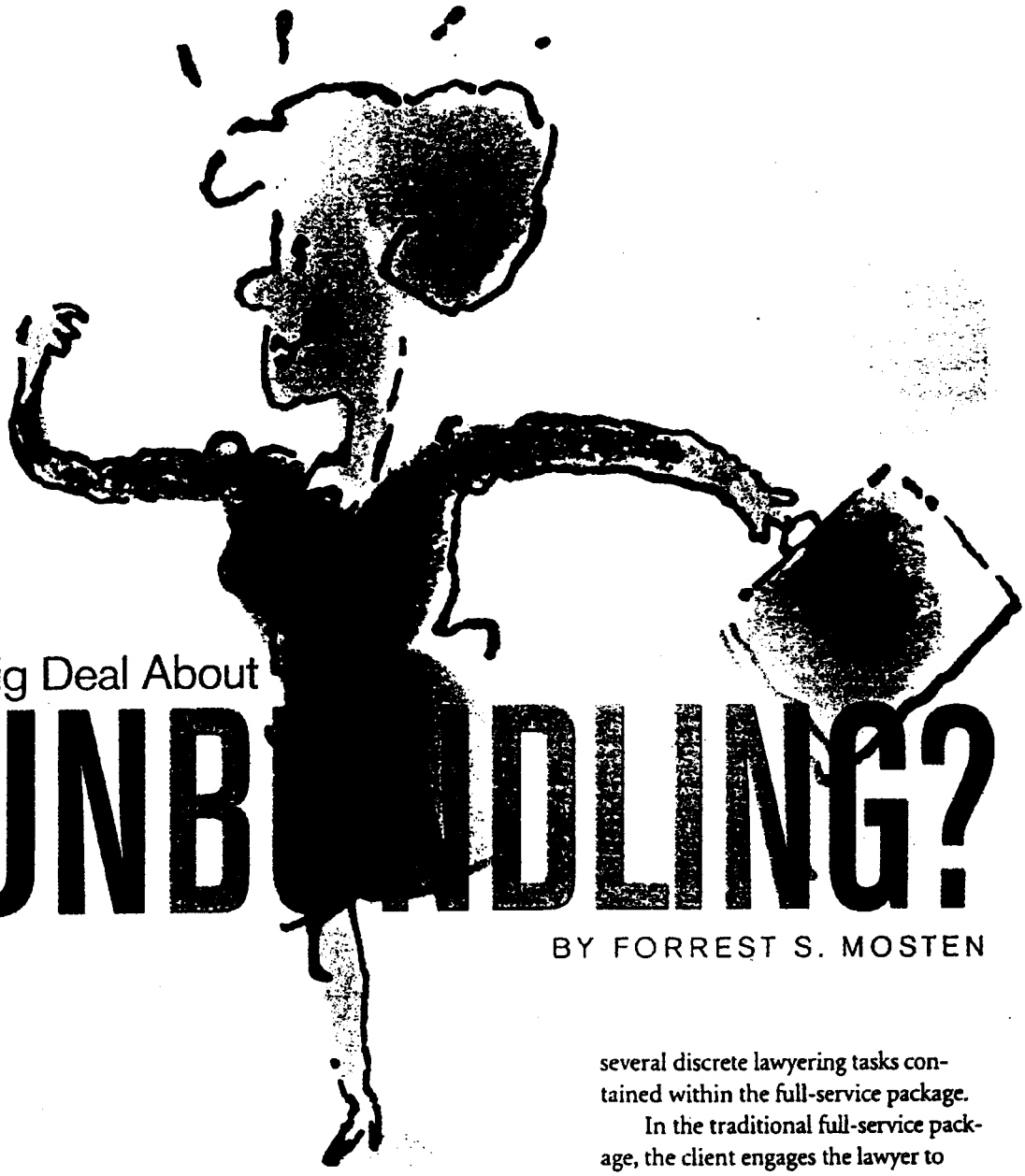


What's the Big Deal About UNBUNDLING?

BY FORREST S. MOSTEN

Allocating tasks between a lawyer and a client is a means to increase access to legal services—and to boost the client's power. It can also improve profitability and satisfaction for the lawyer. Here's how, and why, it works.

WHAT IS UNBUNDLING? It's a way to meet the needs of a new breed of clients—those who want control over the costs, processes and choices involved in their legal services. Specifically, unbundling means that the client is in charge of selecting one or several discrete lawyering tasks contained within the full-service package.

In the traditional full-service package, the client engages the lawyer to perform any and all of the following tasks, meeting the demands of the client's particular case:

- Advising the client
- Doing legal research
- Gathering facts
- Conducting discovery
- Conducting negotiations
- Drafting documents
- Representing the client in court

With the unbundling of services, the lawyer and client work together to allocate the division of these tasks. This allocation depends on the given

ds of the case as well as the needs and potential talents of the client.

The unbundled client specifically contracts for the extent of services provided by the lawyer; the depth of services provided by the lawyer; and the communication and decision control between lawyer and client during the engagement. If that sounds radical to you, you might be surprised to learn that you already unbundle in your law practice.

Selling Discrete Services: Lawyers Do It Every Day

There are very few lawyers who provide the complete package of services to all their clients. Most of us sell discrete services on a fee-for-service basis or provide discrete services for free. Consider the following:

- Do you ever provide an initial consultation on a new matter, and either the client decides to go no further or ends up hiring another lawyer (or non-lawyer) to do the work?
- Do you ever prepare a document, such as a letter, real estate deed or power of attorney, and do nothing else relating to that matter?
- Do people ever come to see you just to get a second opinion on how their cases are being handled by another lawyer, and then they stay with their current lawyer, go with a different practitioner or simply decide to go it alone?
- Do people ever call you with an isolated legal question and, once you give your answer, you never hear from that person again?

All these common activities are examples of discrete-task services that you already perform. The concept of discrete-task representation is not unknown to clients either.

Corporations hire in-house counsel to handle part of the job, manage services that will be purchased from other lawyers and address the terms. High-income individuals know that it makes sense to use different lawyers for different tasks and to manage the lawyers' time effectively by having non-lawyers (accountants, business managers, personal assistants) do a good deal of the legwork. And lower-income people unbundle, albeit involuntarily, when they pick up just a form from a community legal services office (since legal aid budgets preclude full-service representation for these potential clients).

Unbundling, then, is not new. So what's the big deal? The fact that lawyers as well as consumers are generally unaware of its potential both to increase legal access and improve lawyer profitability for middle-income people.

MENU OF LEGAL SERVICES

PRIX FIXE OR A LA CARTE? In a traditional lawyer-client relationship, the lawyer performs all tasks necessary to meet the demands of a particular matter. With unbundling, the client is in charge of selecting which discrete tasks the lawyer will perform. Just as a chef may offer recommendations on the nightly menu, the lawyer may help the client decide which services are needed, and how to allocate the tasks. Ultimately, however, just as the diner is in charge of the meal, the client is in charge of the case.

TRADITIONAL LEGAL SERVICES, PRIX FIXE MENU

Services

All services included:

- Advice
- Gathering Facts
- Discovery
- Legal Research
- Negotiation
- Drafting
- Court Representation

Representation

All services performed by your lawyer

Pricing

Advance retainer required, plus additional time billed on a monthly basis

UNBUNDLED BUFFET OF LEGAL SERVICES, A LA CARTE MENU

Services

Client selects any or all services:

- Advice
- Gathering Facts
- Discovery
- Legal Research
- Negotiation
- Drafting
- Court Representation

Representation

Services performed either by client or lawyer, as client and lawyer discuss and agree

Pricing

Clients pay as they go for the services they need, want and choose in consultation with their lawyer

Who's the Architect? Shifting the Power Balance to Clients

In her extended study of the market for unbundled legal services, *Unbundling Dispute Resolution Services: The Missing Link in Access to Justice* (1998), Suzanne Burn points out that for at least 20 years, the debate on access to civil justice in England and Wales focused on issues important to lawyers, judges and politicians. The missing element in the debate was what clients actually want and can afford.

