

# Helping Parents Tell Their Children About Separation and Divorce: Social Science Frameworks and the Lawyer's Counseling Responsibility

by

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## I. Introduction

The American Academy of Matrimonial Lawyer's most recent publication is entitled "What Should We Tell the Children? A Parents' Guide for Talking About Separation and Divorce."<sup>1</sup> This 25 page booklet is designed to encourage parents to discuss their separation or divorce with their children. It emphasizes the importance of these conversations and provides helpful information on how this can best be done. An over-arching goal is to increase the ability of children and adolescents to cope successfully with the stress and disruption of their parent's separation.

Hopefully, family law attorneys will do more than just provide the booklet to clients.<sup>2</sup> By reading the booklet and familiarizing themselves with the social science literature describing the effects of divorce on children, attorneys will improve their ability to serve and represent clients. The role of the family law attorney should include counseling clients about important interactions between the client and their children. Most parents who are go-

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<sup>1</sup> WHAT SHOULD WE TELL THE CHILDREN? A PARENTS' GUIDE FOR TALKING ABOUT SEPARATION AND DIVORCE. (AAML, 2009). The booklet is available from the American Academy of Matrimonial Lawyers at [aaml.org/publications](http://aaml.org/publications).

<sup>2</sup> See, Louis Parley, *Attorney-client Communications, Now What is it Exactly That We are Supposed to Tell Them?*, 33 FAM. L. Q. 311, 318 (1999) ([s]imply distributing a handbook or providing a bibliography to clients for their self-education does not appear to be adequate. It is the lawyers responsibility to "explain the matter" to the client.)

ing through a divorce are very concerned about its impact on their children. Addressing this concern in ongoing discussions with clients is an important aspect of quality representation.<sup>3</sup> Absent extenuating circumstances,<sup>4</sup> clients should also be encouraged to cooperate with the other parent in deciding what will be said to the children and then jointly or separately engaging in these conversations to further the interests of their children.

This article is written by the professionals who authored the booklet.<sup>5</sup> In the first part, the primary author of the booklet, a clinical and research psychologist, presents the research studies which were the impetus for the creation of the booklet. In the second part, a law professor discusses the rationales for encouraging lawyers to have child-related conversations with their clients.

## **II. Why Is Telling the Children About Separation So Important?**

### *A. Social Science Research Underlying the Need to Talk to Children*

For the majority of children and adolescents, the separation of their parents precipitates a crisis of major proportions which will generally not diminish in impact for months if not more than a year.<sup>6</sup> Separation is the ending of the family as they have known it and children have no vision of what will follow or what will happen to them. Even when marriages or partnerships had significant and evident conflict or difficulties, most children seemed to have little emotional preparation for the parental deci-

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<sup>3</sup> Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965 (2007).

<sup>4</sup> Section VII of the booklet entitled "Special Circumstances: Violence, Child Abuse, Mental Illness" offers helpful advice for addressing these circumstances.

<sup>5</sup> The booklet was prepared under the auspices of a committee commissioned by Marlene Eskind Moses, President-Elect of the American Academy of Matrimonial Lawyers.

<sup>6</sup> JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 35-54 (1980); E. Mavis Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOLOGIST 851 (1979).

sion to separate and divorce and they reacted to hearing about the separation and divorce with shock, disbelief, distress, anxiety, and anger.<sup>7</sup>

Separation is the beginning of an extended process of multiple changes, difficult challenges, and necessary adaptations for children and adolescents that extends for several years.<sup>8</sup> Considerable stress is therefore an expectable outcome, although the severity, nature, and duration of stress will vary from child to child and family to family, and over time.<sup>9</sup> The stress experienced during the initial separation period derives first from the intense emotions precipitated when children and adolescents learn about the dissolution of the family.<sup>10</sup> Sadness, sense of loss, yearning for the absent parent, fear, confusion, worry, feeling rejected, loneliness, conflicted loyalties and intense anger are common responses and take their toll on children's emotional, social, and academic functioning. Second, the abrupt departure in most families of one parent, usually the father, from the household, intensifies children's stress and distress, particularly when the relationship to that parent is meaningful and close. Insufficient time with that parent causes pain, the logistics of transitions require adaptability, communication is often limited, hostility may impact arrangements, and parenting plans may be developmentally inappropriate.<sup>11</sup>

One might anticipate that children and adolescents would receive help in understanding the meaning of the separation and then subsequently in coping with this array of strong feelings and reactions precipitated by the separation and events thereafter. It was shocking therefore to discover in our study of children and divorce in the early 1970's that very few parents provided any useful explanation to their children in advance about the separa-

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<sup>7</sup> WALLERSTEIN & KELLY, *supra* note 6 at 40-41. Some older youngsters experienced relief when extreme tension, intense conflict and/or violence characterized the marriage.

<sup>8</sup> *Id.* at 303-305; Hetherington, *supra* note 6; Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. RELATIONS 352 (2003).

<sup>9</sup> Kelly & Emery, *supra* note 8, at 352.

