# ARTICLES

## REPAIRING THE FAMILY LAW ATTORNEY

*by*
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*Professor Clare Huntington's scholarship advances a theoretical "Reparative Model" of family law that seeks to deemphasize adversarial decision-making and decrease litigation. Building off that scholarship, this Article considers the family law attorney's role and argues that the current Model Rules of Professional Conduct already support—and should be understood to require—a "reparative" advisory role for the family law attorney. Put simply, the harsh realities of the adversarial court system demand that family law attorneys presumptively provide information on litigation's harmful impacts on families and children and encourage the possibility of pursuing goals via means less detrimental than litigation. To encourage a reparative practice norm-shift, comments to the Model Rules of Professional Conduct should include language addressing family law attorneys' contextualized role. Although far from a panacea for the family court system's shortcomings, a presumptive reparative advisory role, if widely adopted, would curb much of family law attorneys' gratuitous contributions to the harmful dynamics facing clients and families in the court system, thereby protecting society and the legal profession, and fostering the possibility of a more satisfying legal practice for family law attorneys.*



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## INTRODUCTION

> *I cannot survive this torment and the grief that comes from such a prolonged separation from my children. . . . Their father has spent years and millions of dollars—over $3 million—to eliminate me from our girls' lives . . . . He will never relent. . . . I hope in death I will accomplish what I could not in life. I hope our legislators, judges, media and others will take notice of the price I am paying today, the horrors of family court, and how the court destroys families in order to profit. I hope the public will stand up and say "no more." Your children deserve better. So did mine.*[1]

On May 27, 2023, Catherine Kassenoff, a mother of three children and former federal prosecutor, posted the above message online and then took her own life. Catherine's tragic death occurred amidst an ongoing, four-plus-year custody battle in Westchester County, New York. In that family court process, Catherine's ex-husband, wealthy litigator Allan Kassenoff, spent over $3 million in attorneys' fees. Shortly before Catherine's suicide, Allan pledged in an e-mail to Catherine that he would "never stop" trying to "protect" their children.[2] To what end and for what purpose he incurred $3 million in attorney fees is a matter of perspective: according to Allan's statements, he needed to "protect the children" from their mother;

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[1] Allie Griffin, *Ex Emailed NY Mom that he 'Will Never Stop Protecting' Their Kids from Her Before Her Assisted Suicide*, N.Y. POST, https://nypost.com/2023/06/11/ex-emailed-catherine-kassenoff-that-he-will-never-stop-before-her-assisted-suicide/ (June 12, 2023, 8:57 AM).

[2] *Id. See also* Dan Ladden-Hall, *Mom Who Died by Suicide Received Email from Ex About Their Custody Battle: Report*, DAILY BEAST (June 12, 2023, 7:49 AM), https://www.thedailybeast.com/catherine-kassenoffs-ex-sent-her-an-email-about-their-custody-battle-before-her-assisted-suicide-report.

according to Catherine's social media posts, Allan leveraged his litigious proclivity to abuse and destroy her through the court process.[3] Family court tragedies like the Kassenoff case, where prolonged, acrimonious court battles fail to resolve cases and instead appear to aggravate family conflict, with tragic result, are far too common.[4]

Viewed from the outside, the Kassenoff case, like most family law cases, is a black box. It is difficult to assess what truly happened here—whether either party (or both) is a villain of some sorts or is a true danger to the children. It is also unclear what role the parties' respective attorneys played—particularly whether Allan's attorneys encouraged a scorched earth, war-of-attrition-style litigation, or instead advised Allan to decrease acrimony and conflict. It is abundantly clear, however, that the multi-million dollars' worth of work performed by Allan's attorneys failed to improve the circumstances facing the Kassenoff family. The attorneys' work did not protect the parties' children, nor did the Westchester County family court system more generally, which apparently provided no reprieve from—and indeed likely intensified—the underlying parental conflict that is itself most harmful to children. The family law bar must reckon with its own role in cases like this one, where contentious family litigation rewards lawyers financially but harms the client, the client's children, and the legal profession's reputation more generally.

Although most family law cases are uncontested or settle via private agreement,[5] family law attorneys[6] operate in the context of an adversarial adjudicatory system that is ill-suited to resolving the vast majority of their clients' disputes, as the Kassenoff litigation in part demonstrates. Largely importing the traditional civil adversarial system to family situations, the court process pits parents against one another in a legal contest where "winning" involves attacking your co-parent—someone with whom you share critical common interests and with whom you will likely

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[3] Griffin, *supra* note 1.

[4] *See, e.g.*, Shara Park & Annie Knox, *Murder-Suicide Sparks Calls for Reform to Utah's Family Court System*, KSLTV, https://ksltv.com/551913/murder-suicide-sparks-calls-for-reform-to-utahs-family-court-system/ (May 19, 2023, 6:49 PM); Michelle Kessel & Cho Park, *Mother, Stepdad of 7-Year-Old Slain in Murder-Suicide Hope Her Death Can Help Change Custody Laws*, ABC NEWS (Sept. 5, 2018, 6:50 PM), https://abcnews.go.com/US/mother-stepdad-year-slain-murder-suicide-hope-death/story?id=57613909.

[5] Family Justice Initiative*, The Landscape of Domestic Relations Cases in State Courts*, NAT'L CTR. FOR STATE CTS. (2018), https://www.ncsc.org/__data/assets/pdf_file/0018/18522/fji-landscape-report.pdf. *See also* Mary Pat Treuthart, *Marriage Story: A Tale of Divorce, Love . . . and the Law*, 45 J. LEGAL PRO. 65, 82 (2020).