It is no wonder. Law school focuses on appellate cases that only result when one party appeals after losing a trial. Using the historical, and confrontational, Socratic method, the personal needs and concerns of individual clients are subordinated to broader legal principles and inductive reasoning. Until clinical education became part of legal education in the 1970s, the word "client" was rarely uttered within the law school classroom, with the expectation that young lawyers would learn all they needed to know about clients upon entering law practice as apprentices.

However, in large firms, young lawyers may not even see a client for years. And in many smaller firms, the models of client interaction are offered by senior lawyers who either were trained in big firms or started their careers in a different era, an era when clients were less consumer-trained and the "brotherhood" of lawyering was steeped in lawyer-centered traditions.

It is true that there is generally an imbalance of expert power between any service provider and customer. Electricians know more about installing wires than homeowners do. Physical trainers know more about exercise than the athletes who grunt to the trainers' instructions. Yet the legal profession is at the top of the list in successfully creating a power structure to keep vital information from clients and hold on to the inherent power imbalance that expertise creates. Avron Sheer (in "Lawyers and Clients: The First Meeting," *Modern Law Review*, 1986) describes the working model as that of a "'High Priest' of law handing down pronouncements to grateful recipients."

Many clients, however, are no longer willing to be treated like children. Today, clients are more active, more educated in the art of "clienthood," more inquisitive and more demanding in their quest to control the purchase and supervision of legal services.

Unbundling meets the needs of this new breed of client. In contrast to the traditional attitude that client anxiety is somehow reduced by a lack of information and attention, unbundling empowers the client in an unbundled case. The client is the architect of the scope and tenor of the relationship—the one who decides how the case is to be managed and what role, if any, the lawyer will play. Even more novel—the lawyer not only agrees to this power shift but invites the public to enter the office on that basis.

Is Unbundling Right for You? Steps and Motivations

How does it work? Suzanne Burn lists the following steps as typical of an unbundled client-lawyer relationship:

- The lawyer offers a menu of services.
- The client sets the budget and selects which services the lawyer will perform.
- The client negotiates terms of payment, as per task or set fee.
- The client and lawyer agree on which of them will be responsible for overall strategy and case management.
- The client and lawyer work together, sharing in decision making, toward resolution of the dispute.

Think of it as the difference between a prix fixe meal and an a la carte buffet. (See the "Menu of Legal Services" on page 39.)

As you can see from the metaphorical menu, the full-service package includes the soup-to-nuts inventory of legal services. Once retained, the full-service lawyer is responsible for using good faith professional judgment on behalf of the client to strategize what services are necessary to accomplish the client's goals.

Ethical and malpractice constructs are built on the full-service package. In return for the discretion to be in charge of case strategy, there is an implicit expectation that a lawyer will do everything necessary to accomplish client goals regardless of the client's financial limitations—or so suggest the malpractice laws. Every lawyer is expected to manage the perfect case plan. Corners are not to be cut unless they do not affect the presentation of the client's rights at trial. It is in this mythical framework of perfection that the official autopsy called "malpractice litigation" exhumes the cadaver and cynically searches for roads not taken as well as those stumbled upon.

In practice, though, few if any clients can afford perfect representation. Lawyers cut corners unilaterally and still more are cut with the agreement with the client. The full-service package in theory is therefore the amended-service package in reality. Yet this corner cutting does not prevent either the client or lawyer from wanting the full scope of services to be utilized. From the client's point of view, it does not really matter what the lawyer does (until the bills start coming). The bottom line is whether or not the lawyer gets the job done. A main feature of client motiva-

j to pass the buck to the lawyer. ›_ .ie.work—pass the worry! The ınbundling client's motivation—to :ontrol costs and choices—is a different natter altogether. It may produce a sea change in the legal profession.

If you are interesting in being part of the sea change, the first step is to take the "Unbundling Mind-set Quiz" on this page to see if unbundling is right for you. It is not necessary to check off all, or even most, of the statements. There is no unbundling "entrance exam." The purpose of the quiz is to determine if you are drawn to the message of unbundling. If you can legally practice law, you can unbundle your services—if you want to. Unbundling is still the practice of law, albeit with a fresh, client-oriented approach.

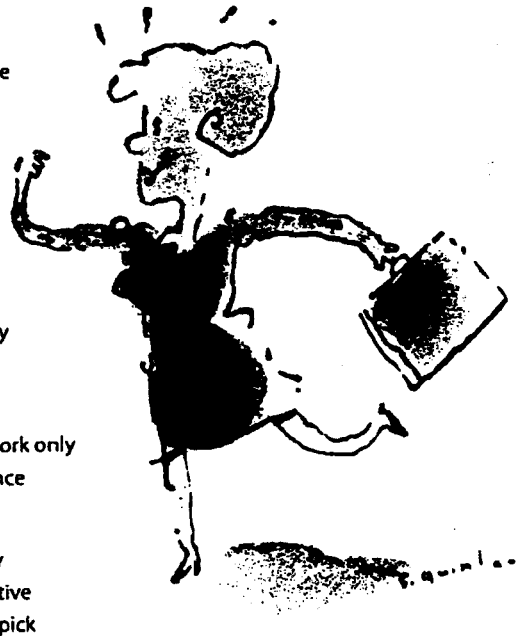
The Benefits to Clients

Regardless of your initial view of this is···, it is important, as a practicing ı r, to understand the benefits of unbundling for competently advising clients—whether or not they choose to unbundle or you choose to add discrete-task services to your present practice.

Cost savings. Cost savings is probably the driving force leading to unbundling. The marketplace does provide a rough calibration between competence and cost. It is probably true that the more clients pay, the better the legal work. However, this is a luxury few people can afford. And, as the American Bar Association and corporate in-house programs are reporting, consumers do not want to pay any more than they have to for legal services. For companies, this means shopping for lawyers that will be more flexible in their delivery structure. Among middle-income individuals and . business owners, the bargain

MIND-SET QUIZ IS UNBUNDLING RIGHT FOR YOU?

THE FIRST STEP in unbundling is to give yourself an unbundling mind-set quiz to see if unbundling is right for you. You don't have to check off all the boxes to be suited to unbundling. But your response to this list will help you decide if this is something to pursue.



- o I want to spend more time in direct contact with clients and less time interacting with lawyers on the opposing side or with the court system.
- o I am able to give up control of doing the legal work myself and am comfortable helping clients who do most of the work on their own.
- o I am flexible with changing roles with clients and even adapting to new roles requested by the client (that do not conflict with my professional or personal ethical boundaries).
- o I am willing to accept payment for current work only and begin an engagement without an advance retainer or deposit.
- o I am able to handle watching clients take my sound advice and make poor or self-destructive decisions—and still be willing to help them pick up the pieces and try to make lemonade out of lemons.
- o I like to teach clients skills and concepts that will make their cases go better—and perhaps even improve their lives.
- o I like to prevent problems from ripening into conflict.
- o I like to reduce my billing load and work on more of a cash-and-carry basis.
- o I like to have more control over my life by not being subject to cancelling vacations or working nights and weekends.
- o I like working with people who like to shop for bargains.
- o I am willing to work with people who may have a high degree of mistrust or disregard for lawyers.
- o I want to provide clients with space in my office so that they can do their own background reading, watch helpful videos, do their own legal research, prepare their own work, or just relax and calm down.