<sup>10</sup> WALLERSTEIN & KELLY, *supra* note 6, at 45-54, 55-95.

<sup>11</sup> *Id.* at 132-148; Joan B. Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. AM. ACAD. MATRIM. LAW. 238 (2005); Kelly & Emery, *supra* note 8, at 353.

tion. Four-fifths of the children eight years and under received no preparation for or any adequate explanation about the separation when it occurred. For these younger children, one parent abruptly disappeared from the household without explanation and many had no idea if they would ever see this parent again. For children of all ages, when parents provided an explanation, it was characteristically brief and, most notably, failed to explain to the children how the separation would affect their lives. Children were therefore left to struggle alone with the meaning of this dramatic event, exacerbating feelings of isolation and cognitive and emotional confusion. It was equally astonishing that none of the sixty families in this study gave their youngsters an opportunity to ask questions and raise concerns, or to recognize with their children that this was a very difficult thing for them to experience but would hopefully improve in the future. Rather than offering empathic support to their children, parents were more likely to assure them that they would be just fine, particularly those mothers and fathers who sought the divorce. The absence of relevant communication about the separation and its implications for children's lives going forward undoubtedly intensified the emotional reactions to separation, particularly anxiety and fear.<sup>12</sup>

These findings opened an important door for education of parents who planned to separate or recently separated. "Parents need help in understanding that telling the children about the divorce provides a signal opportunity to help the child cope with the crisis, and that the telling is not an act apart but a central component in the supportive role of the parent."<sup>13</sup>

Three decades later, the problem of parental failure to talk to children and adolescents about the parental separation has apparently not diminished, despite the fairly widespread implementation of parent education classes for separating parents and articles and books written for lawyers, mental health professionals, and parents.<sup>14</sup> More recent studies continue to indicate that

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<sup>12</sup> WALLERSTEIN & KELLY, *supra* note 6, at 40, 45-46.

<sup>13</sup> *Id.* at 40.

<sup>14</sup> ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (2d ed. 1999); EMERY, *supra* note 8; E. MAVIS HETHERINGTON, COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE Chapter 5 (1999); E. MAVIS HETHERINGTON & JOHN

most children are not adequately informed about the parental separation and how it will affect their lives. They have little or no opportunity to ask questions or provide any input or suggestions regarding their living arrangements and/or subsequent changes to the parenting plan. They have parenting plan schedules imposed on them without any discussion or consideration of the children's views of their own needs or wishes.<sup>15</sup> One study found that for 23 percent of the youngsters, neither parent talked to the child about the separation or divorce. For 44 percent of the youngsters, only the mother talked to them, and for 17 percent both parents discussed the separation together. Among those youngsters where one or both parents announced the separation, 45 percent were provided with only one or two short statements: "Your dad is leaving!" or "Your mother wants a divorce." The children were then left to think about what this was going to mean for their lives. Only 5 percent of children were fully informed about the separation and allowed to ask questions of the parents.<sup>16</sup> This discouraging lack of progress in providing vital information to children over more than two decades should serve as a wake up call for legal and mental health professionals to inquire of all parents seen before and during the separation/divorce process about what specifically they have told their children, and to help them prepare for and continue such discussions as an important aspect of appropriate parenting.

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KELLY, FOR BETTER OR FOR WORSE (2002); Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 FAM. & CONCILIATION CTS. REV. 36 (1999); Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L.129 (2002); Joan B. Kelly, *Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 35 (2007).

<sup>15</sup> Judy Dunn, et al., *Family Lives and Friendships: The Perspectives of Children in Step-, Single-Parent, and Nonstep Families*. 15 J. FAM. PSYCHOL. 272 (2001); Carol Smart, *From Children's Shoes to Children's Voices*, 40 FAM. CT. REV. 307 (2002); Carol Smart & Bren Neale, "It's My Life Too" – *Children's Perspectives on Post-Divorce Parenting*, 30 FAM. L. 163 (2000).

<sup>16</sup> Dunn et al., *supra* note 15.

### B. *Why Do Parents Have Such Difficulty in Talking (and Listening) to Their Children?*

Why is it that parents do not think to tell their children about pending separations or have such difficulty in having useful discussions? It is not largely because they are inept or poor parents, but more often because they themselves are emotionally depleted, preoccupied with their own stress, and are expending significant energy to cope with the idea and logistics of separation/divorce themselves. Some parents of very young children think that their children will not notice the parental separation, and others hold a view that children can not understand anything as complex and important as this, so why bother. Indeed, it is not an easy matter.

