**Forrest S. Mosten and Elizabeth Potter Scully, The Complete Guide to Mediation, 2nd Edition, ABA 2005**

CHAPTER 11

Preventing Future Conflict

Legal problems can be prevented altogether by lawyers who operate in a fast forward rather than rewind mode, designing environments and facilitating relationships that are less conflictual or problem-producing.

— Thomas D. Barton and James M. Cooper, Preventive Law and Creative Problem Solving: Multi-Dimensional Lawyering (2009)

Getting the divorce does not mean the family is free and clear of family court. Especially when there are minor children, long-term support payments, or continuing financial entanglements—deferred sale of the family residence, ongoing joint business or invest­ments, deferred compensation, and the like—the parties are likely to need ongoing legal and dispute resolution assistance in the future.

This chapter will explore three methods of preventing conflict in the family: drafting dispute resolution clauses into the judgment, using preventive mediation to form new family relationships, and maintaining and expanding the legal health of all family mem­bers through legal wellness checkups.

Drafting Future Dispute Resolution Clauses

After spending thousands of dollars on legal and mediator fees to handle a divorce, most clients are open to learning about how to prevent future disputes. The goal of preventive planning is to raise concerns and solve problems before they reach the level of conflict. A second working concept is that absent emergency, consensual methods of dispute resolution are preferable. Therefore, parties should try to start with the least invasive method of dispute resolu­tion. If the conflict remains unresolved, parties should consider agreeing to having more control imposed on them until, finally, they agree to have someone else makes the decision for them. Finally, even as more invasive methods are utilized, the parties should build in a return to mediation with the benefit of new information from the more invasive process as a catalyst for a mediated result returning control (or part of it) to the parties themselves.

The following are some options you can incorporate into settlements to prevent conflict and to keep the parties away from the courthouse in the future.

Although the enforceability of mediation clauses is not guaranteed in every jurisdiction, courts routinely enforce contractual or statutory obligations to mediate as a condition precedent to litigation.[[1]](#endnote-1) Concerns about enforceability are relatively insignificant in practice: “Given the relatively minor time, risk or ex­pense of compliance and the likelihood that noncompliance would be used to block any later clauses, most parties to mediated clauses probably will comply.”[[2]](#endnote-2) A sample mediation clause is included in the Resources section.

Written Notice of Dispute

Completing a legal divorce rarely means ending a relationship with a former spouse. Even with a well-drafted agreement and a detailed parenting schedule, opportunities for contact and conflict seem in­evitable and unending. Being a parental and business partner with a former spouse may be one of the most challenging relationships in modern life. When the challenges become excessive, explosions can oc­cur in areas such as choosing the children’s school, dividing up Christ­mas Day, paying for lessons or camp, or figuring out new support if income fluctuates or either party becomes involved with a new spouse or live-in partner.

Hopefully, parties will be able to communicate by telephone or in person and make whatever accommodations or changes are requested. Even if both parties try with good faith, impasse sometimes develops. When one party feels aggrieved and believes that a dispute remains unre­solved, step 1 in the dispute prevention chain should be for that party to write a note or letter to the other party, detailing the con­cern and suggesting a proposal for resolution.

Once receiving proper notice, the other party can accept the pro­posal in full, in which case the matter is resolved. With most di­vorced couples, even if tensions have escalated to the point of re­quiring the notice, the dispute ends right here. There are no more meetings, lawyers, mediators, or judges. The family just carries on.

If the proposal is not accepted, the party receiving the notice should have a duty to respond in writing within a specified time pe­riod, setting forth that party’s concerns about the proposal. From this point on, either party has the option of continuing the cor­respondence exercise or calling for the next step: an in-person meet-and-confer session.

Parties Meet and Confer

Following the entry of the decree, divorcing spouses might build in contact by correspondence, telephone, or in-person meetings to take care of ongoing matters between them. Such joint business can include reg­ular parental meetings as well as intermittent accountings to reconcile finances; to tote up contributions and reimbursements for post-divorce joint expenses; or to divide up receipts, dividends, or sales proceeds of jointly owned property. These post-divorce meetings are premised on legal wellness—the parties are doing necessary busi­ness to meet the ongoing needs of the divorced family. The preventive dispute resolution provision to meet and confer is somewhat different. It is designed to kick in when there is a dispute between the parties that cannot be resolved and that might otherwise be headed for court. When the written notice and subsequent correspondence are unable to resolve the problem, a personal meeting constitutes the last clear chance to avoid bringing in a mediator or going to court. The judgment should spell out when the parties should meet and confer. The party requesting the meeting should offer a choice of neutral sites (unless a mutually agreeable site has previously been worked out) and several possible meeting times within the time pe­riod prescribed by the notice requirement. The other party should be required to acknowledge the meeting request in writing, but also should have the right to choose among the provided options of venue and time. If none of the meeting times are acceptable to the party receiving the notice of personal meeting, that party should have the duty to respond within a specified time frame and to offer several reasonable alternatives.

