 (2010) (discussing as an example the 1979 European Court of Human Rights decision requiring that counsel be provided for all litigants in civil matters who cannot afford counsel and who cannot adequately represent themselves (citing Airey v. Ireland, 2 Eur. Ct. H.R. 305, 315 (1979))).

440. *See id.* at 313 ("The need for research is intense. We must identify the financial resources sufficient to fund the necessary inquiries. Our courts, our communities, and the most vulnerable members of our society should not have to feel their way.").

441. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 83 (2010) (citing Frase v. Barnhart, 840 A.2d 114, 134-35 (Md. 2003) (Cathell, J., concurring)) (asserting that "a system that achieves a high level of satisfaction is not necessarily a response to the inquiry of where counsel is most essential, absent a decision that satisfaction trumps case outcomes").

442. *See supra* Part V.A (describing what might be considered a favorable outcome for a domestic-relations matter).

443. *See generally* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 219 (2008) (referencing Judge Schma's characterizations of "hands-on courts," which are interested in outcomes more than procedures (citing HON. WILLIAM SCHMA, THE NAT'L CTR. FOR STATE COURTS, THERAPEUTIC JURISPRUDENCE: KNOWLEDGE & INFORMATION SERVICES (2000), *available at* http://www.ncsconline.org/wc/publications/kis_prosol_trends99-00_pub.pdf)).

444. *See* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 72 (2010) (noting efforts of the initiatives to evaluate self-representation programs and the difficulties of determining "justness" of the outcomes). Presently, "judges and academics all agree that there is insufficient evidence" available to determine "what type of intervention is appropriate" to achieve access to justice. Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J. L. & SOC. CHANGE 295, 297 (2010).

the Model Access Act. As suggested, a resolution to family matters that is in the public interest is one of the desired long-term outcomes. Judicial resources are preserved if the outcome is final and enforceable.[445] The study of current limited assistance programs can support a reallocation of existing public funds by identifying when they are the most and least effective so that the most favorable outcomes can be promoted.[446] If litigants involved in contested domestic-relations matters require full representation to reach a fair and positive outcome, resources from limited representation programs should not be used in those cases; the funds not used to offer limited services can then be allocated to programs offering full representation.[447]

In contested domestic-relations matters, arguing for public funding of full representation requires an assessment of the societal benefits, not just the economic costs.[448] The evaluation should include both the economic and societal benefits of providing full representation to litigants involved in a family crisis, as well as the evaluation of costs to the community when families are not able to attain just outcomes.[449] Even though determining the benefits and costs associated with availability of counsel in family matters is difficult, "an evaluation of costs involved in representation requires an equivalent assessment of savings."[450]

Finally, clarity in the rules governing the use of limited representation, either through amendments to the ethics rules or additional guidance in commentary or case law, can assist attorneys in recognizing when offering limited representation is not appropriate. If the existing informed consent

445. *Cf.* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 231–32 (2008) (commenting on problematic nature of family law issues in that they are "seldom capable of being determined with finality," but arguing that pro se litigants in these matters may not achieve proper resolution "without the appropriate means to aid them").

446. *Cf.* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 92 (2010) (concluding that accurate data will help identify positive "starting points for expanding a civil right to counsel").

447. *See id.* at 80 (commenting on the current discussions regarding allocation of resources for legal aid programs).

448. *See e.g.*, *id.* at 90 (citing Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002)) (reviewing a study of bail hearings on the possible fiscal and social costs that result from absence of representation).

449. *See e.g.*, *id.* at 89–90 (examining the costs associated with evictions and lost custody, and reiterating that "the costs relating to the harm that flows from the absence of counsel must be considered").