Parents need the help of professionals and printed materials to assist in organizing their thinking and preparing to talk to their children, even if weeks after the separation. They also need the courage to allow their children to freely express their concerns and ask questions. In this co-author's experience, many parents reported that they simply did not know what to say, how much to say, and when to say it. They also dreaded their youngsters' reactions, particularly their anger, blame, and rejection, and many worried that the separation or divorce would cause irreparable harm to their children. Parents feared that they would not be able to control their emotions during such a discussion. It was easier to avoid what they anticipated would be an unpleasant experience for their children and themselves. When the issue of how, when, and what to tell the children was discussed, and the characteristic reactions of children of different ages described,<sup>17</sup> parents then willingly undertook the task.<sup>18</sup> When they returned for the next session, the majority of parents were not only astonished at what types of questions their children asked and the varied input they received from them, but most felt quite relieved and thought that they had done a satisfactory job of communicat-

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<sup>17</sup> See *supra* note 6, at 45-95.

<sup>18</sup> For thirty years, Dr. Kelly routinely asked parents who came to divorce mediation, consultation, or therapy what they had told their children about the separation and provided developmentally appropriate education and guidance as necessary.

ing this very difficult information.<sup>19</sup> Parents were advised that this should be the first of many discussions that take place over time. Children and adolescents typically absorb as much information as possible, given their maturity, cognitive abilities, and emotional response to the news of the separation. As they experience and consider their new situations, they then cycle back to seek more information as they are ready, particularly if parents are emotionally available to their children. The booklet "*What Should We Tell the Children?*" describes in considerable detail many aspects of how and what to tell the children, including why parents are separating, and how to deal with the special circumstances of partner violence, child abuse, and mental illness. It was designed to be useful not just to parents but to practitioners advising their clients as well.<sup>20</sup>

### C. *What Do Children Want Their Parents to Know*

Views of children's role in the family and their developmental and cognitive capacities have changed over the past two decades. Long thought to be passive participants in the family without much ability to evaluate and comment on their situations, children are now recognized as active and astute observers of their family situations, parent behaviors, and parent-child relationships.<sup>21</sup>

In the past decade, additional research has investigated the views and thoughts of children about their post-separation situations, and what type of input they want to provide to their par-

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<sup>19</sup> Some parents, enraged about the divorce and wanting to damage or destroy the child's relationship with the other parent, resisted constructive suggestions for talking to children about the separation without demeaning the other parent. They insisted that their children "know the truth." See Joan B. Kelly, *Parents With Enduring Disputes: Multiple Pathways to Enduring Disputes*, 9 J. FAM. STUD. 37 (2003).

<sup>20</sup> *What Should We Tell the Children? A Parents' Guide for Talking About Separation and Divorce.* (AAML, 2009).

<sup>21</sup> See Patrick Parkinson & Judy Cashmore, *The Voice of a Child in Family Law Disputes* (2008); Anne B. Smith et al., *Rethinking Children's Involvement in Decision-Making After Parental Separation*, 10 *Childhood* 210 (2003); Nicola Taylor, *What Do We Know About Involving Children and Young People in Family Law Decision Making? A Research Update*, 20 *Australian J. Fam. L.* 154 (2006).

ents and others following separation.<sup>22</sup> The majority of children in the midst of separation and divorce want parents to know how important each parent is to them, and they want to be able to love each parent without parental disapproval or interference. They want parents to understand how painful and stressful it is when parents argue loudly in their presence, when a parent demeans the other parent, or when a parent's nonverbal reactions to the mention of the other parent conveys rage, loathing, or the unacceptability of loving that parent.<sup>23</sup> For many years, children of all ages have complained of having very limited time with their fathers, and although this is slowly changing with more expansive access and shared parenting arrangements, dissatisfaction continues for many.<sup>24</sup> They would like to have a say in the parenting plans or living arrangements that are being developed by their parents or the court. They understand the difference between providing input (having a voice) and making a decision, and overwhelmingly want their parents or others in authority to make the decisions about custody and access.<sup>25</sup> Some older children and adolescents involved in contested child custody matters express an interest in speaking to other professionals, including judges, so that their voices and ideas can be reliably heard. In Australian studies, approximately one-half of youngsters reported that they had no input at all into any of the arrangements affecting their lives, and almost all of them expressed the desire to have more opportunity for their ideas and wishes to be heard about the amount or configuration of time spent with each parent. When older youngsters and adolescents were provided op-

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<sup>22</sup> See Kelly, *Psychological and Legal Interventions*, *supra* note 14, at 147-62; Smart, *supra* note 14; Smart & Neale, *supra* note 14; Anne B. Smith & Megan M. Gallop, *What Children Think Separating Parents Should Know*, 30 *New Zealand J. Psychol.* 23 (2001); Smith, et al, *supra* note 21.

<sup>23</sup> William V. Fabricius. & L. J. Luecken, *Post-divorce living arrangements, parent conflict, and long-term physical health correlates for children of divorce*, 21 *JOURNAL OF FAMILY PSYCHOLOGY* 195-205 (2007); Kelly & Emery, *supra* note 8, at 353.

<sup>24</sup> See WALLERSTEIN & KELLY, *supra* note 6, at 132-48; Kelly, *Children's Living Arrangements*, *supra* note 14; Smith & Gallop, *supra* note 22.