Because the vitality and effectiveness of this dispute resolution ma­trix—in fact the entire post-divorce relationship—depends on compromise, integrity, and commitment to manage conflict, the outlined procedures are intended as default fallbacks. The real hope is that parties will circumvent them and set up the meeting in a 30-second phone call—if not quickly resolving the underlying contro­versy during the call itself.

Required Mediation

If the in-person meeting does not resolve the issue, either party should have the right to compel the other party into mediation. A drafting issue is whether to require the use of the mediator who suc­cessfully handled the divorce or leave the choice of the mediator up to mutual agreement of the parties. For a host of reasons, one or both parties may have concerns about using the same mediator again. On the other hand, using a mediator with flaws might be better than having the parties start over again. In contrast, the underlying purpose of this mediation clause is to get the parties into mediation and get them there fast! Arguing about the choice of me­diator defeats that goal.

The clause should deal with the minimum amount of mediation required. At the very least, one or two 3-hour sessions will get the parties to sit down with a neutral and make an attempt at reso­lution. If there is progress, additional sessions can be mutually agreed upon. The other view is that there should be three or four re­quired sessions (possibly adding initial private meetings) or a full day in the single-session format.

Finally, allocation of cost for the mediator should be considered. The options for payment discussed earlier apply to future dis­putes as well, with one change in perspective. Although the higher earner may be willing to advance or totally pay for mediation costs during a divorce, he or she may be more reluctant to sign on to an open commitment to pay for mediation regarding an undetermined number of issues for the next several years. Due to this concern, parties may be better off agreeing to a fixed split—if not 50-50, then 60-40 or 75-25). It also may be less prudent to have a split based on future comparison of adjusted gross income because this would require a disclosure of income information (maybe involving joint returns with a new spouse) that could cause additional conflict in and of itself.

In about 2005, Woody finished mediating a high-profile, complex matter and he suggested that because the parties had experienced such success, they should discuss having a mandatory mediation clause. The wife, the wife’s lawyer, and the husband wanted such a clause. The husband’s attorney, a well-regarded litigator, stated that although he was very satisfied with how mediation had worked to settle the divorce, he never (and repeated the word *never*) would permit his client to give up his right to go to court without trying mediation. While the wife and wife’s lawyer pointed out that the clause was neutral and applied to both parties and that emergency situations were excluded, the person with the veto won! You know the coda of the story. Two years later, the husband wanted the wife to participate in mediation and the wife refused—14 months of virulent and expensive litigation followed.

Confidential Mini-Evaluation (CME)

This process is available when mediation does not resolve a parenting dis­pute and the parties might benefit from having a nonbinding confi­dential expert’s opinion to defuse the conflict. Initially de­veloped as an alternative to the costly and adversarial formal court custody evaluation,[[3]](#endnote-3) the CME is a balancing act that gives the parties the input of an experienced custody evaluator without the cost, delay, adversarial posturing, and virtually binding decision of imposing a court-appointed evaluator on the family and making the deci­sion part of the permanent court record. The CME evaluator is selected by the parties and will customize the process based on the mutual instruction of the parties. For example, the evaluator may do the entire evaluation in one day without any home visits, psycholog­ical testing, or interviews with collateral witnesses such as teachers, child-care providers, or physicians. To save both time and expense, no written report is prepared. In addition, such written reports often become indelible parts of the family history. They usually expose the least attractive aspects of both parents. Furthermore, such written reports often create smoldering resentment in the parent described or are used as weapons. The CME evaluator gives oral feedback con­taining recommendations, and the parties then can use that report to stimulate negotiations. If resolution is not reached, either party can compel a formal evaluation, but the judgment should provide that in any subsequent evaluation or court hearing, the parties are restrained from making reference to the communications or recommendations adduced during a CME.