[6] This Article uses the term "family law attorney" to refer to an attorney who practices domestic relations law, including divorce, custody, equitable distribution, support (spousal and child), domestic violence, and other, related family matters. Referring to family law attorneys as "divorce lawyers" is reductive and contributes to harmful public misunderstandings about an attorney's role in family law matters. Family law attorneys do far more than divorce, and divorce/dissolution is not necessarily the object of the work that they engage in, so defining them as such is inaccurate and even potentially harmful. Using careful and precise terminology is critically important in the family law context, as misunderstandings arising from colloquial connotations have great potential to contribute to parties' conflict-ridden dynamics (*e.g.*, parties fighting over emotionally charged terms of "sole" versus "joint custody," as compared to more emotionally neutral terms, like "parenting time schedule" or "parenting plan").

have to cooperate over a substantial time period.[7] A sober assessment of contested family law litigation reveals that "prevailing" is often pyrrhic due to the process's harmful effects and tremendous transaction costs: interpersonal, emotional, financial, and opportunity.[8] In contested family cases, separated spouses may expend tremendous resources litigating property, support, and child custody, mutually draining the ultimate pool of assets available and harming their children, each other, and themselves in a prolonged, high-conflict process. This is the harsh baseline reality that family litigants encounter in the adversarial system and that experienced family law attorneys know well.

Scholars like Professor Clare Huntington, and organizations like the American Academy of Matrimonial Lawyers (AAML), have long acknowledged family law's unique nature and the ways in which the adversarial process negatively impacts clients, children, and the legal profession's reputation.[9] As an alternative to the traditional adversarial system, Huntington has proposed a theoretical "Reparative Model" of family law[10] that acknowledges the role of emotions in family disputes and "incorporat[es] the key, missing elements of guilt and reparation into the substance, procedure, and practice of family law."[11] Indeed, there is a longstanding trend in family law that can properly be characterized as reparative, reflected in part by measures like mandatory mediation and litigation alternatives like Collaborative Law. In practice, a Reparative Model encourages measures to "decrease litigation," to "de-emphasiz[e] adversarial decisionmaking," and to "modify the substance of family law to recognize the ongoing relationships that often persist even after legal relationships are altered."[12] Most notably for this Article's purposes, in Huntington's view, a Reparative Model requires major changes to the practice of family law, including potentially reconceiving of the family law attorney's role "to require that the attorney provide holistic advice rather than merely advocating for the stated interests of a client."[13]

Despite Huntington's suggestion that the family law attorney's role must "fundamental[ly] change" under a "Reparative Model," the current Model Rules of Professional Conduct already support as supererogatory—meaning permissible and even commendable, but not required—a reparative advisory role for the family law

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[7] *See, e.g.*, Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 894–95 (2010). *See generally* CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS (2014).

[8] *See* American Academy of Matrimonial Lawyers Standards of Conduct, *The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIM. L. 1, 8, 19–20, 22–23 (1992) [hereinafter AAML Standards of Conduct].

[9] *See, e.g.*, Barbara Glesner Fines, *The Changing Landscape of Disciplinary Risks in Family Law Practice*, 50 FAM. L. Q. 367, 369–370 (2016) (citing JANE C. MURPHY & JANA B. SINGER, DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION 51–52 (2015)); HUNTINGTON, *supra* note 7, at 219–220. *See* AAML Standards of Conduct, *supra* note 8, at 2–3.

[10] In later works, Huntington refers to the model as a "flourishing family law." *See, e.g.*, HUNTINGTON, *supra* note 7, at xiii. *See generally* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1294 (2008) [hereinafter Huntington, *Repairing Family Law*].

[11] Huntington, *Repairing Family Law*, *supra* note 10, at 1294.

[12] *Id.* at 1246, 1302.

[13] *Id.* at 1310.

attorney.[14] Attorneys must provide their clients with competent representation,[15] which demands, among other things, that they "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[16] The Model Rules further require the attorney to "exercise independent professional judgment and render candid advice" "refer[ring] *not only to law but to other considerations* such as moral, economic, social and political factors, that may be relevant to the client's situation."[17] An attorney's obligations under the Model Rules necessarily vary depending on the context in which they practice: competent representation for a corporate transactional lawyer means something very different from competent representation for a family law attorney. For example, the information "necessary to permit the client to make informed decisions" and the nature of the "candid advice" will necessarily vary depending on the practice context and the circumstances facing a particular client.[18]

As a baseline matter, considering the family law context and its fraught and self-destructive dynamics, competent representation presumptively entails conveying information to the client on, among other topics, the benefits of cooperation with the opposing party, the likelihood that the relationship will persist, the inadequacy of legal remedies, the substantial probability that legal action will aggravate conflict-ridden dynamics, the extraordinary costs (monetary and non-monetary) of litigation, and related non-legal issues. Presumptively providing such baseline information is critical to enabling the client's autonomy, particularly their ability "to make *informed* decisions regarding the representation."[19] The provided information is distinctly reparative in that it *ipso facto* militates in favor of decreasing conflict and avoiding use of the adversarial legal process except in extraordinary circumstances, when all other approaches prove inadequate. In their advisory role, the family law attorney should *presumptively* orient themselves toward reparative advice, like "decreas[ing] litigation," "de-emphasizing adversarial decision-making," and acknowledging the role of emotion in the dispute and the reality that relationships often continue long into the future, even after legal processes end. In their reparative advisory role under the current Model Rules, family law attorneys do not simply advocate for their client's initial "stated interests," as Huntington's article suggests.[20] Such a conception of the family law attorney's role fundamentally misapprehends

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[14] *Id.* at 1308; In the early 1990s, the American Academy of Matrimonial Lawyers first published an ethics-guidance document called the "Bounds of Advocacy", acknowledging that the Model Rules and its various state-by-state incarnations provide little guidance on a family law practice's "unique demands," and attempting to fill that gap for family law attorneys. Fines, *supra* note 9, at 369. *See generally* AAML Standards of Conduct, *supra* note 8, at 2–3.

[15] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2024).

[16] *Id.* at r. 1.4.

[17] *Id.* at r. 2.1 (emphasis added).

[18] *Id.* at r. 1.4, 2.1, 2.1 cmt. [2].