UNBUNDLE WITHOUT CREATING TROUBLE

- Always use a written limited-scope client-lawyer retainer agreement.
- Screen clients to make sure they are appropriate unbundling candidates.
- Confirm what tasks you will do and what tasks the clients will perform for themselves.
- Use a replenishable retainer—get paid in advance. An unpaid bill can compromise your coaching relationship.
- Don't give hurried or incomplete advice.
- Get enough facts so that you do not miss key issues.
- Disclose your unbundling practice to your malpractice carrier and get a rider for discrete task work.
- Check out your state's rules regarding your duty to disclose your involvement in ghostwritten court documents. If in doubt, disclose with the client's knowledge and consent.
- Never make a limited court appearance without prior permission of the court.
- Do not coach witnesses in the courtroom.
- Be clear about communication—are you or the client responsible for checking in and monitoring progress?
- If the client can't handle the responsibility of unbundling or the limited-scope relationship isn't working, convert to full service or end the relationship.

hunting is even more prevalent. Unbundling addresses the cost barriers of high lawyer fees in these ways:

- High retainers are unnecessary. Because clients are in charge of the amount of legal work, they can pay as they go. Many unbundling lawyers do not charge deposits, with the understanding that the biggest risk will be losing a few hours of work. When the lawyer does charge a deposit or retainer, it is only for the work requested. Since an unbundling lawyer is not counsel of record in a court action, a retainer is not needed to protect the lawyer in a runaway case—where even if the client owes money, the lawyer must keep working until the client consents otherwise, or the judge grants the lawyer's motion to withdraw. In unbundling, no payment, no more work.
- Total bills are more affordable. Less work equals lower fees. The hourly rate may not differ in discrete-task representation, but the cost to the client will be more controlled and, generally, far less. Because clients are bearing more of the total tasks load, you will do less work. And lower overall fees can, in turn, increase lawyer use. Clients will be willing to "stick a toe in the water" and use a lawyer's services without the dread of being stuck with an unpayable bill at the end.
- The lawyer focuses on top-priority tasks. By limiting your scope, you can concentrate on the client's most pressing needs. This should increase your efficiency for the tasks undertaken, as well as reduce the costs to clients.

Control over processes. In her unbundling training program for lawyers (sponsored by the Contra Costa Bar Association), M. Sue Talia describes the typical unbundled client as having the following personality traits:

- Is resourceful
- Is self-help oriented
- Has a technical background
- Is able to gather and organize information
- Is able to do research in books or on the Internet

While more research is necessary to define the unbundler's personality, the need and desire for control over their lives seems to universally describe members of this consumer group. Essentially, unbundling gives them control in terms of process and choice.

The nature of unbundling is such that both lawyer and client explicitly agree, "The client is in charge of the process." This agreement on the nature of the relationship defines the power balance and sets the parameters for the roles and expectations of both client and lawyer regarding who is in charge and whose needs are paramount.

We all bridle at being dependent or powerless. Unbundling supports the desire for clients to be treated like adults by their lawyers. This process control works in a number of ways:

- The client decides what needs to be done to solve the problem.
- The client decides whether the lawyer will even be involved.
- The client decides the allocation of work between client and lawyer.
- The client decides whether the lawyer will actively monitor the situation or wait for the client to reinitiate contact.

Moreover, when they are involved in this way, and on the firing line themselves, clients understand the pressures and problems of the case—it remains

case and they are not permitted the luxury of dumping it solely on you and then abrogating responsibility. Unbundling clients actually sign up for this responsibility. And they appreciate lawyers who understand what they are going through, demonstrate that understanding with empathy and availability, and are flexible enough to work with them in ever-evolving patterns of task allocation and decision making.

Control over choices. By remaining on the firing line, unbundling clients are faced with challenging decisions similar to those you face when providing full-service representation. Should I write a letter or have a personal meeting? Should I serve the summons or request that the other side pick it up? Should I give in on five smaller issues to get a bit more on the big issue or just to reach finality?

Unbundling offers clients the opportunity to know about such necessary decision points firsthand. At the same time, when confronted with these decisions directly, unbundling clients will often want the help you can bring from your training, experience and just plain good judgment. Since client education and the availability of options are two selling points of unbundling, the essence of discrete-task coaching is for you to help the client explore alternatives on the decision-making spectrum. For example, I had a client who booked a session just to talk about timing the first offer in a residential home sale conflict involving major leaks. Would an offer be a sign of weakness? Should the offer come before the scheduling of a mediation? Should the offer be bifurcated between actual settlement terms and the settlement process?

You have probably had many such client consultations throughout your career. What makes it different in the unbundling context is that the client initiates the conversation as the result of challenges that arise in the client's handling of the case. Once the conversation is concluded and decisions are made, it is the client who implements the plan. Such control over getting the options and fully exploring them drives many clients to unbundling.

The Benefits to Lawyers

The legal profession can certainly benefit from increasing its client-centered orientation. Lawyers have begun to recognize their vulnerability in the marketplace, with clients increasingly self-representing, turning to non-lawyer providers or simply living with acknowledged legal needs. At the same time, our clients are learning from their experiences as consumers of other products and services to expect disclosure of relevant "sales information" and friendly, customer-oriented service. Unbundling provides several opportunities for lawyers in this regard.

Increasing your market share. The benefit resulting from no or low deposits is that the public is more willing to use lawyers. Many people who are doing without lawyers can afford, and are willing to pay, limited fees for reduced service. Most people know that it is in their self-interest to use lawyers—except they cannot afford the necessary starting fee. Many people will still choose not to pay a few hundred dollars and will still try it themselves—or just endure. But when the cost is lower, many more will at least give lawyers a limited try. And, if they are satisfied with the result, they will use the lawyer again and again—and will recommend the lawyer to others.

Maintaining your hourly rates. Unbundling need not be confused with a reduced hourly rate. The fee arrangement can be win-win for both you and your clients. The client pays significantly lower overall fees. You, however, can charge (and clients generally expect to pay) a customary hourly rate for the limited services provided. Actually, some lawyers may choose to offer unbundled services at a higher than normal rate based on a value-billing concept, owing to the malpractice risks.

Improving your receivables. Another advantage of unbundling is that satisfied clients pay their bills. And satisfied clients generally pay faster so you need to write off fewer fees. Because bills do not skyrocket as fast and your work is better understood and appreciated by clients (who are making informed decisions about which tasks you perform and how much time will be billed), accounts receivable stay more controlled.

Increasing your personal satisfaction. Lawyers who sign on for the discrete-task model may also find greater satisfaction and congruence with their personal values, especially when you compare unbundling with the bloodletting of a courtroom. Your belief in the creative opportunities, efficiencies and cost benefits of unbundling can often steady and inspire a client to persevere through a bumpy, painful process. That inspiration alone may help clients achieve satisfactory resolution. And that, in turn, is a very satisfactory experience for you, the lawyer. ■

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This article is excerpted and adapted, with permission, from Chapter 1 of *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte* by Forrest S. Mosten.

STANDARDS FOR CERTIFICATION IN ALTERNATIVE DISPUTE RESOLUTION (ADR) LEGAL PRACTICE: *A PROPOSAL (2004)*

FORREST S. MOSTEN

DEFINITION

ADR Legal Practice is the practice of law dealing with all aspects of advising and representing clients in mediation, arbitration, collaborative law, and other ADR processes, as both counsel of record and/or in an unbundled manner as defined by California Rules of Court. Other ADR Processes, include, but are not limited to:neutral fact finding, mini-jury trial, private judging, early case evaluation, non-judicial case management, conflict prevention and dispute system design. Attorneys serving as neutrals are not covered by this certification.