Although the CME can be started by the parties themselves or by their lawyers, it works best when initiated and conducted in the media­tion setting. The parties can have prospective evaluators come to the medi­ation for joint interviews under the mediator’s guidance. The medi­ator can facilitate negotiations over the final selection and scope of the evaluator’s assignment. Being present during the evaluator’s oral feedback session (hopefully along with the parties’ lawyers), the me­diator can be an objective neutral witness to what the evaluator ac­tually did say and then use that information to help negotiate a resolution.

The CME process can be adapted for experts in financial issues as well. Instead of the parties hiring two forensic CPAs to do a cash available report for support or a business evaluation, each of whom might take adversarial posi­tions in submitting their lengthy reports replete with bells and whis­tles, one neutral CPA can be hired on a customized assignment to give an oral report to the parties. The same can be true if the parties need real estate appraisers or vocational counselors to determine suitability for employment, for example.

[begin box]

AT THE MEDIATION TABLE

Mediation Fills the Family Album

Mediation is a malleable, custom-designed process that can adapt to the changes in a divorced family. The first time Kate and Samuel came in, they had one daughter, Rebecca, age 2, and a baby on the way. Samuel was involved with Cheryl. A divorce settlement was reached.

Three years later, Kate and Samuel returned, urged strongly by Cheryl, who had a son in her arms. Samuel’s company had gone out of business, and he wanted a reduction of the overgenerous support agreement made at the time of divorce.

Four years later, seven years after the divorce, Kate and her new husband, Peter, initiated a mediation when they wanted to move to an adjoining county, radically changing a long-standing joint physical custody arrangement. The move was worked out, with Samuel hav­ing additional control on weekend activities, putting driving re­sponsibilities on Peter and Kate.

After another two years, the family was back, this time with law­yers in the room. Tensions had simmered over driving and lifestyle differences. After two all-day sessions, the parties agreed that Cheryl and Samuel would move close to the other home with a return to an equal time-share arrangement.

While less than a perfect situation, the family has a history of res­olution, and only they know when the mediation will recommence. A mediation file rarely closes—yet the timing and format of the next stage to resolve family conflict are subject to later determination.

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 These CME evaluators permit parties to get the expert information needed to facilitate negotiated agreement without being stuck with an adverse written report that could be submitted to the court. A sample court stipulation for a CME appears in the Resources section.

Formal Evaluation Report

If a parenting or financial dispute does not settle after the results of a CME are reported by the CME evaluator at a mediation session, one of the parties may require the use of a neutral full evaluation as pro­vided in the judgment. The full evaluation capitalizes on the benefits of having one impartial expert instead of two, and because it entails a written report that can be sent to the judge and admitted into evidence, it may provide extra motivation for the parties to settle. On the other hand, because it is an unabridged full-service job, the expert will probably take longer and it will cost quite a bit more compared with a CME.

As with the CME, the parties should provide for mandatory medi­ation at the request of one party after the report is complete and before it is submitted to the court. This mediation will give the parties an opportunity to resolve the matter based on the new infor­mation of the expert’s findings (for which they probably paid dearly) and before the party feeling wounded goes out and pays another evaluator to prepare still yet another report (unless the dispute resolu­tion clause makes the full evaluator’s findings binding on the parties). The opportunity to mediate before sending the report to court allows the family to keep the matter private rather than airing the linen (clean or dirty) in public.

Binding Adjudication

Despite all the hoops, some disputes just won’t settle. The parties need someone to make a decision for them. However, before au­tomatically assuming that the binding adjudicator will be a judge in the public court system, consider several other options in drafting the future dispute resolution clauses.

Arbitration

Although arbitration is binding and enforceable like a court order, the parties can streamline the process to make it faster and cheaper than the court system. The trend is to give the arbitrator virtually absolute power to decide the matter with little right of court review or appeal unless specifically reserved.

The dispute resolution clause can call for all issues to be resolved by arbitration or merely delineate single issues that can be arbi­trated with court having jurisdiction to decide everything else. It is customary to designate which rules of arbitration service providers will govern. If you are unfamiliar with the specifics of the designated rule scheme, look it up to make sure it is appropriate for your type of dispute.

Liz recently worked on a cohabitation agreement that provided for future arbitration of disputes under the rules of a major provider. When she looked up the rules, she discovered that although various subsets applied to specific types of disputes, no subset existed for family law, and it was not apparent which set of rules would apply to a family law dispute. Because the goal of these kinds of clauses is to limit areas of future dispute, be mindful that you are not inadvertently opening new lines of miscommunication.