[19] *Id.* at r. 1.4 (emphasis added).

[20] In her article, *Repairing Family Law*, Huntington argues that a Reparative Model requires "fundamental changes to the practice of family law," including "reconceiv[ing] of the role of the family law attorney . . . to require that the attorney provide holistic advice rather than *merely advocating for the stated interests of a client*." Huntington, *Repairing Family Law*, *supra* note 10, at 1246, 1302, 1308, 1310 (emphasis added).

the important and robust advisory relationship that should exist between a family law attorney and their client.

Family law attorneys collaborate with their clients to determine a representation's reasonable, achievable objectives. They are not mere vessels for receiving and then implementing clients' initial "stated interests."[21] A client's initial "stated interests" are often uninformed and unrealistic. Ideally, family law attorneys challenge a client's unreasoned decision-making and self-destructive impulses; they are competent in the emotional dynamics of divorce and can effectively communicate difficult messages to clients.[22] They educate the client on the law and the court process—including the limits of what that law and court process can do for the client. The family law attorney should strive to empower their clients to focus on the broad forest, not narrow individual trees, and counsel their clients to avoid or minimize disputes that are self-destructive or damaging to children, whenever possible.[23] As part of their obligation to provide competent, diligent representation, family law attorneys advise their clients to "salvage as much as possible out of a less-than-satisfactory situation" and avoid the trap of "believing the law has greater power to do 'good' than to do 'bad'" in the family law context. [24]

Not all family law cases call for a reparative approach—hence the obligation's presumptive nature. Each and every case is sui generis. Unfortunately, a reparative approach is not always sufficient to the task at hand. Litigation may be necessary or appropriate in many circumstances, including, but not limited to, cases involving domestic violence, serious concerns about a child's safety and well-being in an intractable co-parent's care, a party who steadfastly refuses to engage in the dissolution process, hidden or dissipated assets, and grossly imbalanced interpersonal power dynamics. But, at the fore of the family law attorney's mind when approaching a case at first glance should be the baseline, all-things-being-equal recognition that litigation is a severe course of action that poses substantial risks, certain costs, and should be avoided in favor of less-detrimental alternatives whenever possible. Private practice family law attorneys have additional reasons to approach cases with a presumptive reparative approach—to affirmatively ward off any post hoc claim that they purposefully or indifferently fueled the underlying conflict to increase their billable hours and, therefore, their profit. For both private practice and pro bono attorneys, however, the presumptive reparative advisory role is necessary to mitigate the extent to which attorneys may gratuitously contribute to the harmful dynamics facing families in the court system.

Although the current Model Rules of Professional Conduct support a reparative advisory role, family law attorneys nevertheless lack adequate guidance on their role. According to the AAML, the leading family law practice organization, state rules of professional conduct currently provide "insufficient, or even undesirable"

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21 *Id.* at 1310.

22 *See id.* at 1309–1310.

23 *See id.* at 1309–1311.

24 JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 50–51 (1996).

guidance.[25] In 1992, the AAML first promulgated a document, *The Bounds of Advocacy*, which includes ethical guidance, much of which can properly be deemed reparative as Huntington uses that term in her scholarship on a "Reparative Model" of family law.[26] The AAML presents its guidance in *The Bounds of Advocacy* as aspirational, not mandatory, but makes clear that it expects AAML fellows to adhere to the guidance.[27] While helpful, a permissive, supererogatory reparative role under the Rules is insufficient, at least in context of a family law attorney's role as advisor and counselor. Given the context of the family court system's inadequacies, as well as attorneys' great potential to amplify harmful dynamics affecting the parties, the Model Rules demand a presumptive reparative advisory role of the family law attorney. Put simply, ethical family lawyering is fundamentally reparative-minded.

The lack of guidance for family law attorneys' unique ethical challenges—and the lack of widespread awareness and adherence to existing aspirational guidance documents like *The Bounds of Advocacy*—surely contributes to the unnecessary conflict and harm facing families in the court system, as many attorneys apply wholesale the adversarial approach of the general civil litigation system to the unique family law context.[28] Cases like the Kassenoff family litigation make clear that a practice norm shift is needed to protect children and families. With a mandated shift towards a reparative advisory role, we could then presume, absent evidence otherwise, that attorneys in circumstances like those representing Allan Kassenoff provided critical reparative information and explored less detrimental means before litigating full tilt—that the attorneys did not gratuitously or corruptly contribute to the conflict and harms facing their client and their client's family. Adding reparative comments to the Model Rules would mandate such a norm shift amongst the family law bar, thereby serving to "decrease litigation" and "de-emphasiz[e] adversarial decisionmaking."[29] A practice norm shift would also improve the legal profession's reputation, addressing the caricature of an unethical family law attorney who preys upon clients' vulnerabilities and fuels interpersonal family conflict for their own

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[25] Fines, *supra* note 9, at 369. *See* AAML Standards of Conduct, *supra* note 8, at 4. *See also* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much; Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 969 (2007). In 2004, the Florida Bar's Family Law Section adopted its own updated/revised version of the aspirational *Bounds of Advocacy*. Andrew Schepard, Kramer vs. Kramer *Revisited: A Comment on the Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677, 701–02 (2007) [hereinafter Schepard, Kramer vs. Kramer *Revisited*].

[26] *See* HUNTINGTON, *supra* note 7, at 276 n.5 (defining "reparative" to mean "the idea of mending or repairing relationships in preparation for the ongoing relationships that will continue after the end of the legal action").

[27] *See Qualifications to Become an AAML Fellow*, AM. ACAD. MATRIM. LAWS., https://aaml.org/qualifications/ (last visited Aug. 1, 2024). According to the AAML's website, AAML fellows are "[t]he most dedicated and professional family lawyers who are recognized and respected by the bench and bar as leaders in the field"; fellows "provide the highest quality family law services you can find." Those who apply to become an AAML fellow undergo a "rigorous vetting process" before being selected as a fellow. AM. ACAD. MATRIM. LAWS., https://aaml.org/ (last visited Aug. 1, 2024).