<sup>25</sup> PARKINSON & CASHMORE, *supra* note 21; Kelly, *Psychological and Legal Interventions*, *supra* note 14; Patrick Parkinson et al., *Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia*, 21 *INT'L J. L., POL'Y & FAM.* 84 (2007); Smith et al., *supra* note 21.



portunities for some input, they were more likely to be satisfied with their access arrangements. These youngsters were more likely to see their access or parenting plan as “fair” if they could see their nonresident parent whenever they wanted to, and saw their access arrangements as “unfair” when they did not have enough time with the nonresident parent. They complained about lack of flexibility in parenting plans, voicing the strong wish that their important adolescent activities would be accommodated by both parents. They express the wish to be able to talk more freely about how the arrangements were working for them, and to make suggestions for change when necessary in their view.<sup>26</sup>

This and other research cited above confirm the view that talking to children and adolescents about separation and/or divorce is an ongoing process and that parents need to invite comment from their children periodically by asking their children: “How are things going for you now with this separation/divorce?” “Are there any changes in your schedule or the way we are doing things that would make it easier for you?” “Do you have any advice for us that would be helpful for you?” This “checking in” with children represents appropriate and supportive parenting at its best and is more likely to promote more satisfactory and better outcomes for their children.

### **III. Why Attorneys Should Encourage Their Clients to Talk to the Children**

The role of the attorney in counseling the client who is also a parent should include conversations regarding the impact of the client’s behaviors and attitudes on the child. The rationale for doing so can be found in client expectations, the responsibility to promote the welfare of children and in ethical codes and standards.

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<sup>26</sup> Judy Cashmore & Patrick Parkinson, *Children’s and Parents’ Perceptions on Children’s Participation in Decision Making After Parental Separation and Divorce*, 46 FAM. CT. REV. 91 (2008); Patrick Parkinson et al., *Adolescents’ Views on the Fairness of Parenting and Financial Arrangements After Separation*, 43 FAM. CT. REV. 429 (2005).

### A. *Client Expectations*

A compelling reason for discussing the impact of the divorce client's actions on their children and the need for them to communicate with their children is client expectations about the role of the attorney. Publicly expressed dissatisfaction with the role of divorce lawyers suggests that clients are often disappointed. Clients want their attorneys to discuss with them issues that the client views as important. However, divorce lawyers are often seen as pressuring clients to align their perspectives with those of the attorney.<sup>27</sup> In a now famous study of divorce lawyers Sarat and Felstiner remarked that "time and again we observe lawyers attempting to focus their clients' attention on the issues the lawyers thought to be major while the clients often concentrate on matters that the lawyer considered secondary."<sup>28</sup> A further study of divorce attorneys concluded that few lawyers appreciate that they deal with emotions, human values, beliefs, secret hopes and fears. The failure to recognize these aspects of the client's "case" is probably the single most important reason for client dissatisfaction with legal services.<sup>29</sup>

In their study on the role of attorneys in divorce from the perspective of parents, young children and attorneys, Marcia Pruett and Tamara Jackson report that divorcing parents with young children are "often at a loss to understand and interpret their children's responses to the divorce (and therefore) especially rely on the attorneys for the guidance and support needed to navigate through the overwhelming experience of divorce."<sup>30</sup> Unfortunately, the overwhelming majority of responses from parents pertaining to the attorney's role were negative.<sup>31</sup> The role of the attorneys was perceived as contributing to parental

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<sup>27</sup> See Lynn Mather, Craig McEwen & Richard Maiman, *DIVORCE LAWYERS WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 90 (2001).

<sup>28</sup> Austin Sarat & William Felstiner, *Law and Strategy in the Divorce Lawyers Office* in Robert Abel, *LAWYERS: A CRITICAL READER* (1997) 44 at 49.

<sup>29</sup> Serena Stier, *Reframing Legal Skills: Relational Lawyering*, 42 *J. LEGAL EDUC.* 303, 306 *citing* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, 688 (1986).

<sup>30</sup> Marcia Klein Pruett & Tamara D. Jackson, *The Lawyers Role during the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 *FAM. L. Q.* 283, 284 (1999).

<sup>31</sup> *Id.* at 295.

rivalry conflict by creating and encouraging less communication between parents.<sup>32</sup> As part of a larger study comparing traditional adversarial and mediated divorce processes, Joan Kelly reported that clients were less satisfied with their divorce attorneys on a number of dimensions, when compared to client ratings of their divorce mediators. Attorneys were perceived as less helpful in proposing ways to resolve disagreements, in leading to workable compromises, and in increasing clients understanding of children's psychological needs. Similar to other studies, attorneys were more often viewed as worsening communication problems with the other parent, and less likely to help parents become more reasonable with the other parent.<sup>33</sup>

In the Pruett and Jackson study, when asked what they wanted from their attorneys, parents said they needed information and guidelines about what to expect from the legal process, and wanted their attorneys to serve as "interpreters" of the system's unfamiliar language and procedure. Second, parents appreciated when their attorneys were stabilizing factors in the divorce, helping them to maintain focus on a balanced perspective. Third, clients indicated that attorneys provided emotional sustenance in the forms of calming and listening to them, encouraging them to feel less helpless.<sup>34</sup> Parents also suggested that attorneys needed more training in child development. Recommendations that came out of the study include providing information to parents about the legal process, the divorce experience and most importantly, the needs of their child.<sup>35</sup>

It is clear that clients want and expect their family law attorneys to discuss issues such as the well-being of their children with them. Lawyers who continue to believe discussions with clients should be limited to "legal issues" will fail to meet the client's needs or their expectations. For instance, John M. Burman reasons:

Rather obviously, clients are in search of help with problems which they perceive, whether rightly or wrongly, to involve legal issues. But

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<sup>32</sup> Id at 298.