Also, different arbitrators can be designated to handle different disputes. For example, if a deferred house sale is provided for in the judg­ment, the parties may agree to a modified step process, such as meet and confer, mediation, full appraisal report, then straight to ar­bitration, eliminating the CME. In so doing, for this issue only, per­haps they could name a real estate broker at the time of judgment or at the time of the dispute. The same approach can be taken by naming a CPA to arbitrate tax filing, audit, or refund conflicts.

In high-conflict custody cases, there is a trend to designate a therapist or another mental health professional to serve as arbitrator or special master to have binding authority over some but not all parenting disputes. For example, the binding decision maker decides issues such as holiday and vacation periods, selection of medical pro­viders, and struggles over extracurricular activities. The major deci­sions, such as time-share, location of residence, and choice of school, remain in the public court system.

Private Judges

An alternative to arbitration is a private judge. Very popular in Cali­fornia,[[4]](#endnote-4) this option is providing steady employment for retired judges (and some lawyers) and is an available option for those who choose to pay for more accessible justice. There has been considerable crit­icism that the popularity of private judging has created two types of justice: one for those who can pay and the public court system for everyone else. The draining of talent from the judiciary and the conflicts of interest created by repeat buyers of the same providers are other issues of current public debate.

The benefit for the family of providing for a private judge is that the major costs to litigants result in complex prehearing court pro­cedures and waiting time to both get and finish a hearing. Some courts are so overburdened that it takes months to start a hearing. Once it has started, the judge may have to bifurcate and trifurcate the proceedings to squeeze in three hours one day and four hours several weeks later. It can be very frustrating for parties and lawyers—and very expensive. Private judging offers the speed and possible customized, streamlined procedures of arbitration with the safeguards of the rules of evidence and rights of appellate review guaranteed in the court system. Many private judges wear their robes, most private trials have a court reporter to preserve the record, and many private courtrooms have been built to accommo­date demand. The prestigious Los Angeles family law firm Trope and Trope has even built such a courtroom in its well-appointed office suite, which is available for rental to other lawyers in the commu­nity. These amenities can be the subject of discussion and drafting in the judgment.

Once a private judge is selected, the scheduled hearing time is vir­tually guaranteed to go on that date. The judge works six to eight hours a day without the interruption of other cases—which is more than enough for any trial lawyer! In December, a dad wanted an immediate change of custody because his son had received Fs in four of six subjects in seventh grade. After considerable negotiation and preliminary procedural wrangling in court, in early January, the parties stipulated to use a respected retired judge. By February 1, the parties had completed an eight-day hearing and the child had changed his residence.

Mediation to Follow a Binding Decision

Of course, if the parties cannot agree on the terms of arbitration or private judging, the parties can still use the public court system as their binding-decision option. Regardless of which binding option is included in the scheme, it is generally worthwhile to have it fol­lowed by mandatory mediation if requested by one party after the binding decision is rendered. After beating each other up in a contested hearing and receiving a result that may satisfy neither party, the parties may welcome the return to the mediation process, which helps them restore some control to their lives as well as facilitate healing from the wounds of litigation. Many clients do not realize that even after the judge rules, the parties can generally negotiate a modification of the court order that may better meet their needs.

Many lawyers are unaccustomed to drafting dispute resolution clauses. Traditional litigation mindset has been “We have enough to do in working out agreements on the current disputes. If there are problems in the future, parties can always seek a modification in court (except in final determinations such as property divisions and nonmodifiable spousal maintenance orders) or enforcement actions. Let’s just wrap it up fairly and let the future take care of itself.” This school of family law may be suspicious of a step-by-step, calibrated approach to future dispute resolutions. The cure may be seen as worse than the disease. Fears of unnecessary hoops and expense when the case might end up in litigation anyway are quite reasonable.

Robert Theobald, a well-regarded futurist and adviser to the Ore­gon Legislative Task Force designing the court of the future, has said that the essence of professional competence is trying to use one’s best judgment in making the very best decisions at the mo­ment given the people involved.[[5]](#endnote-5) It is true that at times, negotiating and drafting future dispute resolution clauses may take more time and money than actually litigating a dispute later. Also, by detailing a step-by-step approach, the parties may incur unnecessary fees and conflict in addition to the costs of litigation. This concern may also be valid. In fact, when presented with that concern, many clients opt to leave everything open or just have a mediation option without all of the rest. Yet others, even when advised about the dan­gers of uncertainty, may choose to invoke the calibrated process set out here, a hy­brid, or a wholly original concept. In rendering the most competent service, modern family lawyers are keeping their eyes on the road ahead as well as in the rearview mirror—sharing those observations with their clients and working collaboratively to enhance informed client decision making.