TASK REQUIREMENTS FOR CERTIFICATION

An Applicant must demonstrate that within the five (5) years immediately preceding the initial application, he or she has been substantially involved in ADR Legal Practice, which shall include actual experience in the following areas:

- Representing Clients in Court Mandated Mediation
- Representing Clients in non Court Mandated Mediation arbitration, Collaborative Law Sessions, or other ADR Processes
- Negotiating, reviewing and drafting ADR arrangements including setting up mediation, arbitration, collaborative law , and other ADR processes
- Negotiating, reviewing, and drafting terms of settlement within mediation, collaborative law, and other ADR processes; and/or
- Negotiating, reviewing and drafting future dispute resolution clauses for contracts and settlement agreements;

A prima facie showing of substantial involvement in the area of ADR Legal Practice is made by completion of at least two of the following categories:

- Principal counsel in twenty-five (25) Court Mandated Mediations involving at least 1 session with parties and counsel for minimum of at least three (3) hours in duration

;

- Principal counsel in twelve (12) Mediations (not mandated by a court) resulting in a written Memorandum of Understanding or Settlement Agreement involving at least 1 session with parties and counsel for a minimum of at least three (3) hours in duration

;

- Principal counsel in twelve (12) _Collaborative Law Proceedings resulting in a written settlement agreement involving at least 2 sessions with parties and counsel for a minimum of at least three (3) hours in duration per session

- Principal counsel in twenty-five (25) Court Mandated Arbitrations involving at least 1 session with parties and counsel for minimum of at least three (3) hours in duration

- Principal counsel in twelve (12) Arbitrations not mandated by a court resulting in a written decision involving at least 1 session with parties and counsel for minimum of at least three (3) hours in duration

- Principal counsel in twelve (12) Other ADR Process matters resulting in a written agreement or decision involving at least 3 hours per matter;

- Principal Counsel in fifty (50) matters of Unbundled Representation of Pro Per parties participating in mediation involving at least two (2) hours per matter;

- Principal Counsel in fifty (50) matters involving Conflict Prevention Legal Services involving at least two (2) hours per matter;

Principal counsel is the attorney who spends a majority of the time on a case in the activities of preparation, review, and providing ADR Legal Services to a client. There can be only one principal counsel per case.

EDUCATIONAL REQUIREMENT FOR CERTIFICATION

An applicant must show that, within the three (3) years immediately preceding the application for certification, he or she has completed not less than forty-five (45) hours of activities specifically approved for ADR Legal Practice as follows in addition to

completion of a minimum of 50 hours of mediation training as a neutral or 25 hours of mediation training and 25 hours in collaborative law training, or 25 hours of mediation training and 25 hours of arbitration law training :

:

Not less than four (4) hours in interviewing and advising clients on alternatives to litigation

Not less than ten (10) hours in negotiation planning and strategic interventions

Not less than (20) hours in mediation advocacy and/or advanced collaborative law training, and/or advanced arbitration training, and/or advanced training in other ADR processes

Not less than three (3) hours in unbundled legal services and/or other legal services for unrepresented persons

Not less than four (4) hours in ethical issues involved in ADR Legal Practice;

Not less than four (4) hours in law office management supporting ADR Legal Practice

CONFIDENTIAL MINI-EVALUATION

Forrest S. Mosten

This article describes the use of a very focused, concentrated, one day child custody evaluation process. This process is structured and interactive. The author has used this method in resolving several custody disputes and contends that this method yields accurate, meaningful results with minimum disruption and cost to the parties.

In resolving custody and other parenting issues, mediation — both through the court system and through private providers — offers parents an excellent opportunity to work out their own arrangements for their children.[1] However, many parents are unable or unwilling to take the responsibility for directly resolving custody issues — even with the facilitation of a neutral mediator. These parents may need a trained professional to meet with them and their children and, after making an assessment, to *tell* the parents what would be best for the family.

A custody evaluation ordered by the court in a contested proceeding or by stipulation of the parties is the process generally utilized in this community. Judges favor this process because decision-making is virtually transferred from the judge to the evaluator. The evaluator becomes like a master in financial issues. If a decision has to be made for the family, many parents and attorneys also prefer that it be made by a qualified mental health professional rather than by a judge who may have little or no training and/or experience in child development, individual psychopathology, family dynamics, therapeutic treatment or other similar issues.

However, as formal evaluations become more common and the role of the evaluator becomes more like that of a custody judge, the evaluation process itself often becomes more adversarial and more parental decisions may be delegated to the "super parent." Thus this writer believes that formal evaluations should be a *last* resort in custody proceedings — after less invasive options have been utilized. However, families can benefit from many of the positive aspects of having a professional offer insight and recommendations

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Author's Note: *This article appeared in the Los Angeles County Bar Association's* Family Law News and Review.

FAMILY AND CONCILIATION COURTS REVIEW, Vol. 30 No. 3, July 1992 373-384

to a conflicted family and be available to work with the family to help implement recommendations and improve parenting and communication as well as conducting or supervising therapeutic treatment for family members.

The purpose of this article is to discuss an alternative process which has been successfully utilized in my jurisdiction—the Confidential Mini-Evaluation (CME). The CME can be utilized in place of or prior to the traditional custody evaluation, giving parents and children the benefits of the evaluation without the cost, acrimony, time, or possible risks to the family of the traditional evaluation.

TRADITIONAL CUSTODY EVALUATION

An evaluation may be ordered when the parties are unable to work out a custody or visitation plan. The traditional evaluation is conducted by a mental health professional (usually psychiatrist or psychologist) who has advanced training and experience in child development, parenting and specialized issues of divorced families. The process is initiated either by agreement of the parties or by Court Order and ends with the submission of a formal report.[2] The evaluator generally completes a written evaluation report that includes the evaluator's observations, findings and recommendations based on a variety of data. The source of data may include but are not limited to the following: a history of the parties and child; interviews with the parent, child and significant others; interviews with educators, treating doctors, therapists and other professionals, witnesses, and character references; a review of pleadings, correspondence, depositions and records; the results of psychological testing, drug tests and other data; and a review of other material as deemed necessary by the evaluator.

Although a therapist conducts the evaluation, the parents, children, and other family members receive little or no therapeutic help to solve the underlying family problems that precipitated the evaluation. In fact, most evaluators feel that such a therapeutic role compromises the evaluator's function. While attempting to be empathetic and approachable to parents, most evaluators consciously and expressly remove themselves from any type of treatment role. Some evaluators never even communicate their impressions, findings or recommendations directly to the parents and do not explain their conclusions unless compelled to do so in formal deposition or court testimony. Other evaluators may have a feedback session in which the results are delivered to parties and counsel. While parents and counsel can ask

questions or express concerns, parties are generally advised that the feedback session is itself part of the evaluation and that the behavior of the parents during that session can affect or modify the evaluator's recommendations. Such warnings are generally heeded, so that parents are coached to "be good" and deal with their concerns in later negotiations and/or court proceedings.

After rendering the report, most evaluators are not available to the family for counseling or mediation—even though therapy and mediation for the family are often recommendations.[3]

A traditional evaluation process will take from 4-5 weeks to as long as 60-90 days or longer. Costs range from a rock bottom low of $1,000.00 to as high as $20,000.00. Most disputes settle on terms close to the recommendations of the evaluator. The settlement process may result in both sides agreeing to the recommendations of the evaluator, negotiating settlement terms in Conciliation Court, private mediation, an office conference, or in the Courthouse just prior to trial, often with the help of a Judicial Officer.

In those cases that are decided in a contested court proceeding, the evaluator's recommendations are given considerable weight, and the Court's decision rarely differs substantially from the views of the neutral evaluator, even when other expert witnesses testify that a different custody plan is warranted.