<sup>33</sup> Joan B Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, *MEDIATION QUARTERLY* 24, 78-82 (1989).

<sup>34</sup> Pruett & Jackson, *supra* note 30, at 294-95.

<sup>35</sup> Id at 308.

they generally want more. No legal problem arises in a vacuum. All arise in a context. A client usually wants, therefore, advice about how to resolve the problem, in general, and not just the legal aspects of it. Resolving a problem thus invariably involves non-legal issues.<sup>36</sup>

Clients want lawyers to understand the importance of their relationships with their family members, in particular their children and to assist in furthering these relationships that are important to them. Lawyers must be aware of the effect of legal strategy and decision-making upon the psychological well-being of their clients and their client's children.<sup>37</sup> Lawyers enhance their effectiveness when they understand the client's reality. Treating clients with dignity and respect by recognizing their nonlegal concerns enhances a lawyer's effectiveness.<sup>38</sup>

Lawyers must develop the skill of "empathic understanding"<sup>39</sup> as a means to "enter into the experience of clients in order to develop a feeling for their inner world and how they view both this inner world and the world of people and [events] around them."<sup>40</sup> For clients who are parents, understanding and responding to their concern about the impact of the divorce upon their children is critical. The "process of listening to the client's story, providing attention and acceptance to the clients emotions, and helping client's sort out goals is a powerful service lawyers can provide. It is clearly the service that clients most desire."<sup>41</sup> Family lawyers should become knowledgeable about the literature on the impact of divorce on children and should also provide re-

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<sup>36</sup> Larry O. Natt Ganatt II, *More Than Lawyers: The Legal And Ethical Implications of Counseling Clients on Nonlegal Considerations* 18 *GEO J LEGAL ETHICS* 365, 383 (2005) citing John M. Burman, *Advising Clients About Non-Legal Factors*, *WYO. LAW.*, Feb. 2004, at 40, 41 (reasoning that "[i]t is seldom possible to explain the 'practical implications' of a client's legal rights without referring to non-legal factors").

<sup>37</sup> Marla Kahn, *Jurisprudential Countertransference*, 18 *TOURO L. REV.* 459, 463 (2002) ("careful attention to the concerns of clients, both legal and non-legal, provides greater cooperation between all parties and consequently is associated with outcomes the clients will be more likely to abide by").

<sup>38</sup> Richard Marsico, *Working for Social Change and Preserving Client Autonomy: Is there a Role for Facilitative Lawyering?*, 1 *CLINICAL L. REV.* 639 (1995).

<sup>39</sup> DAVID A. BINDER, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 18 (1991)

<sup>40</sup> *Id.* at 40.

<sup>41</sup> Glesner & Madsen, *supra* note 3 at 982.

source lists of books, videos and online material such as those contained in the booklet, to parents.

### B. *The Changing World of Legal Practice*

Family law attorneys, like all attorneys will need to adapt to the changing world of legal practice. New studies indicate that client expectations for lawyers continue to change.<sup>42</sup> As the structure of families has changed dramatically so has the practice of family law. The largely adversarial process has been replaced by an emphasis on collaboration and settlement.<sup>43</sup> This is particularly true with respect to issues affecting children. Litigating child custody cases is now viewed as the least desirable option for resolving child-centered disputes.<sup>44</sup> There is increased emphasis on parent education,<sup>45</sup> mediation<sup>46</sup> and parenting coordinators.<sup>47</sup>

To serve their clients well, lawyers must understand and be ready to explain to their clients various ways to address their family-related problems. In 2005 the Family Law Education Reform Project (FLER)<sup>48</sup> surveyed over 600 family law practitioners on what skills, knowledge and attributes they believed were

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<sup>42</sup> See, JULIE MACFARLANE, *THE NEW LAWYER* (2008).

<sup>43</sup> ANDREW SHEPHERD, *CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES* (2004).

<sup>44</sup> See, e.g. John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 *FAM. CT. REV.* 280 (2004).

<sup>45</sup> Peter Salem, Andrew Scheperd & Stephen Schlissel, *Parent Education is a Distinct Field of Practice: The Agenda for the Future*. 34 *FAM. CT. REV.* 9 (1996); Andrew Shepherd, *War and PEACE : A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 *U. MICH. J.L. REFORM* 131 (1993).