Preventive Mediation

If mediation helps preserve relationships during and after a divorce when parties have differing interests and life paths, the process should also work when the parties form new relationship commitments. Preventive mediation may be discussed by divorcing spouses as a way to spare family members (especially the children) future conflict and pain if either spouse breaks up with a new romantic partner. However, the main use of preventive medi­ation during divorce mediation is to educate both parties and their lawyers in how to stay out of trouble (but not just with each other) after the judgment is entered. Any conflict affecting any member of the new family system can have a ripple effect.

Preventive mediation is used most frequently in forming commit­ted life partner relationships such as domestic partnerships and marriage or sharing a resi­dence. As exciting and promising as these relationships can be, they are also frightening, especially for divorce survivors. People fear not only an acrimonious breakup (perhaps another one), but also the new problems that might be presented by this new commitment. These concerns go beyond the legal ramifications of sharing income, buying real estate, and having joint bank accounts or obligations to a broad range of issues: “How will I communicate and resolve prob­lems with my new partner (better than I did the last time around)?” “How will we work out budgeting and managing our money?” Will it hurt our new relationship to have separate incomes?” “Should we have a baby? If so, what would that do to our lives?” “How will we deal with controlling in-laws or the need for a sibling to live with us or be supported by us?”

Binding legal agreements may be helpful in protecting against the disaster of a breakup, but what people really want is information and guidance about leading a happy and satisfying life to­gether. Maximizing their opportunities for harmony and mutual gain may be far more important to an engaged couple than protecting against the ultimate demise of the relationship.

All that having been said, you might be concerned that premarital agreements are walking malpractice time bombs. Some lawyers won’t do them, and many who will do them charge ex­tremely high fees because of the explosive risk of professional liabil­ity. Regardless of the fees charged, think about the appropriateness and real value of having two lawyers, pledged to get the best finan­cial and legal deal for their respective clients, haggling over terms while their clients are more interested in just living their new lives together. Yes, marriage and cohabitation can entail great risks in case of failure. These issues must be discussed—but how?

Some divorced couples are now consulting mediators when they form new relationships. They want a supportive, relaxed educational setting in which to speak with a professional who wants to help them. They have heard that many family lawyers do not want to handle relationship formations. Even though mediators generally work with divorces, the orientation of healing and looking beyond rights toward underlying needs and concerns is a very attractive alternative to having two lawyers writing letters and running up big bills. Most important, while understanding that they should face problems, most parties are afraid of lawyers planting mistrust or doubt about the other party—either to them or the other.

In preventive mediation, client education may be even more important than writing up the agreements of the parties. However, written agreements can actu­ally help relationships! Worrying about the loss of property or fi­nancial insecurity in case of a breakup can cause relationship anxi­ety. The same is true of worrying about the other partner worrying. If people can talk about sex, intimate emotions, and family secrets, why can’t they talk openly about money, property, and legal rights? If an agreement can ameliorate fears and then be put in the drawer, it can actually strengthen the relationship—as long as the process of making the agreement doesn’t do too much damage. To be married by clergy, some religions require a couple to participate in education and counseling about the responsibilities and pitfalls of marriage. The overriding goal is that such education may make a marriage stronger.

Preventive mediation is based on the same principles. It is interesting that the same lawyers who use mediation for divorce never think of mediation when they have a client who is trying to save a marriage[[6]](#endnote-6), getting married [[7]](#endnote-7)or blending a family in a nonmarried relationship. Part of the problem is that the client calls and says:,“I’m getting married; I need help with a premarital agreement.” The client’s presenting request often determines the lawyer’s actions, which might differ greatly from those flowing from the mediative approach of attempting to uncover the client’s underlying goals and concerns—many of which have nothing to do with legal rights.

Ethically and practically, the lawyer’s role in a preventive media­tion is the same as in a dispute mediation: help the client achieve a result maximizing the goals and concerns that improve the client’s life—which may or may not coincide with maximizing legal protection. A mediator can set the proper tone for doing this important business without intruding on the romance. The mediation can also cover wills, durable powers of attor­ney, deed drafting, and other estate planning needs, which often go hand in hand with marriage planning.