450. *Id.* at 90.

and competency requirements remain,[451] adopting a view of limited representation in contested domestic-relations matters similar to that of the federal courts in bankruptcy proceedings can prevent the inappropriate use of such services.[452] A presumption that informed consent cannot be attained in contested domestic-relations matters would provide clear guidance for attorneys and eliminate the temptation for clients to agree to less representation than they need.[453]

VII. CONCLUSION

Recognizing that limited representation is not appropriate in contested domestic-relations matters will lead to the creation of better options for families seeking to attain just outcomes in crisis. Even though Model Rule of Professional Conduct 1.2(c) and corresponding state ethics rules were amended to explicitly allow limited representation in an effort to alleviate the burdens of the pro se phenomenon, a correct analysis of the appropriateness of its use raises serious concerns for the family law attorney.[454] The unique legal and emotional challenges involved in domestic-relations cases requiring more than perfunctory court involvement make it almost impossible for the attorney to conclude that offering some representation, leaving the litigant pro se status for aspects of the case, is reasonable.[455] These same challenges should lead the attorney to doubt whether obtaining the client's informed consent to limited representation is possible, especially when the consent presumes a voluntary choice by the client based on the client's understanding and careful consideration of the risks and alternatives to limited representation.[456] An analysis of the situation should lead the family law

451. *See* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 921–22 (1998) (examining the Model Rules that express the requirements of consent and competency); *see also supra* Part IV.A (discussing the competency and informed consent requirements in the Model Rules).

452. *See* Deborah B. Langehennig & R. Byrn Bass, Jr., *Being Retained and Paid in a Chapter 13 Case*, 28-4 AM. BANKR. INST. J. 46, 72 (2009) (explaining the very strict standard for limited representation in bankruptcy proceedings).

453. *See supra* Part IV.B.3.c (exploring the concept of informed consent in domestic-relations matters).

454. *See* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 917 (1998) (acknowledging the conflict between unbundled legal services and the duty to further their client's position competently)

455. *Cf.* Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J. L. & SOC. CHANGE 295, 301 (2010) (mentioning a study which revealed that, as opposed to the common assumption, lawyers convey the most advantage in more "informal adjudicatory settings").

456. *See* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay*

attorney to conclude that limited representation is not appropriate in contested domestic-relations cases.[457] However, an incomplete analysis can lead to inadequate or ineffective representation.[458] The low- or moderate-income litigant is faced with only two options: go it alone or do not go at all.[459]

Strong support for the need to restrict the use of limited representation in domestic-relations matters involving litigation is found in the resolutions calling for a civil *Gideon*.[460] The idea that full representation is presumed necessary in adversarial hearings involving basic human needs, coupled with Model Access Act's definitions for the basic human needs, include those issues commonly involved in contested family matters: "shelter, sustenance, safety, health[, and] child custody."[461]

These basic principles can be used to establish a system-wide approach to determine the appropriateness of the use of limited representation and remove the sole responsibility of this determination from the attorney. Even though obtaining funding for a nationwide civil *Gideon* is unlikely in this economic climate, the recognition of the need for full and adequate representation in cases involving basic human needs can be used to build awareness of the economic and societal benefits associated with assisting families in crisis to reach a full, fair, and just resolution to these issues in family court.

For?, 11 GEO. J. LEGAL ETHICS 915, 922 (1998) (explaining that the Model Rules allow lawyers broad and ambiguous authorization to get clients to consent, which may be limited by the clients ability to posses the competency to actually consent).

457. *Cf. id.* at 946 (suggesting that if lawyers approached limited-performance agreements from the perspective of the client, the lawyer would be able to better determine whether limited representation would be in the client's best interests).

458. *Cf.* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 82 (2010) (mentioning that a higher skill level is needed in an advocate who represents cases where there is a dramatic power imbalance, and ordinary representation will not suffice when litigants are highly vulnerable).

459. *See* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 63 (2010) (discussing the increase in pro se litigants since the 1970s); *see also supra* Part III.D.1 (introducing "the pro se phenomenon").

460. *See* AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 112A, at 7 (2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf (expressing the need for a civil *Gideon,* specifically, a legal right to counsel in civil matters, because representation for all are is important to the effectiveness of the justice system).

461. AM. BAR ASS'N, ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 2 (2010), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1282162572Resolution105Summary081010.doc (explaining the definition of "basic human need").