[28] *See* Huntington, *Repairing Family Law*, *supra* note 10, at 1248.

[29] *Id.* at 1246, 1302. *See id.* at 1310 (citing Schepard, Kramer vs. Kramer *Revisited*, *supra* note 25, at 678).

profit.[30] Repairing the family law attorney requires sober acknowledgment of the adversarial system's harms to families, and strict adherence to a presumptive reparative role, thereby mitigating attorneys' needless contributions to the conflict-ridden dynamics affecting families in the court system.

This Article proceeds in three parts. Part I examines the unique family law context, specifically considering the adversarial system's harmful effects on families and the vulnerabilities of family law clients. This Part underscores the fraught and distinctive aspects of family law disputes as opposed to the more typical civil disputes upon which our adversarial system is predicated. Part II examines the family law attorney and their unique challenges representing family law clients, considering the adversarial system's realities and their own inadequate training for the task at hand. Part III considers the current Model Rules of Professional Conduct in the family law context and argues that the Model Rules already permit—and should be understood to demand—a reparative advisory role for the family law attorney. This Part further proposes adding comments to Model Rules of Professional Conduct to advance a practice-norm shift toward reparative-minded family lawyering.

## I. FAMILY LAW AND ITS DISCONTENTS

> *Family law is full of private tragedy. Case after case pits one family member against another in a zero-sum struggle for resources. Spouses battle over limited assets; parents clash over child support; . . . and there is little that the law can do when families self-destruct amidst unemployment, poverty, mental illness, disability, substance abuse, domestic violence, child neglect, and other problems.*[31]

### *A. Family Law and the Adversarial System*

The adversarial system is predicated upon adjudicating typical civil disputes, *e.g.*, negligence, breach of contract, etc., between arms-length parties, not family disputes involving intimate partners and co-parents.[32] The adjudicatory system's adversarial nature is thought to protect due process, decision-making integrity, fact-finding accuracy, and legitimacy.[33] The civil system privileges certain ideals across legal subjects and party identity, like "finality, uniformity, judicial efficiency, and the goal, above all else, of determining winners and losers."[34] Typically, a court uses its coercive power to manage and resolve a dispute concerning discrete events that happened in the past.[35] Upon a dispute's resolution, either through settlement or upon final court order, a party generally does not require ongoing, cooperative

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[30] *See* Fines & Madsen, *supra* note 25, at 973 (citing Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 614, 617 (2006)).

[31] Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3 (2010).

[32] Historically, ecclesiastical courts, as opposed to civil courts, adjudicated family law disputes. Fines & Madsen, *supra* note 25, at 966.

[33] Huntington, *Repairing Family Law*, *supra* note 10, at 1275–76.

[34] *Id.*

[35] *See* Fines & Madsen, *supra* note 25, at 969; Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 440–41 (2002).

contact with their former litigation foe. In other words, in typical litigation cases, ongoing animosity between the parties need not materially impact their lives moving forward.

When applied to the family dispute context, the adversarial system often takes high-conflict situations and makes them even worse.[36] In contrast to run-of-the-mill civil cases, family law clients bring interpersonal, intimate relationship issues to their attorneys and to the court system. Their cases are about people—spouses, children, *families*—not mere "transactions or occurrences."[37] The parties in family law cases, most often spouses or co-parents, tend to remain entangled for many years, even after an initial legal salvo ends, as children grow, and changed circumstances create new (or old) issues to fight over. Family law cases—custody cases, in particular—sometimes do not truly end for many years, as numerous micro-disputes (often emblematic of broader macro-disputes) arise over the course of a child's minority, and sometimes even beyond.[38] Unlike other areas of the law where parties might also need to work together after a dispute's conclusion, like employment, landlord-tenant, etc., family law differs materially because it concerns the interests of "vulnerable, dependent, unrepresented third parties," *i.e.*, children.[39] Thus, there is no easy comparison in the adversarial system for family cases, where parties' relationships with one another are "restructure[d]" but often do not "truly end."[40] Even in circumstances where the family court terminates a legal relationship (*e.g.*, termination of parental rights), an informal or formal relationship of some sort is likely to persist.[41]

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[36] Huntington, *Repairing Family Law*, *supra* note 10, at 1280–81.

[37] Fines & Madsen, *supra* note 25, at 968.

[38] Child support obligations, for example, generally continue until a child turns 18 or 19, depending on whether the child is still attending school. *See, e.g.*, ALA. CODE § 26-1-1 (2019), ALA. CODE § 30-3-1 (1940) (child support continues until 19, but a parent may be obligated to support a college education); IOWA CODE § 252A.3 (2024) (child support continues until a child is 18). In some states, child support continues beyond the age of 18 or 19. *See, e.g.*, Kelsey v. Panarelli, 363 N.E.2d 1363, 1364 (Mass. App. Ct. 1977) (court has authority to order maintenance of any child who has not yet attained the age of 21 years and who is living with a parent and is principally dependent on the parent for maintenance); Nichols v. Tedder, 547 So.2d 766, 769–70 (Miss. 1989) (child support continues until a child is emancipated by reaching age 21); D.C. CODE § 46-101 (2024) (age of majority is 18 years, but that does not "affect any common-law or statutory right to child support"); Butler v. Butler, 496 A.2d 621, 622 (D.C. 1985) ("[F]or purposes of child support, a person is considered a child until age 21"); COLO. REV. STAT. § 14-10-115 (2024); CAL. FAM. CODE § 3910 (2024); Nelson v. Nelson, 548 A.2d 109, 111–12, 119 (D.C. 1988) (finding a common law duty in the District of Columbia for parents to support a physically or mentally disabled child past the age of majority). Family law court processes thus have the *potential* to continue indefinitely, further underscoring the tremendous stakes faced by parties in this context. *See also* Jaylo v. Jaylo, 262 P.3d 245, 251 (Haw. 2011) (no age limitation on court's authority to continue educational support for an adult child). In many states, a parent may be required to support a disabled or "destitute" child indefinitely.