The recognition for marriage education, including informed consent for agreements, has spawned at least two successful Bar-spon­sored preventive programs in addition to the activity in practi­tioners’ offices. Under the leadership of former Chair Lynne Gold Bikin, the ABA Section of Family Law launched a partnering program designed to educate citizens before making committed relationships.[[8]](#endnote-8)

If your client is reluctant about using and paying for a mediator for a premarital agreement, consider using a collaborative approach in building an agreement. In addition to choosing an interdisciplinary option and utilizing the values and guidelines of collaborative practice discussed in Chapter 7, this approach prevents much resentment that often is the fallout of one party wanting these agreements and the other being either neutral or opposed. Rather than having you draft a one-sided agreement to maximize the interests of your client and then sending it over with the message (either overt or covert) Please sign this, sweetheart,” both parties are involved in a facilitated meeting in understanding the concepts of the agreement and deciding it together. You and the other collaborative lawyer can then jointly draft the agreement so that much of the heat of these transactions is avoided.

Other Uses of Preventive Mediation

In addition to helping form a romantic relationship, preventive media­tion is very conducive to forming a new parent-child relationship. Adoptions often cause tension and fraying among the participants. For example, as an al­ternative to working only through lawyers, mediation is a suitable process for having the birth mother, adoptive parents, and other concerned family members iron out concerns with the guidance of their lawyers. In surrogate situations, a sister is sometimes the birth mother, which results in the adoptive mother’s family of origin being intimately involved in the future of that child—and not without con­flicting interests. Finally, family businesses are rife with potential strife. Preventively working out parent-child issues while at the same time formulating business goals and agreements is a perfect application of mediation.

These opportunities for preventive mediation often arise from presenting problems around conflict—to wit, the present divorce. You may have run across conflicts involving parents and adult children, siblings, or quarrelling business partners. These sad cases are often symptomatic of underlying relationship dynamics that cry out for resolution—or at least workable agreements. Such matters also can benefit from the use of an intergender lawyer-therapist co-mediation team. A family experiencing the resolution of conflict may also be more open to learning about methods for preventing conflict and main­taining legal health in the future.

Preventive Legal Wellness Checkups

Mediation offers many benefits for resolving and managing conflict, but even its most ardent proponents concede that a successful mediation is focused on settling a dispute, not on helping people have happier, more satisfying lives. Research has shown that mediation does not bring about long-term behavioral change in the par­ticipants. Compared with the process of psychotherapy, client contact with a professional is rather superficial in psychodynamic terms.[[9]](#endnote-9) Some mediation authorities, such as Robert A. Baruch Bush, Jo­seph P. Folger, and Gary J. Friedman, talk about mediation as a transformative experience.[[10]](#endnote-10) Such transformation, when and if it occurs, may or may not be the motivation that propels people into future mediation and is not likely to occur unless the pre­senting dispute is settled in a fair and satisfying manner. Two esteemed mental health colleagues with whom Woody has co-mediated, Dr. Constance Ahrons and Dr. Mary Lund, have stated: “Mediation is not necessarily a growth ex­perience. Fasten your seat belts and get ready for a rough ride. The best you can hope for is for it to stop hurting when it’s over. Then you can start healing.”

Having muted expectations for long-term behavior change through mediation is important in helping clients be satisfied with the progress they do achieve. Once resolution is achieved, having used mediation can significantly and positively impact a participant’s fu­ture life. The benefits of saved money, expeditious finality, preserved privacy, salvaged relationships, and feelings of satisfaction rather than victimization can facilitate improved personal lives for the par­ticipants and/or limit any damage caused by the dispute that would be compounded by the transaction costs of resolution.

The legal wellness checkup is an unbundled service that you can use to improve the legal health of clients at every stage of representation. Just as a doctor will examine a lump on your nose even though the presenting problem is a stye in your eye, a preventive lawyer will inquire about a client’s overall legal health when trying to solve the specific problems—for example, divorce, support or custody modification, or adoption—that brought the client into the office. The legal checkup can be brief, such as one question: “Do you have a will?” The client’s answer can initiate a client-lawyer dialogue that focuses on the importance of having an up-to-date will, a durable power of attorney, beneficiary designations, and other related documents. It is the client’s choice to take any action or have any legal work done. If work is desired, the client must de­cide whether to prepare documents without assistance, use the fam­ily lawyer who diagnosed the problem, or hire another lawyer or fi­nancial planning professional.

If you actively ask other questions concerning the client’s life, the discussion can be more wide-ranging. Such questions could include the following:

“I notice that your expenses seem to be exceeding your available cash of about $1,000 a month. How do you plan to solve this prob­lem?”