CONFIDENTIAL MINI-EVALUATION (CME)

The confidential mini-evaluation (CME) is a recommended alternative process to a traditional evaluation. Through the CME the mediator makes a non-binding confidential verbal recommendation, often within a single day.

After selecting an evaluator by mutual agreement of the parties, the evaluator meets with the parents, children, significant others and the attorneys in the space of a few hours. Following these sessions, the evaluator meets with parents and attorneys to orally give observations, impressions and custody recommendations (see Sample Schedule).

The process is confidential by stipulation and the evaluators, parties and counsel agree not to discuss the evaluator's observations, findings or recommendations in any subsequent evaluation or any Court proceeding.

Following the feedback session, the parents and counsel are encouraged to ask questions, give reactions and share concerns. If the parties so desire, the evaluator can then assist to mediate a resolution on the same day or to schedule a follow-up appointment.

Regardless of the follow-up work by the evaluator, since the recommendation is not submitted to Court, the parties can use the information to negotiate a settlement directly or with the help of Conciliation Court, or a mediator. If both parties desire a formal evaluation, this process can be then initiated.

The cost of the CME can be as low as $600.00 ($150.00 × 4 hours) or higher depending on the hourly rate of the evaluator and the time spent by the evaluator in session and in the review of documents provided by the parties.

ADVANTAGES OF THE CME

1. *Expeditious Finality*

With certain important exceptions, regardless of the specific outcome of a custody dispute, expeditious finality (even for a period of time) may be a very important variable in shielding children from the negative consequences of litigation and helping parties move on with their lives. Parental positions involving children are often strongly held and some parents will not modify their positions unless a "child expert" tells them what is best for their children. While a non-binding expert's opinion may not work in all cases, such didactic intervention will often be sufficient to either have one party abandon an untenable view or stimulate both parties to search for middle ground. In either result, the family would be spared from further acrimonious conflict and expense.

2. *Self Determination*

Parents using mediation have higher satisfaction than those resolving disputes through litigation, in part, due to the amount of control parents feel they have over the result compared to having a judge make the decision for them. In customary evaluations, the evaluator assumes the role of decision maker, causing one or both parents to feel out of control. It is not uncommon for both sides to appeal issues, and as one local judge is fond of saying: "There are no homeruns in family law (litigation)."

The CME permits parents to have the input of the expert without ceding decision making to that expert.

NO RISK OPTION

Many parents are afraid of undergoing a formal evaluation due to the significant consequences of a recommendation being admitted into evidence that is generally followed by the judicial officer. Most family lawyers have experienced cases in which the parent screaming for a "change" is devastated by adherence to the recommendation of the evaluation.

The CME offers parents the opportunity to receive useful observations and recommendations without the risk of an unfavorable recommendation being submitted to court. Of course, even "advisory recommendations" have considerable persuasive power and most parents will follow such recommendations without further proceedings being requested. On the other hand, the dissatisfied parent can always seek a formal evaluation and hope that a second evaluator would view the situation differently. A strong signal from the confidential evaluator may convince the dissatisfied parent to negotiate the best deal without putting the family through more time, acrimony and expense of the formal evaluation.

If a subsequent formal evaluation substantially confirms the findings and recommendations of the CME, the cumulative impact of two similar independent recommendations may influence the dissatisfied parent not to pursue further litigation.

REDUCED COST

In a formal evaluation, since the stakes are so high, parents feel it necessary not to "pull punches" in feeding the evaluator all possible evidence. It is standard practice for family attorneys to take extensive multiple depositions before or during the evaluation process in order to send transcripts (or portions thereof) to the evaluator. Not only is such discovery very expensive, but the cost is compounded by the cost of the evaluator's time in reviewing, assessing and integrating the depositions (which often consist of hundreds of pages).

The weight of the evaluator's recommendation in a formal evaluation generally motivates evaluators to be exceedingly comprehensive in their investigations. Extra interaction sessions are scheduled to satisfy parents and provide more data. Extensive (and expensive) psychological tests may be ordered, solely to confirm clinical impressions. Long interviews (in person or by telephone) are conducted with sources named by each parent and

evaluators tend to opt to overinclude rather than possibly miss important information.

Preparing a written report for court use is in itself an expensive aspect of the evaluator's work. Evaluators seem to be making their reports longer in order to explain their recommendations and substantiate their findings. Since each paragraph may be dissected by counsel and/or the judge in custody litigation, evaluators take more time before producing the final version. All of this costs money to the parties.

As the final evaluation is indeed part of litigation, the lawyers are often intimately and comprehensively involved. Skilled counsel spend extensive time preparing their client, analyzing material, writing advocacy letters to the evaluator, and digesting the report either to support or to attack. The costs are staggering—however, given the impact of the report—parents and counsel often feel constrained to take short cuts and opt to "go for broke" (often literally). The CME can achieve much of the benefit of the evaluator's input at a fraction of the cost.

REDUCE ACRIMONIOUS CONFLICT

Formal evaluations are so stressful for children that many therapists will not commence therapy for a child until the evaluation and litigation are over. Given the high stakes, parents often overadvocate their own positions and provide "dirt" on the other party. The parenting problems that originally led to the evaluation in the first place become compounded and heightened by the evaluation itself. Charges made during an evaluation, even if unfounded, may never be erased from the memories of the parents. While some families heal and improve after formal evaluation and/or litigation, the damage wrought sometimes remains part of the fabric of the family.

In the CME, similar destructive elements are also often present. However, as the process is over much faster and the results will not be shown to the court, the long-range negative impact on the family is often lessened.

COMMENCING THE CME

BY AGREEMENT

As in most alternative dispute resolution (ADR) procedures, agreement of the parties is necessary. Under the statutory schemes involving custody

and attorneys' fees. offers of ADR procedures demonstrate a party's willingness to cooperate and resolve disputes. If the other party rejects the CME process as a first step in resolving the matter, the party offering cooperation has seized high ground in both the custody and fee issues should they need to be resolved by the court.

BY JUDICIAL ORDER

Under California Civil Code Section 4608.1(a), the court has the right to order the parties to participate in counseling. An order for CME seems to fit within this statutory authority. It is strongly urged that judicial orders contain the penalties for disclosure of confidentiality and that Court Rules be modified to reflect this policy of encouraging CME's.

A sample stipulation follows this article. The key issue is to preserve the confidentiality of the CME evaluator's findings and recommendations should a formal evaluation or custody litigation be necessary. The parties rely on confidentiality. Any breach thereof could taint and prejudice a subsequent evaluation or judicial determination. Therefore, just as violation of relocation restrictions, use of alcohol, and other custody orders can be *per se* bases for changes of custody, intentional or careless disclosures of confidential recommendations should also bear major consequences to the party that violates the confidential agreement/order.

CONCLUSION

The practice of family law is evolving into the skilled management of disputes in addition to the traditional advocacy of a client's adversarial positions. Court Rules, statutory schemes, economics, and standards of professional competence argue for exploration of options that give parents a chance to avoid full blown litigation. The CME is such an opportunity.

APPENDIX A
SAMPLE SCHEDULE OF ONE DAY
CONFIDENTIAL MINI-EVALUATION (CME)*

8:00 a.m.	Evaluator reviews submitted materials.
9:00 a.m.	Meeting with both parents.
10:00 a.m.	Meeting with Parent #1; significant other.
10:15 a.m.	Break.
10:30 a.m.	Meeting with Parent #2.
11:00 a.m.	Meeting with Parent #2's significant other.
11:15 a.m.	Meeting with Child #1.
11:30 a.m.	Meeting with Child #2.
11:45 a.m.	Meeting with Child #3.
12:00 p.m.	LUNCH
1:00 p.m.	Interaction Session, Parent #1, Child #1.
1:20 p.m.	Interaction Session, Parent #1, Child #2.
1:40 p.m.	Interaction Session, Parent #1, Child #3.
2:00 p.m.	Interaction Session, Parent #2, Child #1.
2:20 p.m.	Interaction Session, Parent #2, Child #2.
2:40 p.m.	Interaction Session, Parent #2, Child #3.
3:00 p.m.	Additional Interaction Sessions.
4:00 p.m.	Feed back session with parties, significant others and attorneys. Evaluator shares observations, impressions, findings, recommended parenting plan, rules for decision making, parental communication problems and future treatment plan.
5:00 p.m.	Adjourn — total time billed — 8 hours.