[39] Rebecca Aviel, *Family Law and the New Access to Justice*, 86 FORDHAM L. REV. 2279, 2295 (2018) [hereinafter Aviel, *Family Law*].

[40] *Id. See also* Fines & Madsen, *supra* note 25, at 969 (noting that the law simply restructures the framework for "adjusted on-going relationships").

[41] For example, divorcing parents usually continue to interact with each other for many years after entry of their divorce judgment. Even in termination of parental rights cases, where children

As a general matter, the adversarial system is unconcerned with how the process affects the parties' welfare.[42] While the adversarial system may be appropriate in typical civil cases, where exchange of money is the usual outcome, family cases involve categorically different concerns, like ongoing care and custody of a child.[43] By creating a public venue in which parties' private, personal lives and narratives are subject to public, third-party review and adjudication, the family court process's adversarial nature tends to amplify the underlying human conflict. Its zero-sum framework incentivizes parties—often co-parents—to find faults in one another as opposed to reasons to cooperate.[44] If the issues (ultimately an assessment of relationships) are tried before a court, one party will, in effect, be declared "winner," and the other, "loser." However, declaring any party the "winner" ignores litigation's staggeringly high transaction costs. The adjudicatory family court process largely imports the traditional adversarial model, a model that conflicts with the children's best interests.[45] Indeed, legal professionals in the family court system—including judges and lawyers—lack special expertise regarding children and families' needs, even though the family court system's ostensible imperative is to protect children and families' needs.[46]

A family court bases its forward-looking child custody decision on evidence of past events that, although helpful, are not dispositive of a child's future welfare.[47] While a tort case concerns liability for a past injury, a custody case requires the court to divine an arrangement that "best" serves a child's interests *moving forward*. But families are always dynamic entities—especially during and after the break-up

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are subsequently adopted, relationships between biological parents and children often persist. Most adoptions are between related individuals, and therefore it is quite likely in most cases that the child has an ongoing relationship of some kind with their birth parent. Huntington, *Repairing Family Law*, *supra* note 10, at 1282–83.

[42] *See id.* at 1276; Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 82–83 (1997).

[43] Weinstein, *supra* note 42, at 82–83.

[44] Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 501–02 (2001). *See also* Weinstein, *supra* note 42, at 133 ("The litigation itself is often demeaning, as litigants attempt to exaggerate each other's flaws and reopen old wounds in order to win points for themselves.").

[45] *See* Sean Hannon Williams, *Sex in the City*, 43 FORDHAM URB. L.J. 1107, 1117 (2016) (noting that "litigation . . . is just about the only thing that people agree is *not* in the best interest of children." (emphasis in original)); Marsha B. Freeman & James D. Hauser, *Making Divorce Work: Teaching a Mental Health/Legal Paradigm to a Multidisciplinary Student Body*, 6 BARRY L. REV. 1, 8–9 (2006) (noting that the adversarial system "more often than not takes a very painful family situation and makes it infinitely worse.").

[46] Joan S. Meier & Vivek Sankaran, *Breaking Down the Silos That Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals*, 28 VA. J. SOC. POL'Y & L. 275, 285 (2021) ("The majority of legal and mental health professionals who find their way into family law and child custody litigation . . . lack meaningful education or training in domestic violence, child maltreatment, and especially, both. Nor is continuing education likely to make up for that insufficiency. Limited 1-3-hour trainings are not capable of engendering critical or deep thinking that could challenge an attendee's personal beliefs about families and child custody."); Aviel, *Family Law*, *supra* note 39, at 2295.

[47] Weinstein, *supra* note 42, at 98.

process.[48] In the midst of family law proceedings, many people experience tremendous stress and may not be operating at their highest capacity, for themselves or for their children.[49] Given the fraught context of a family breakup, basing a custody decision in part upon circumstances at the time of divorce is a potentially misleading indicator of future parenting.[50] Family courts are in the unenviable position of making critical, forward-looking decisions on child custody, with limited or no expertise, based on imperfect, conflicting, and potentially non-predictive evidence of past conduct.[51]

Once a family law party invokes the litigation process by filing and serving a complaint, the adversarial system pits the parties against one another, labeling them with traditional adversarial terminology—*plaintiff* versus *defendant*.[52] The parties cede some control over their lives:[53] court dates are set, summons are issued, and, in cases involving children, the court's *parens patriae*[54] role is invoked. Filing a complaint sets a proverbial train in motion that has its own independent interests and priorities. The litigation process freezes parties in an adversarial posture and risks aggravating their underlying dysfunctional dynamics. The adversarial system leads many parties to focus on "winning" legal combat; in the family context, that focus often comes at their own and their children's expense, as family relationships further deteriorate.[55] For example, routine, critically important co-parent interactions, like child transfers, became opportunities to create evidence for current or future litigation—something to show the court to obtain perceived or real advantage in the ongoing dispute.[56] Parents' conduct during the litigation process itself tends to feature prominently in custody trials;[57] each passing day may bring new evidence

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[48] *Id.*

[49] As aptly stated in a recent, popular film, "divorce lawyers see good people at their worst." MARRIAGE STORY 48:14–48:28 (Netflix 2019).

[50] Weinstein, *supra* note 42, at 98.

[51] *Id.* at 84.

[52] It is noteworthy that, anecdotally, family law clients occasionally become preoccupied with whether they are designated the "plaintiff" or "defendant" in the family court action, as if those titles have meaningful significance as to the outcomes. Legal terms often have needlessly charged content for a layperson client, contributing to the client confusion, stress, and conflict. *See* Weinstein, *supra* note 42, at 142.