“You mentioned that you sometimes are feeling depressed these days—and that intensifies when the children are at their mother’s home. What thoughts do you have about feeling better?”

“I am delighted to hear that you and Jim are moving in together. You looked great together the last time he was in the office with you. He has custody of his three children, right? Do you have any concern as to how this might affect your relationship with your former spouse or your own children?”

“You really do work long hours! I am sorry to hear that this work stress comes home with you. What are you going to do about it?”

Probing these hot spots through concerned lawyer-client conver­sation can encourage the client to think about possible solutions. The client need take no action at all. As a preventive lawyer, you have ful­filled an important function just by raising the questions. The client can ignore advice, cut corners, or make stupid or self-destructive choices once these questions are on the table. The client is ulti­mately in charge of the information and options provided by the lawyer in regard to legal health.

In addition to spontaneous conversation that sparks preventive counseling, many lawyers use preventive checklists to guide the con­versation. Invented by Louis M. Brown, the internationally recog­nized father of preventive law, such checklists are available com­mercially. Sample checklists are provided in the Appendices.

People are more than willing to pay for a medical wellness checkup on a regular basis. They will go to their doctor’s office for these checkups even if they have no symptoms or pain. They do not expect the doctor to find a problem. In fact, they are delighted and will pay their bill when given a clean bill of health. Why do lawyers generally be­lieve that problems must be present before clients need to see us? Some preventive family lawyers schedule the next office visit before the client leaves the office. Others have implemented non-litigation calendars that alert the lawyer to contact the client on a regular cal­endar basis or on the occurrence of significant client events through life cycle dates or events that resulted from the executory provisions of the settlement agreement.

With respect to life cycle events, the non-litigation calendar can be set to trigger client contact one year before, six months before, three months before, and one month before important dates in the client’s life, including the age of retirement eligibility, matriculation of chil­dren to a new school or college, and the date each child attains majority.

When negotiating or mediating custody and support agreements, you can educate the parties about the possibility of having wellness checkups with the mediator on a regular basis. Generally, these checkups are scheduled on a six-month or one-year ba­sis. The contract specifies that the parties come to see the mediator even if there are no presenting problems. The appointment is gener­ally one hour long, but if there is a pressing issue, more time can be booked. On occasion, spouses complete a wellness checkup without any repressed or latent issue arising. In that case, the parties deserv­ingly get a clean bill of health and support from the mediator that they are doing well. However, usually something comes up—often parties save their concerns for the checkups, knowing that their dis­cussion will be monitored and managed by the mediator and not get out of hand. These regular discussions can preempt and solve prob­lems before they ripen into expensive and destructive conflict.

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Sample Notice-Triggering Events for Non-litigation Calendar

**October 1, Year 1** Settlement completed that provides that the client reside in the family house until the oldest child, Mary, is 18 (on September 15, Y3). The youngest child (Johnny) is at local elementary school and will matriculate to middle school in February Y4.

**October 2, Year 1** The preventive lawyer makes all of the following entries in the office’s non-litigation calendar.

**January 15, Year 2** Write client concerning upkeep and expense of house.

**October 1, Year 2** Write client about house and general status. Remind client about buyout date and monitor efforts to save money for possible buyout. The mortgage interest is 9% on date of the Judgment (October 1, Y1). Check current interest rates for refi­ possibilities. Remind client of wellness checkup.

**January 15, Year 3** Monitor buyout or sale progress. Discuss initiating negotiations with other spouse (either directly between the clients or through counsel).

**May 1, Year 3** Monitor buyout or sale progress. Remind client to bring in listing agreement or any sales documents before execution and financing. Discuss seeking extension of September 15 deadline.

**August 1, Year 3** Monitor house sale listing or buyout. Final check to ascertain if court action to extend deadline is required.

**September 1, Year 3** Final monitoring of house sale listing or buyout.

**October 1**, **Year 3** Write client to schedule wellness review re residence, insurance, estate planning, and status of possible career change.