INSTRUCTIONS

(1) Payment due 48 hours before session.

(2) Attorneys are required to attend feedback session. Arrangements should be made to have children transported from office by 3:45 p.m.

(3) All feedback by evaluator shall be oral. No report shall be issued unless parents mutually instruct in writing.

*This sample schedule is for a one day CME with no work by the evaluator prior to the evaluation session. Parties and counsel can work out any variation of this basic structure to increase the comprehensive quality of the CME.

APPENDIX B
SAMPLE STIPULATION

Attorneys for ,

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

In Re Marriage of:)
)
Petitioner:)
)
and)
)
Respondent:)
)
_____)

CASE NO.

STIPULATION RE: CONFIDENTIAL MINI-EVALUATION (CME)

IT IS HEREBY STIPULATED BETWEEN THE PARTIES:

1. The parties shall undergo a Confidential Mini-Evaluation conducted by _____. The costs of said evaluation shall be borne equally by the parties not to exceed _____, subject to allocation.

2. Parties, counsel, and any person participating in the CME (including the Evaluator) are restrained from

any third person except if that communication is protected by statutory privilege (e.g. attorney-client, therapist-patient). Such restraint specifically includes but is not limited to any subsequent evaluator, mediator, or to any judicial officer or court personnel through any oral or written manner.

3. Any disclosure, intentional or inadvertent of the confidential communication shall be subject to punishment by contempt and payment of attorneys fees and sanctions pursuant to C.C.P. Section 128.5, and such disclosure shall be a per se violation of said section.

The parties stipulate that confidentiality of all CME communications, particularly findings and recommendations of the CME Evaluator, is in the best interest of the child(ren).

It is further stipulated that each party shall present this stipulation to any third party neutral (e.g. mediator, arbitrator, judicial officer, evaluator) and each party shall request said neutral to immediately disclose any violation of this stipulation to both parties and counsel.

_____ _____
Date Father

_____ _____
Date Mother

I hereby submit to the jurisdiction of this Court for the limited purpose of compliance with the

confidentiality of CME communications. I promise to maintain confidentiality and understand that I am subject to the possible penalties of monetary sanctions, payment of attorneys' fees, and time in jail if I disclose any communications made during the CME session in which I participate.

Date	CME Evaluator
Date	Attorney for Father
Date	Attorney for Mother
Date	Spouse/Significant Other of Father
Date	Spouse/Significant Other of Mother
Date	Grandparent
Date	Child Care Provider

IT IS SO ORDERED.

Date	JUDGE/COMMISSIONER OF THE SUPERIOR COURT

THE COMPLETE GUIDE TO MEDIATION

THE CUTTING~EDGE APPROACH TO FAMILY LAW PRACTICE

FORREST S. MOSTEN

SECTION OF FAMILY LAW
~~~~~
AMERICAN BAR ASSOCIATION
~~~~~

CHAPTER 11
Co-Mediation

Mediation presents a unique opportunity for the combining of services from different disciplines and the merging of expertise by use of a team or co-mediation approach. Integration of professional services through the context of mediation allows professionals to avoid overstepping the limits of their knowledge and training, while providing a unique opportunity for disputants to receive comprehensive help with their conflict. Mediation should promote cooperation among professionals, as well as between clients.

Jay Folberg and Allison Taylor
Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation, 1984[1]

- Barbara and Jeff are key executives of a successful advertising agency, which they own together. Despite their divorce, they want to continue working in the business. Barbara has a new romantic relationship, and their two adolescent children want to live with Jeff.
- Fred and Cynthia were both successful in their careers, married in their late thirties, and had Catlyn (age four) within their first year of marriage, at which time Cynthia quit her job to be a full-time mother. For the last two years, they have been in and out of family court, battling on both custody and support issues. After her child sexual abuse allegations were found to be unsubstantiated, Cynthia wishes to relocate across the country. Fred has cut off her support, and reciprocal contempt charges are pending.
- Robert and Jan are each divorced with children under ten, and both are survivors of their respective litigated divorces. They wish to buy a house together and to clarify their financial and "Brady Bunch" parenting relationship but do not have the stomach to hire lawyers again to negotiate a cohabitation agreement.

One family has a low-conflict separation, and the spouses wish to preserve their ongoing parenting and business relationship. The second family is in high conflict and cannot agree on any issue at any time. Neither spouse has found satisfaction through the courts. The third couple wishes to start a family unit and to formalize their mutual understandings and commitments to prevent conflict and preserve or even increase the harmony and love that they now have for each other. What these three families have in common is that they chose to increase the advantages of mediation by employing a co-mediation team to resolve their differences.

Co-mediation is the use of two mediators working as a team with the family. They can either work together in the mediation session

or tag-team by working separately, dividing up by issue (lawyer/mediator works on the property and therapist/mediator works on the holiday schedule). In her seminal article, "Lawyer and Therapist Team Mediation" in *Divorce Mediation: Theory and Practice* (1988, Guilford Press) by Jay Folberg and Ann Milne, Lois Gold labels these two styles *conjoint* and *collaborative.*[2]

CONJOINT CO-MEDIATION

Some co-mediators will work only conjointly. These mediators are together all of the time: for the first intake session, in all joint sessions, and in all caucuses. It may be less efficient and more expensive to have both mediators meet with each party in every caucus.[3] However, in his book *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* (1994, Guilford Press), Robert C. Emery believes that "concerns about forcing alliances between one [party] and one mediator outweigh the desire for efficiency." Some conjoint co-mediators will talk individually on the telephone with one party; others require all communication to be with the team. Although trained in different professions, the conjoint co-mediators do not necessarily retain their separate professional roles. In the sessions, they act as "mediators, neutral facilitators, problem solvers, and resource people."[4] In regard to the lawyer-therapist conjoint co-mediation team, Gold summarizes the function of each as a resource:

> The focus of the therapist is to improve communication, identify the underlying issues, and deal with emotional conflict that interferes with the negotiations. The therapist can also function as a resource person by providing information about the children's needs, the emotional dynamics of divorce, and the restructuring of the marital relationship into an effective parenting unit.
>
> The lawyer provides information about statutes, case law, and local judicial tradition, Legal standards can be used to establish parameters within which bargaining can take place. It is assumed there are rights to private ordering [cite omitted]. The lawyer serves to remind the couple that they are bargaining in "the shadow of the law" and that if negotiations fail, legal rules would be invoked. Having an attorney as part of the team may make the parties more aware of the legal standards, although the lawyer does not represent either party and each is advised to seek independent counsel.[5]

COLLABORATIVE CO-MEDIATION

Interdisciplinary Co-Mediation Teams

In the collaborative model, the mediation may start with the team together and then switch to tag-teaming, depending on issues, mediator availability, or economics of the parties.

Issue Allocation

The parties may meet with the therapist for all communication and parenting agreements and with the lawyer for support, property, and other economic issues. If an impasse or other trouble should develop, the parties could always seek a united mediator team to co-mediate conjointly.