[53] "[T]he process is disempowering as it forces parties to place their fates in the hands of their attorneys and the court." *Id.* at 133.

[54] *Parens patriae* is defined as the role of "the state in its capacity as provider of protection to those unable to care for themselves." *Parens patriae*, BLACK'S LAW DICTIONARY 1287 (10th ed. 2014).

[55] Huntington, *Repairing Family Law*, *supra* note 10, at 1283 ("Whatever breach the members of the family have suffered, subjecting that breach to the pressures of the adversarial system is likely to heighten the emotions surrounding the breach."). Professor Janet Weinstein further notes:

> [T]he process of engaging in a battle with family members cannot be a positive experience; certainly it is not for the children who are often placed in the middle of this internecine warfare. Nor is it generally friendly to the parents. . . . It forces parties to package their experiences in a way which will help them "win" their case, rather than to examine them contextually, in the unique and complex way in which experiences occur.

Weinstein, *supra* note 42, at 83–84.

[56] *Id.* at 83.

[57] *Id.* at 98, 111, 133.

critical to the court's custody decision, as parental dynamics deteriorate during the high-stress process. In misguided attempts to "win" a family law case, otherwise reasonable parties may engage in counter-productive and even actively harmful behaviors. The court process can dramatically harm families by inflaming the underlying emotional circumstances.

Litigation is a lengthy, time-consuming process, including in family law cases. It is not uncommon to wait six months—or even much longer—to obtain a final custody order after a contested evidentiary hearing (not to mention the long wait between initiating litigation and obtaining an evidentiary hearing on permanent custody).[58] Substantial delays in obtaining resolution underscore litigation's pyrrhic nature as a mechanism for resolving family disputes, particularly those involving child custody. By the time the court issues an order, it is very possible that the underlying facts concerning the child's best interests have changed dramatically; six months is a substantial percentage of a childhood. This reality has led some scholars to argue that decisions concerning placement of a child should consider and account for the child's subjective experience of time.[59] If four years go by without final resolution, like in the Kassenoff case, the children whose custody is being determined end up living shockingly—unacceptably—long periods of their childhood in legal limbo.[60]

Making matters worse, the background law that courts apply in family cases lacks predictive standards.[61] Custody and marital property distribution statutes invariably provide judges with broad discretion to apply numerous unweighted factors, often including a catch-all provision. One need only review the non-exhaustive factors that a court must consider in divvying a marital estate or adjudicating custody to determine that a person's *entire life* is arguably relevant to the adjudication. In marital property/debt distribution cases, for example, the relevant statutes require courts to consider vague factors like "each party's contribution as a homemaker or otherwise to the family unit" and "the circumstances which contributed to the estrangement of the parties."[62] In custody cases, the "best interest of the

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[58] *See* Huntington, *Repairing Family Law*, *supra* note 10, at 1285 n.174.

[59] GOLDSTEIN ET AL., *supra* note 24, at 41–45. "[A] child may experience a given time period . . . according to . . . subjective feelings of impatience, frustration, and loss . . . ." *Id.* at 42.

[60] Goldstein et al argue that the "child's-sense-of-time . . . require[s] that all disputes between the parents about the placement of their children be resolved by separate and *accelerated* proceedings prior to and without waiting for determination of the divorce." *Id.* at 44 (emphasis added).

[61] *See, e.g.*, Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2011 (2014) [hereinafter Aviel, *A New Formalism*] ("[M]any of the decisional frameworks in family law lack 'ruleness.' They instead vest judges with enormous discretion to rely on their individual assessments . . . ."). The concept of "ruleness" as used here is derived from Professor Frederick Schauer's work. *Id.* at 2008 (citing Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988)).

[62] *E.g.*, D.C. CODE § 16-910 (2024). Equitable distribution statutes often include a catch-all provision. *See, e.g.*, *id.* ("[T]he court shall . . . [v]alue and distribute all other property and debt accumulated during the marriage . . . [i]n a manner that is equitable, just, and reasonable, after considering *all relevant factors, including*: (A) The duration of the marriage or domestic partnership; (B) The age, health, occupation, amount, and sources of income, vocational skills, employability, assets, debts, and needs of each of the parties; (C) Provisions for the custody of minor children; (D) Whether the distribution is in lieu of or in addition to alimony; (E) Each party's obligation from a prior marriage, a prior domestic partnership, or for other children; (F) The opportunity of

child" standard includes factors like "the interaction and interrelationship of the child with his or her parent[s] . . . and any other person who may emotionally or psychologically affect the child's best interest."[63] The relevant statutory provisions open the door for parties to attempt to introduce tremendous evidence from their relationship and co-parenting as relevant to the court's determination.

The long list of relevant statutory factors provides litigants—and lawyers—with limited guidance on how the court will resolve their case.[64] The results from applying unweighted, multi-factor tests are entirely dependent on a specific judge's views, and thus are difficult to predict.[65] How much an idiosyncratic judge

each party for future acquisition of assets and income; (G) Each party's contribution as a homemaker or otherwise to the family unit; (H) Each party's contribution to the education of the other party, which enhanced the other party's earning ability; (I) Each party's increase or decrease in income as a result of the marriage, the domestic partnership, or duties of homemaking and child care; (J) Each party's contribution to the acquisition, preservation, appreciation, dissipation, or depreciation in value of the assets that are subject to distribution, the taxability of these assets, and whether the asset was acquired or the debt incurred after separation; (K) The effects of taxation on the value of the assets subject to distribution; and (L) The circumstances that contributed to the estrangement of the parties, including the history of physical, emotional, or financial abuse by one party against the other.") (emphasis added); DEL. CODE ANN. tit. 13, § 1513 (2024); FLA. STAT. ANN. § 61.075 (2023); 750 ILL. COMP. STAT. ANN. § 5/503 (2019); IOWA CODE ANN. § 598.21 (2009); KY. REV. STAT. ANN. § 403.190(1) (1996); MD. CODE ANN., FAM. LAW § 8-205 (2006); MO. REV. STAT. § 452.330 (1998). Some states simply say something to the effect of "a court shall split property equitably" without further clarification. *See, e.g.*, ALA. CODE § 30-2-51(a) (2017); ALA. CODE § 30-2-51(c) (2017); ARK. CODE ANN. § 9-12-317(a) (1997); MICH. COMP. LAW ANN. § 552.19 (1972). In contrast, California and Louisiana have more predictive statutes that presume equal division of marital/community property. *See* CAL. FAM. CODE § 2550 (1994); LA. CIV. CODE ANN. art. 2335 (1979); LA. CIV. CODE ANN. art. 2338 (1979); LA. CIV. CODE ANN. art. 2369.2 (1979).