<sup>46</sup> See, Forrest S. Mosten, *Mediation and the Process of Family Law Reform*, 37 *FAM. CONCILIATION CTS. REV.* 429 (1999).

<sup>47</sup> Christine A. Coates, *Parenting Coordination for High-Conflict Families*, 42 *FAM. CT. REV.* 246, 247 (2004).

<sup>48</sup> The Family Law Education Reform Project (FLER) was created to systematically address the gap between the teaching and practice of family law. It began as collaboration between Hofstra Law School's Center for Children, Families and the Law and the Association of Family and Conciliation Courts (AFCC), an interdisciplinary organization of family court professionals. Input was subsequently sought from major organizations of family law professionals such as the American Association of Law Schools, the National Council of Juvenile and Family Court Judges, the American Bar Association (ABA) Section of Dispute Resolution, and the Association for Conflict Resolution Family Sec-

most important in the practice of the family law.<sup>49</sup> Slightly more than 85 percent of the respondents indicated that knowledge of the impact of separation or divorce on children was essential for effective family law practice.<sup>50</sup> In terms of attributes, 64 percent of the respondents indicated that being sympathetic to the needs of children was important.<sup>51</sup> The FLER project also stressed the importance of the role a lawyer as educator. Mental health participants in the project expressed the view that lawyers spent little time educating clients.<sup>52</sup> Yet previous studies indicate that this is exactly what clients expect from lawyers. There is a clear need for integration of social sciences and family law on the impact of divorce on children.

Several other organizations have also recognized the changes that are occurring and will continue to affect the practice of law. The American Bar Association created a special committee on research into the future of the legal profession.<sup>53</sup> In its report the committee was clear that as both society and the legal profession change, lawyers will be significantly affected. The dominance of technology suggests that clients will increasingly obtain information from sources other than the lawyer. A shift in values focusing on an increasing need for economy and self-determination will mean that clients are less willing to accept a traditional paternalistic relationship with their attorneys and in fact will be participants in collaborative partnerships.<sup>54</sup> In addition lawyers will be called upon to increase their knowledge of the role of interdisciplinary processes. All of this suggests that the role of lawyer will increasingly include discussions of nonlegal matters that are of great importance to the client such as the impact of divorce on children. In considering the future of the practice of family law, the American Law Institute in its Principles on the Law of Family Dissolution includes among its stated

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tion. See Andrew Schepard & Peter Salem, *Foreword to the Special Issue on The Family Law Education Reform Project*, 44 FAM. CT. REV. 513, 514 (2006).

<sup>49</sup> Mary E. O'Connell & J. Herby DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM CT REV. 524 (2006).

<sup>50</sup> Id at 606.

<sup>51</sup> Id at 607.

<sup>52</sup> O'Connell & DiFonzo, *supra* note 49.

<sup>53</sup> Gary K. Munneke, *Legal Skills for A Transforming Profession*, 22 PACE L. REV. 105 (2001).

<sup>54</sup> Id at 114.

goals the attorney's duty "to focus greater attention during family breakdown on planning for the child's needs"<sup>55</sup>

Finally, in her book entitled, *The New Lawyer*, Julie MacFarlane cites continuing dissatisfaction with the role of lawyers as conflict resolvers,<sup>56</sup> and suggests that there is an urgent need for lawyers to modify and evolve their professional role. She acknowledges that the lawyer's role is shaped by current social and economic environment, and that several factors are at play. Clients are dissatisfied with the cost of traditional litigation and expect their lawyers to settle cases.<sup>57</sup> In addition now clients have unprecedented access to information, primarily from web-based sources.<sup>58</sup> This information was previously only available from professional sources such as lawyers. In turn clients feel empowered with this additional information and expect something different from their lawyers such as advice on strategies to resolve their conflicts.<sup>59</sup> There is no longer deference to the lawyer whose standard philosophical map includes the phrase "Trust me, I'll handle it."<sup>60</sup> Family law lawyers in particular are affected by the increased emphasis on alternative methods of dispute resolution. Lawyers are now spending more of their time playing a different role in offering different types of services to their clients. Increasingly clients see their lawyers as partners in their problem-solving aspirations as the client becomes more active in planning and decision-making.<sup>61</sup>

She also observed that it is increasingly the responsibility of the lawyer to ensure that the client understands the role of the law as just one way of approaching a principled basis for resolution<sup>62</sup>. Relying on a wholly legal framework is unlikely to resolve long-term problems such as poor relationships or parenting between acrimonious spouses. This more holistic approach to the problem is likely to enable resolution of the deeper underlying

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<sup>55</sup> AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISOLUTIONS (2002) 6

<sup>56</sup> MacFarlane, *supra* note 42.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 6 *citing*, WILLIAM URY, THE THIRD SIDE: WHY WE FIGHT AND HOW WE CAN STOP (2000).

<sup>59</sup> MacFarlane, *supra* note 42 at 130.

<sup>60</sup> *Id.* at 138.

<sup>61</sup> *Id.* at 9.