Some mediation teams have a senior mediator teaming up with a less experienced mediator, who either charges a lower fee or no fee at all if the mediator is part of an internship or professional supervision. In this model, the parties may meet mostly with the junior mediator both to save money and because the senior mediator is less available. The senior mediator is available for consultation with the parties and the junior mediator and can come in to handle difficult issues.

Finally, in lawyer-therapist teams, since the professionals receive their customary hourly rates, the lawyer often gets paid more than the therapist. Due to this disparity, the parties may resolve as many issues with the therapist/mediator alone, with the lawyer acting more in the capacity of backup and legal reviewer.

The most effective co-mediation teams are interdisciplinary and intergender. While we use the therapist-lawyer combination as the most prominent model, co-mediation teams composed of other discipline combinations can also serve a family well. For example, a lawyer-accountant team or an accountant-therapist team may work effectively when complex financial issues require interpretation of ledgers, tax returns, cash flow projections, and the like.

Quite often, the parties may be part of a special cultural, religious, or political community or have careers in specialized industries, and it might make sense to have a co-mediator from that community or industry to give more authority to the mediation process. For example, two devout Catholic spouses might benefit by having a priest serve as a co-mediator in a lawyer-priest or therapist-priest team. If the wife is a film producer and has complicated deferred compensation in royalties and points, it might make sense to have a film executive or entertainment lawyer as a co-mediator. As mediation training becomes more widely available, more people with substantive knowledge and respect in their community or industry are being trained as mediators. However, just as experts such as real estate brokers can do one-issue mediations without special training (see page 156), they can be helpful in co-mediation even without training, provided that the expert's co-mediator is skilled in mediation process skills.

Intergender Co-Mediation Teams

Co-mediation can also work when both members of the team come from the same profession. Lawyer-lawyer teams are often quite useful, especially when they are intergender and the mediators have different styles. A couple may be well served by choosing a team composed of a male lawyer and a female lawyer, one who is proactive and uses the law and the other who is less directive and focuses on behavior and normative transformation. Having different perspectives and two creative problem solvers may be just what is needed to

break through barriers to reach settlement. Many people who would be willing to try co-mediation are anti-therapist either because they have had an unpleasant or ineffective experience or just because they are therapist-phobic but could benefit from the use of a co-mediator from a non–mental health field.

Folberg and Taylor put it this way:

> The benefits of combining the talents and energies of mediators are not limited to cross-disciplinary pairings. Mediators from the same discipline can complement one another's efforts by assuming different mediation posture or by juxtaposing strategies to see what works most effectively in a particular case. One mediator may play the skeptic while the other is accepting; one mediator may be harsh while the other is kind; one may joke while the other is serious; one may be practical while the other is a visionary. The ingenuity required for successful mediation can be enhanced, and more settlement alternatives can be developed, through the combined efforts of two mediators.[6]

The value of having both genders on the mediation team cannot be overstated. It helps when a mediator can readily be identified as both a gender ally to one spouse and facilitative and fair by the spouse of the opposite sex. The balancing of genders also helps balance power within the session. Being validated by mediators of both sexes is reassuring and empowering for a mediation participant. Gold sums it up as follows:

> The team mediator can capitalize on gender identification, whereas a single mediator needs to guard against it. Marital rupture often creates a deep sense of vulnerability toward people of the opposite sex. Some clients may feel threatened by a mediator of the opposite sex or may fear the mediator will be more sympathetic to the spouse. The single mediator is more likely to be perceived as biased because of the increased caution and mistrust toward members of the opposite sex that seems to occur during a divorce. The anxiety can be eased because the client sees the same-sex mediator as someone who can identify with the client's situation and be sympathetic, if not an ally. Confrontations, therefore, may be more effective because of the common gender. A client may be more willing to hear from the same-sex mediator because he or she feels less threatened and less concerned about mediator bias. Rigid positions can sometimes be deflated by acknowledging and identifying with a client's feelings in a way that a person of the opposite sex cannot convey. Humor or discussion that capitalizes on sexual identity ("man-to-man" or "woman-to-woman" jokes) can also be used with greater liberty. Generally the team can use gender linked rapport as a strategy in ways that would be risky for a single mediator.[7]

WHY USE A MEDIATION TEAM RATHER THAN A SOLE MEDIATOR?

To keep expenses down, mediation team members may be volunteers, part of a community program, be inexperienced and want the practice, or cut their fees for any number of reasons. However, gen-

erally co-mediation will be more expensive than using a sole mediator. Regardless of whether the two mediators charge as a team or as individuals, having two professionals work together will cost more per hour than just having one mediator in the room. If cost is a consideration in selecting mediation, why would you ever recommend co-mediation?

Even with both professionals of the team charging their full hourly rates, resolution of a family dispute through co-mediation generally costs much less than a litigated result. While the cost of that second professional may feel exorbitant and unnecessary, the following chart illustrates what it can cost the family to have two days of depositions (and depositions, even if the smoking gun is found, rarely resolve cases in and of themselves).

Comparison of Costs Between Two Days of Deposition and a Complete Co-Mediation

Two Days of Deposition	
2 lawyers each present for 6 hours of deposition plus 4 hours each for lawyer preparation time	$8,000
Entire Co-Mediation	
2 mediators @ $200 for 15 hours (5 sessions @ 3 hours each)	$6,000
2 consulting lawyers @ 5 hours each, coaching, reviewing, drafting	$2,000
	$8,000

*All professional time billed at $200/hour.

The benefits of mediation generally are set forth in Chapter 4. The issue here is what value is added by having a second mediator. Co-mediation is more comprehensive than working with a sole mediator. The clients have their emotional and legal concerns met more fully by the very nature of having professionals from the separate disciplines. There are more technical resources at the mediation table available to the participants. If one role of the mediator is to educate the participants to improve informed decision making, two mediators have more capacity and time to perform this client education. By modeling positive communication and problem-solving skills in their own dialogue in front of the parties, the co-mediation team can educate the parties in how to communicate better for the divorce negotiation and, hopefully, for their postdivorce interaction as well. In sole mediation, the mediator is often so involved in trying to keep the lid on a conflict and steer it into settlement that the educational function can take a backseat, and this may be counterproductive in both the short and long term.

Increased Balance and Fairness

Another function of the mediator is to assure fairness in the mediation process. Having two mediators checking each other can often help increase the chances for a fair result—especially muting a pos-

sibility of mediator bias or myopic perspective. In a similar way, when the spouses have an imbalance of power, having two mediators recognize and intervene to empower the weaker spouse and confront the overpowering spouse will increase the chances of balance. Gold points out that the more vulnerable spouse has an increased feeling of safety in the mediation, which may lessen a motivation to bolt and litigate through the courts. She points out three ways that the mediation team can achieve this power balance in a way that is superior to most sole-mediation situations:

1. The two mediators can gang up on the stronger spouse: Robert Emery prefers to call it the "good cop–bad cop" approach.
2. One member of the team can act as a coach or consultant to the weaker spouse to help that person through the process.
3. Having two mediators instead of one permits the team to take the time and attention to encourage the more submissive spouse to speak up. Such time and attention are not readily available to the sole mediator.[8]

In *Renegotiating Family Relationships*, Robert Emery points out that co-mediation is useful since while one mediator directs the content of the session, the other is free to observe the process: "The mediators can reverse roles when appropriate. The mediator who has been more passive can comment on the process or redirect the content to an overlooked topic."[9]

These aspects of co-mediation will help clients in several ways. If having a second mediator increases the odds of settlement by only 20 percent, this added settlement power may be what is needed to resolve a bitter struggle that might otherwise erupt into a litigation battle. Also, if hiring the additional professional accelerates the time it takes to settle the case within the mediation process, parties may actually save mediators' fees as well as be able to move on with their lives sooner.