[63] D.C. CODE § 16-914 (a)(3) (2024). *See also* COLO. REV. STAT. ANN. § 14-10-124 (2021); DEL. CODE ANN. tit. 13, § 722 (2024); FLA. STAT. ANN. § 61.13 (2023); HAW. REV. STAT. § 571-46 (2023). Child custody statutes very often include a catchall provision. *See, e.g.*, D.C. CODE § 16-914(a)(3) (2024) ("To determine the best interest of the child, the court shall consider *all relevant factors, including, but not limited to*: (A) the wishes of the child as to his or her custodian, where practicable; (B) the wishes of the child's parent or parents as to the child's custody; (C) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest; (D) the child's adjustment to his or her home, school, and community; (E) the mental and physical health of all individuals involved; (F) evidence of an intrafamily offense as defined in § 16-1001(8); (G) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare; (H) the willingness of the parents to share custody; (I) the prior involvement of each parent in the child's life; (J) the potential disruption of the child's social and school life; (K) the geographic proximity of the parental homes as this relates to the practical considerations of the child's residential schedule; (L) the demands of parental employment; (M) the age and number of children; (N) the sincerity of each parent's request; (O) the parent's ability to financially support a joint custody arrangement; (P) the impact on Temporary Assistance for Needy Families, or Program on Work, Employment, and Responsibilities, and medical assistance; and (Q) the benefit to the parents.") (emphasis added). The Court is generally instructed to consider "all relevant factors," "including, but not limited to" the statutory factors. *Id.*

[64] Williams, *supra* note 45, at 1115 ("[C]ustody determinations are so multifaceted that they are impossible to predict.").

[65] *See id.* at 1115–16. *See also* Elrod, *supra* note 44, at 506 ("The wide variety of unweighted best interests factors often cancel each other out, making the result difficult to predict.").

personally values a child's education versus a child's time with a parent, for example, might very well be determinative of a final custody decision. In addition to vesting judges with enormous discretion in deciding cases, family law itself is particularly subject to a judge's own biases simply because so many judges—so many human beings more generally—have had their own personal experiences related to family law: for example, their own divorce or custody case, their own co-parenting experiences, or even just their own deeply-held conception of what matters most to a child's or family's well-being, based on their own life experiences. Given lack of statutory guidance and lack of subject-matter expertise, judges rely on intuition, which in turn depends upon their own idiosyncratic views and life experiences.[66] The ultimate result is that a family court judge's personal values, based on their own unique life experiences, matter more to the outcome than any statutory factor.[67]

On top of the unique lack of predictive standards in the statutory law, family cases involving child custody have an additional layer of unpredictability due to the court's *parens patriae* role. *Parens patriae* is a common-law doctrine that gives the court authority to act on its own initiative to protect children.[68] This active judicial role is not present in typical civil cases. Family court judges thus have even broader doctrinal license, above and beyond their statutory grant of authority, to get actively involved in a family law case involving custody of children. This doctrinal grant exists despite judges' relative lack of training and expertise in child welfare. Even in circumstances where parents resolve child custody on their own via private agreement, the court must review and may second-guess the parents' private, negotiated settlement.[69] The court has power to supplant *the parents' agreed-upon view* as to the child's best interests with *its own view* of the child's best interests, upon certain findings. The court's *parens patriae* role adds an additional layer of complexity to the process's unpredictable nature, to private lawyers' financial gain and to children and families' detriment.

The lack of predictive standards in family law contributes to the uncertainty and conflict experienced by the parties and their children and sometimes makes parties *less* likely to settle—as if the high-level of emotional content were not enough.[70] When a legal framework provides meaningful guidance and reliably predicts court outcomes, it encourages out-of-court settlement by giving parties the

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66 Weinstein, *supra* note 42, at 104–105 (citing Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1889 (1996)).

67 *Id.* at 109–10.

68 Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 42 (2006); *In re* J.J.Z., 630 A.2d 186, 193 (D.C. 1993); *Parens patriae*, BLACK'S LAW DICTIONARY 1287 (10th ed. 2014).

69 *See, e.g.*, D.C. CODE § 16-914(h) (2024) ("The Court shall enter an order for any custody arrangement that is agreed to by both parents unless clear and convincing evidence indicates that the arrangement is not in the best interest of the minor child.").

70 *See* Williams, *supra* note 45, at 1117 (The "unpredictability [in family law] creates fertile ground for self-serving biases to skew each spouse's determination of what settlement is fair and what settlement is likely. This hinders settlement and increases the likelihood of litigation, which is just about the only thing that people agree is *not* in the best interest of children."); discussion *infra* Section I.B.

opportunity to "bargain in the shadow of the law."[71] In a criminal or landlord-tenant case, for example, the issues in dispute are comparatively narrow; the relevant legal standards constrict and guide the decision maker.[72] By contrast, in family law, the legal standards are vague and unweighted, thereby providing little guidance to the judge, lawyers, and parties themselves. Unable to predict what evidence will sway a particular judge to rule in their favor, some family litigants "mount . . . all-out assault[s] on the other parent's fitness."[73] The law's unpredictability fuels "self-serving biases," "skew[ing]" views on what is an appropriate and fair settlement.[74] Put simply, indeterminate law, like that seen in the family law context, has limited predictive value, thereby impeding out-of-court settlement, and fueling the underlying conflict that is itself most harmful to children.