<sup>62</sup> *Id.* at 167.

issues that caused the problem in the first place, such as a difference in parenting styles.<sup>63</sup> The Academy's newest publication will assist attorneys in their duty to help parents better fulfill their responsibilities to their children. Perhaps the most important reason why attorneys should advise parents on what to tell their children is that it ultimately benefits children and sets the stage for more effective parenting.

### *C. Professional Responsibility*

In 1987 the American Academy of Matrimonial Lawyers convened a committee to identify and address the most significant ethical issues confronting matrimonial practitioners.<sup>64</sup> Relying on the collective wisdom of its members the Academy sought input from those who have spent their professional lives serving the legal needs of families. The committee determined that standards of conduct are necessary to guide matrimonial lawyers because existing codes often fail to provide adequate guidance to lawyers practicing family law.

One of the primary rationales for developing the standards, known as the Bounds of Advocacy was the recognition that the practice of family law presents unique challenges. Unlike many other types of disputes, clients in these cases will likely continue to have a relationship with each other for years to come.<sup>65</sup> As a result, to best serve the individual client, the attorney must be cognizant of how the process will advance the client's interest in promoting more positive future interactions with other family members. The legal process merely sets up a framework for the ongoing relationships and therefore attorneys must be aware of the role they play in affecting the future nature of these relationships. Consistent with the Bounds of Advocacy is the "ethical

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<sup>63</sup> Id at 181.

<sup>64</sup> The American Academy of Matrimonial Lawyers, *Bounds of Advocacy*, 9 J. AM. ACAD. MATRIM. LAW 1 (2002) also at [HTTP://www.familylawfla.org/PDFS/boundsRevised.PDF](http://www.familylawfla.org/PDFS/boundsRevised.PDF).

<sup>65</sup> This is particularly true when one considers that divorces involving young children comprise a significant proportion of the population of couples separating or divorcing. See, Marsha Kline Pruett, Glendessa M. Isabella & Katherine Gustafson, *The Collaborative Divorce Project: A Court-Based Intervention for Separating Parents with Young Children*, 43 FAM. CT REV. 38 (2005). ("Over half of the children who experience divorce do so by age 6 and 75% of these children are under three years of age.") Id.



judgment” approach which expands the lawyer’s role beyond that of a zealous advocate for an individual client.<sup>66</sup> In this model, the “lawyer sees the client not just as an individual, but as a part of a family that will continue to function in some way after the litigation is over.”<sup>67</sup>

In addition, a distinguishing characteristic of family disputes is the frequent presence of unrepresented third parties, whose lives will be significantly impacted by the client’s actions and by the process. For this reason, the Bounds set forth as aspirational the lawyer’s duty “to consider the welfare of, and seek to minimize the adverse impact of divorce on, the minor children.”<sup>68</sup> The Academy specifically addresses the interest of the children in Standard 2.14 which reads “An attorney should advise the client on the potential effect of the client’s conduct on a custody dispute.”<sup>69</sup> This should include discussions on the nature of communications between the client and his or her children. Attorneys will have the opportunity to discuss the potential benefits to the children, and hopefully to the client’s case, by referring to the suggestions made in the publication. At the same time, attorneys can issue a caution about the impact of negative comments about the other parent. Such behavior is not only damaging to the children’s welfare<sup>70</sup> but has potential negative legal consequences as well.<sup>71</sup>

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<sup>66</sup> Deborah Weimer, *Ethical Judgment and Interdisciplinary Collaboration in Custody and Child Welfare Cases*, 68 TENN. L. REV. 881, 884 (2001) (“The ethical judgment approach tempers zealous advocacy for individual clients with the recognition that a resolution in the child’s best interest is the primary legal value to be vindicated in a child custody dispute”).

<sup>67</sup> *Id.* at 893.

<sup>68</sup> Bounds of Advocacy, *supra* note 64 at R.6.1.

<sup>69</sup> *Id.* at 2.14.

<sup>70</sup> ROBERT E. EMERY, *THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE* (2004); Kelly & Emery, *supra* note 8.

<sup>71</sup> Many states have child custody statutes that allow a court to consider the willingness of one parent to allow access to the other parent in making a custody determination. These so-called “friendly parent” statutes put “non-cooperative” parents at a disadvantage. *See*, Edward B. Borris, *Parent’s Ability and Willingness to Cooperate: The “Friendly” Parent Doctrine as a Most Important Factor in Recent Child Custody Cases*, 10 DIVORCE LITIGATION 65 (1998). The doctrine is, however not without its significant critics, *see e.g.*, Margaret K.