Even if the parties would have settled all the issues just as fairly and just as fast without the second mediator, the team approach may increase client feelings of fairness and satisfaction with the process, so that there is less remorse after the settlement. If both parties "own" their settlement, the family can benefit due to greater compliance with agreements and/or return to mediation rather than the court forum downstream. Gold has pointed out that while empirical research on the differences between sole and team mediation has not been done, the clinical impressions of both mediators and clients reveal a high level of satisfaction with the team approach.[10]

When Is Co-Mediation Appropriate?

Due to fears of cost, co-mediation is used significantly less than the sole-mediation format. Quite often it is not used because the family lawyers setting up the mediation do not know very much about how it works or its effectiveness. The following are some prototypes of situations discussed by Gold in which co-mediation can be particularly effective:

1. High levels of conflict or manipulation
2. Power imbalance
3. Complex assets
4. Informational consultation
5. Nonmutuality regarding decision to separate
6. Adversarial posturing[11]

Which Families Use Co-Mediation?

Gold concludes that the team approach is most appropriate for couples with poor communication, a volatile situation, and complex assets. She does not believe that child-related conflicts with simple assets need co-mediation; she believes they could see a sole therapist/mediator. She also believes that couples who are emotionally disengaged or who have been in therapy and are more objective about divorce may prefer a sole lawyer/mediator.[12]

My clinical impressions corroborate Gold's view of the benefits of co-mediation. However, I have found that it is used more widely than Gold indicates. Frequently couples with solid working relationships choose co-mediation because they value their low-conflict success and wish to use it as a foundation for settlement and beyond. Conflictual custody matters, particularly geographical move-aways, have an increased chance of resolution using the co-mediation model—having two professionals intervene increases the pressure on the parties to resolve. In such cases, the additional resources of a mediation team are viewed as a relatively minor investment to attempt to avoid a debilitating *War of the Roses.*

It is true that many couples who have resolved their marital emotional issues in therapy may wish to focus only on the divorce issues with a sole lawyer/mediator. However, I have found that it is also true that having experienced the benefits of working with a therapist to end the marriage, many divorcing couples want to retain many of the benefits of therapy while resolving the issues of child custody, support, and division of marital property. While mediation with a lawyer/mediator highly trained in emotional issues may serve the bill, many couples desire to maximize the odds of mediation's succeeding by employing a comprehensive co-mediation team—particularly when one spouse truly wants mediation to work and has concerns that the other spouse might sabotage the process.

DISADVANTAGES OF CO-MEDIATION

As indicated, the greatest disadvantage of co-mediation is the cost of professional fees. It is axiomatic that two mediators cost more than one. When many people can't afford one professional (or think they can't), the increased fees are a major entry barrier for co-mediation.

However, in comparison research Gold reports that a survey by the Divorce Mediation Research Project showed that at the Family Mediation Center in Portland from 1979 to 1982 the average team cost was not significantly higher than the average sole-mediator

cost. As Gold states: "If mediation is seen only as a way to save money, a higher hourly fee to compensate the team may be difficult to justify. The principal advantage of the team is not economy. It is better service, not a cheaper one."[13]

The chart earlier in the chapter demonstrates that in high-conflict litigation the costs of the co-mediation team may be de minimis compared to the out-of-control lawyers' fees incurred in battles to cover discovery, motions, emergency hearings, and long trials.

Friction Within the Mediation Team

Another problem to look out for is communication difficulties within the team itself. Unless the team members have worked with each other for some time, they may have clashing communication styles or egos that could compound the problems in the mediation room instead of reduce them. The two mediators might have control issues between them, including in whose office the mediation should take place, whose scheduling problems are more pressing, who should take a leadership role in managing the agenda, how talking time should be divided, and how settlement and intervention strategy and techniques should be used. Compounding these potential problems, a gap in skill between the mediators may cause one member of the team to be passive or drop out altogether (this is to be contrasted with a mentor-mentoree team, which should be agreed to by the couple in advance). In addition, if one of the mediators is being paid more than the other for the same amount of professional time, underlying resentment may fester between them. In any of these situations the remedy for resolution may increase the existing problems of the divorcing couple—or at least not help as much as a sole mediator could.

Increased Complexity

Another set of problems of co-mediation revolves around the complexity of adding another person to the communication dynamic. From the simplest logistic arrangement to adding another chair to the table to trying to juggle four busy schedules instead of three (or six schedules instead of five if lawyers attend the session), there is just more to deal with. Having two mediators means more words being spoken, more opinions, more options generated—perhaps more decisions for the parties to make. Some couples just want to keep it as simple as possible. If they could settle their issues themselves, they would choose never to go to mediation at all—let alone have to deal with two more people!

Lack of Consumer Awareness

Finally, since mediation is still relatively new and not understood by many lawyers and clients, there may be resistance to entering mediation in the first place. This resistance may be compounded by trying to sell the idea of two mediators instead of one. A better option might be just to start with a sole mediator and, once trust and success are established, keep in reserve the possibility of a co-mediator if the need arises.

Dialogue Between Lawyer and Therapist on a Co-Mediation Team

The following is an abridged dialogue between Dr. Barbara Biggs and me that appeared in the *Journal of Divorce* (winter 1985–86).[14]

THERAPIST: As a lawyer/mediator, what are the things that you look for in a therapist co-mediator?

LAWYER: The first thing that comes to mind is that the therapist must enjoy focusing on concrete problem solving. I have met many therapists who voice sincere appreciation of the humanistic virtues of mediation yet seem unable to switch gears when they are actually in a mediation session. I want to work with someone with superior training and experience as a therapist, someone who can understand the dynamics of a relationship as well as the interactional patterns in the mediation itself.

THERAPIST: I often see mediating couples behave in ways that hinder their making an agreement. It's quite appropriate for a mediator to point this out and to make suggestions about the kinds of behavior that would, instead, facilitate the process. If the couple learns to interact in a more productive way, they may very well continue to do so. In our model, the contract is to arrive at a fair—and relatively speedy—agreement. This is a new role for the therapist, to be a negotiator rather than a leisurely listener. There isn't time—or permission—to delve into anyone's psyche.

LAWYER: So we want to be clear about several things: where the mediation takes place, what assumptions the spouses are making in coming to that setting; and what contractual terms are set down between the parties and the mediators so that the goals of the mediation are clear to everyone.

THERAPIST: In our office, "everyone" may include me, right from the start. But sometimes I join the mediation later on.

LAWYER: Occasionally, a couple requests that a therapist be present, or they indicate, on the phone, that they are open to the idea of co-mediation. Then, of course, I ask you to join us in the initial interview. But even when I see a couple alone, if it becomes obvious that the emotional issues are likely to be difficult, I recommend that they engage a therapist co-mediator.

THERAPIST: The more we talk about it, the more aware I become of the contractual differences between mediation and psychotherapy. When clients come in for therapy, they are essentially saying to me: "Look at me and tell me whatever you can about me." When a person comes in for mediation, there is no such contract. What each spouse is saying to me, as a therapist/mediator, is "I'm here to settle issues that have some emotional meaning for me. My feeling may get in my way and may even cause me to do something that I might regret later on. My emotions could cost me a lot of money, because if I don't come to an agreement here in mediation, I may have to go through a real fight in court. That struggle would take a lot of my energy as well as my time and money. It might be damaging to my children. I don't want that for myself or for them." It's a very different process.

LAWYER: I conclude that co-mediation would benefit a particular couple, but they don't expect or want therapy. What shall I tell them? Why should they increase their mediation fees by retaining a therapist co-mediator?

THERAPIST: Because they'll get two good heads working on their problems instead of one and more emotional support in the bargain. One of the main things that

(continued)