[end box]

PRACTICE TIPS

1. Work toward future dispute resolution processes that will not only resolve disputes, but also prevent conflict from ever developing.
2. Erect barriers to the courthouse so that, absent an emergency, fil­ing in court is a last rather than first resort.
3. Encourage parties to work out problems themselves and to surrender control to an outside decision maker only when other options have been attempted unsuccessfully.
4. Include both a written notice and a personal meet-and-confer requirement for parties to use in resolving future disputes themselves.
5. Build in required mediation as the first and primary dispute res­olution process.
6. Have parties return to mediation after more invasive processes such as expert evaluations, arbitration, and court. Parties can regain control by mutually modifying imposed decisions and begin to heal after conflict.
7. Use a confidential mini-evaluation (CME) to retain privacy and control and to cut costs in parenting and financial disputes.
8. Provide a safeguard for the parties not to file an expert’s report with the court until the findings can be a basis for a mediated agreement.
9. Arbitration can be used on single issues or for an entire case, with the possible exception of child custody.
10. Consider using a private judge to select the best decision maker, expedite a hearing, and possibly save overall costs.
11. New family relationships can benefit from using preventive mediation. Marriage, adoption, and family business are prime candidates for using mediation to form and monitor the new re­lationships.
12. Provide legal wellness checkups to keep clients healthy legally and to provide a new source of revenue.
1. MEDIATION LITIGATION TRENDS: 1999–2007 by James R. Coben and Peter N. Thompson., World Arbitration and Mediation Review, Volume 1, No. 3. [↑](#endnote-ref-1)
2. NANCY ROGERS AND CRAIG MCEWEN, MEDIATION: LAW, POLICY, AND PRACTICE *§ 8:01* (2d ed., 1994). For an example *of* a dispute resolution clause, *see* Richard Chernick, *Dispute Resolution Assessment and Process Design in Professional Respon­sibility Disputes,* AMER. ARB. ASS’N (Prof. Resp. Panel/Panel Seminar No.2, Los Angeles, CA), May 15, 1996. [↑](#endnote-ref-2)
3. Forrest S.Mosten, *Confidential Mini-Evaluation,* FAM. & CONCILIATION CTS. REV., Jul. 1992, at *373–84; and* Forrest S. Mosten, [Confidential Mini Evaluations: Another ADR Option ****](http://www.americanbar.org/tools/digitalassetabstract.SIGNIN.html/content/dam/aba/publications/family_law_quarterly/vol45/1spr11_mosten.pdf)
45 Family Law Quarterly (ABA) No. 1, Spring 2011.

[Au: Use URL in footnote 3 instead of PDF link?] [↑](#endnote-ref-3)
4. See THE PRIVATE JUDGE: CALIFORNIA ANOMALY OR WAVE OF THE FUTURE? By Jill S. Robbins, [www.iaml.org](file:///C%3A%5CUsers%5CAppData%5CLocal%5Cescully%5CAppData%5CLocal%5Cescully%5CAppData%5CLocal%5CMicrosoft%5CWindows%5CTemporary%20Internet%20Files%5CContent.Outlook%5CMLTAVDHS%5Cwww.iaml.org) (2012). [↑](#endnote-ref-4)
5. Robert Theobald, Opening Address, 1995 Northwest Conference of Asso­ciation of Family and Conciliation Courts, Nov 1995. [↑](#endnote-ref-5)
6. See Laurie Israel who writes and practices in the area of marital mediation <http://www.ivkdlaw.com/practice-areas/marital-mediation/> [↑](#endnote-ref-6)
7. **Sandra M. Rosenbloom and Judith C. Nesburn ISN’T IT UNROMANTIC?  Collaboratively Negotiating
Pre- and Post-Nuptial Agreements**, http://www.judithcnesburn.com/CM/Custom/artice-collaboratively-negotiating.asp [↑](#endnote-ref-7)
8. AMERICAN BAR ASSOCIATION, SECTION OF FAMILY LAW, PARTNERS CURRICULUM MANUAL FOR TEACHERS at Overview (1996). (*“*PARTNERS teaches students about the legal system as it impacts on marriages, families, and children. It also teaches basic relationships that can withstand the normal stresses of the daily interaction of family life.”) [↑](#endnote-ref-8)
9. Joan Kelly et al., *Mediator and Adversarial Divorce: Initial Findings from a Longitudinal Study,* in JAY FOLBERG AND ANNE MILNE, DIVORCE MEDIATION: THEORY AND PRACTICE (1988) at 465–66. “The mediator intervention was not powerful enough to selectively reduce major psychological distress beyond the passage of time.” [↑](#endnote-ref-9)
10. ROBERT A. BARUCH BUSH AND JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RE­SPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 20–21 (Jeffrey Z. Ru­bin ed., 1994); GARY J. FRIEDMAN, A GUIDE TO DIVORCE MEDIATION: HOW TO REACH A FAIR, LEGAL SETTLEMENT AT A FRACTION OF THE COST 365–66 (1993). [↑](#endnote-ref-10)