In discussing these important issues the family lawyer is also affirming the client's role as a caring and effective parent. Attorneys can only responsibly and ethically advocate their client's interest when their role involves counseling each client fully on their rights and responsibilities as a parent and as a co-parent, and "exploring deeply the ramifications of all their actions on the welfare of the children."<sup>72</sup> Encouraging clients to take responsibility for their children's well-being also speaks to the goal of supporting clients in their fiduciary responsibilities. Again the Bounds of Advocacy are relevant. Standard 2.23 makes it clear that in representing a parent an attorney should consider the welfare of the children.<sup>73</sup> The comments suggest that although a lawyer must represent the client zealously, the lawyer is not to do so at the expense of children. Parents have a fiduciary obligation to their children and this provides a further rationale for the attorney to advise a client on the effect of his or her attitudes and behaviors on the children. In the divorce context, lawyers can become objective advisors to protect the interest of third party children and further the long-term interest of the client who is a parent.<sup>74</sup>

The American Bar Association's Model Rules of Professional Conduct (Model Rules) also recognize the fact that attorneys often consider nonlegal implications when they represent clients. Model Rule 2.1 expressly authorizes attorneys to counsel clients on such considerations. The rule provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social, and political factors that may be

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Dore, *The Friendly Parent Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41 (2004).

<sup>72</sup> Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-conflict Divorce Families and Their Children: Who Needs What Kind of Help?* 22. U. ARK. LITTLE ROCK L. REV. 453,460-461 (2000).

<sup>73</sup> Bounds of Advocacy, *supra* note 64 at 2.23.

<sup>74</sup> Lynn Mather, *What Do Clients Want?, What Do Lawyers Do?*, 52 EMORY L. J. 1065, 1076 (2003) ("Experience with the long-term consequences of divorce, particularly the impact of an acrimonious divorce on children, has provided another reason for many divorce lawyers to reject the hired gun role").

relevant to the client's situation."<sup>75</sup> Clearly, consideration of clients' relationships with their children is most relevant to the situation. It would be hard to separate the clients' concerns for the well-being of the children from a discussion of the legal process of divorce. Encouraging these conversations and a civil co-parenting relationship with the other parent will benefit the children. This is true because the manner in which the divorce is processed will have a significant and long-lasting impact on the children. Research indicates that parents who cooperate initially are less likely to return to the court system for further intervention.<sup>76</sup>

The Model Rules also provide that the attorney's duty is not only to inform the client about the legal aspects of his or her situation but also to assure that the client is making an informed decision. Specifically, Model Rule 4.1 (b) provides "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>77</sup> Family law attorneys must address those issues that are most important to clients, such as the well-being of their children if they are going to assist clients in making rational and informed decisions. Lawyers must explain the situation to the client in such a way that the client understands and has a full appreciation for the consequences of his behavior. In addition, the lawyer should also assist the client in learning skills and acquiring knowledge that are important for the client in resolving the matter.<sup>78</sup> These would include the ability to communicate effectively with their children and to acquire knowledge concerning the impact of these conversations. The new AAML publication will assist lawyers in these tasks.

Attorneys are not psychologists, but addressing the emotional aspects of representing families is a competency issue. In order to give competent representation family law attorneys must be knowledgeable and skilled in dealing with human emo-

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<sup>75</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (2003).

<sup>76</sup> Janet R. Johnston, *supra* note 72 at 457 *citing* Janet R. Jonson and Linda E.G. Campbell, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* (1988).

<sup>77</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (2003).

<sup>78</sup> Kimberlee Kovach, *The Lawyers as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359, 365 (1998).

tions. As noted earlier, representation of children and families is different from other areas of the law. The problems that clients bring to family law attorneys are often relationship problems.<sup>79</sup> In their article discussing competence issues for the family law attorney, Professor Barbara Glesner Fines and Cathy Madsen suggest that in the family law arena the impact of litigation on non-clients and the impact of these non-clients on the process is significant.<sup>80</sup> They point specifically to the consideration of children in divorce actions and conclude “no matter how much the attorney tries to individualize representation, he/she must consider the practical impact on these others.”<sup>81</sup> Asking a divorce client “What have you told the children about the separation?” opens the door to a discussion of the impact of the proceeding on them and also a consideration of how their feelings and reactions may influence the client’s decisions.

#### **IV. Conclusion**

Parents who are separating or divorcing face many challenges. Among them are concerns about what, when and how to talk to their children about the impending change in circumstances. The booklet, *What Should We Tell the Children?* published by the American Academy of Matrimonial Lawyers is designed to help parents with this difficult task. The information in the booklet is based on sound social science data and represents the collective wisdom of professionals committed to helping children cope with their parents’ separation or divorce. Increasingly attorneys will be called upon to address their clients’ concerns about the effects of the legal processes of separation and divorce on their children. Attorneys who are familiar with the literature regarding the effects of separation and divorce on children as well as the helpful suggestions contained in the booklet will be in a better position to serve their clients. Ultimately, all of these efforts will inure to the benefit of children whose interests must remain paramount.

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<sup>79</sup> The Academy recognized this unique nature of family law disputes in deigning the *Bounds of Advocacy*. The Preface states in part “Few human problems are as emotional, complicated or seem so important as those problems people bring to matrimonial lawyers.”

<sup>80</sup> Glesner Fines & Madsen, *supra* note 3.

<sup>81</sup> *Id.* at 969.