### *B. Family Law Litigants in the Adversarial System*

Although this Article focuses on the relationship between attorneys and family law clients, pro bono and private, it bears noting that most family law litigants are pro se, *i.e.*, unrepresented by counsel.[75] As compared to other courts, family court has the highest proportion of pro se litigants.[76] Even some family law parties who can afford to obtain attorneys choose not to over concerns that an attorney may worsen conflict and limit their control over the process. [77] Of course, pro se parties do not receive any of the benefits potentially offered by lawyers, including education about the law and, hopefully, level-headed advice to decrease conflict. For example, lawyers can often assist a party in resolving a case without ever filing an adversarial action in court.[78]

Without a lawyer to guide them and potentially attempt to resolve the matter out-of-court, pro se parties are disproportionately funneled directly into the default

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[71] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

[72] *See* Weinstein, *supra* note 42, at 98.

[73] Williams, *supra* note 45, at 1115.

[74] *Id.* at 1117.

[75] Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705, 2706 (2014) ("Family law courts in America are overwhelmed with self-represented parties who try their best to navigate an unfamiliar territory laden with procedural and evidentiary rules.").

[76] *Id.* at 2708.

[77] Natalie Anne Knowlton, Logan Cornett, Corina D. Gerety & Janet L. Drobinske, *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 19–22 (2016) (finding that 20% of pro se family litigants did not retain a lawyer out of concern that the attorney would "either increase[] conflict and animosity" or would "not bring value to the process."). *See also* Weaver, *supra* note 75, at 2709 ("Research shows that . . . self-representation [in family court] stems from a myriad of factors, including an inability or unwillingness to pay for a lawyer, an attitude toward self-help and control over problem solving, and a negative attitude toward lawyers' ability and desire to make the court process simpler and less painful."); Fines & Madsen, *supra* note 25, at 972 (citing Andrew Schepard, *Law Schools and Family Court Reform*, 40 FAM. CT. REV. 460, 462 (2002)).

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

"contested" litigation framework, at least initially.[79] The first step of the divorce process for an unrepresented party is usually filling out a template complaint for divorce and then initiating an action that is itself inherently adversarial. Pro se parties commonly do not engage with counsel until *after* a complaint for divorce has been filed if they ever have an opportunity to engage with counsel at all.[80] And that means initiation of the adversarial process, with exposure to its independent priorities and interests and to its potential attendant harms. Although there has been a significant trend to create alternatives to litigation and improve the family court process, people with financial means have disproportionately benefitted from this trend.[81] Indigent families bear the brunt of the harms posed by the adversarial family court system discussed above,[82] as well as other harms[83] that may result from engaging in the process.

*1. Trauma and Destructive Decision-Making*

Family law clients are frequently in a vulnerable place when they first enter a lawyer's office: their cases concern the most intimate relationships that human beings possess—the very foundations of a person's security and stability. For this

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[79] *See generally* Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 124-25 (1993) (documenting the difficulties that low-income persons seeking legal assistance face in obtaining it in Maryland and the District of Columbia); Daniel Richardson, *Civil Gideon: Balancing the Access for All*, 42 VT. B.J. 33, 33 (2016) (noting the rise in pro se litigants in family law cases in the state of Vermont).

[80] *See* Weaver, *supra* note 75, at 2707 (noting that the public relies on "state-sponsored forms as a secure, acceptable way to engage in the court process"). Unlike in criminal cases, there is no civil right to counsel, even in cases involving custodial rights. *See* Richardson, *supra* note 79, at 34. Many states, however, have passed laws guaranteeing legal representation to individuals involved in termination of parental rights proceedings or abuse and neglect proceedings. *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 42 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 245, 246, n.6 (2006).

[81] Aviel, *Family Law*, *supra* note 39, at 2292–93 (citing Jane C. Murphy & Jana B. Singer, *Moving Family Dispute Resolution from the Court System to the Community*, 75 MD. L. REV. ENDNOTES 9, 9–10 (2016)) *See* discussion *infra* at Section II.B.

[82] *See* discussion *supra* pp. 476–77. The notable exceptions are that pro se litigants avoid attorneys' fees and the additional harm/conflict, if any, contributed by the presence/actions of lawyers.

[83] Upon the initiation of a litigation action concerning custody of children, there is substantially increased risk of having contact with child protective services, sometimes referred to as the "family police." *See, e.g.*, Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 642–43 (2021) (referring to the "child welfare system" and "child protective services" as a "family policing system"). In child protective actions, "parents are presumed dangerous and guilty from the moment [of] an allegation . . ." and the "presumption of parental dangerousness is a powerful factor . . ." in how the government "exercises governmental police power in their interactions with Black families." *Id.* at 645. As parents hurl accusations at each other in court, child protective services may very well become involved, leading to further intrusions and disruption in the parties' lives. There is also increased risk of economic insecurity, as court hearings very often require parties to attend in person and thus take time off work. For low-income clients, taking time off work for court hearings potentially threatens their employment, as blue-collar jobs tend to have more stringent in-person requirements. By contrast, wealthier clients tend to have white-collar jobs that, particularly in a post-pandemic world, often allow for more flexible work schedules. *See id.* at 678.

reason, when families undergo change or dissolution—when foundational family relationships are under threat—parties and their children often experience substantial emotional distress and trauma.[84] A family breakup ranks amongst life's most stressful events.[85] In addition, a substantial percentage of family law cases have domestic violence components.[86] Domestic violence's effects on mental health are "severe and long-lasting" and include increased risk of substance use, suicidal behaviors, post-traumatic stress disorder, anxiety, and depression.[87] But even in cases that do not involve domestic violence, family law cases inherently threaten what people usually value the most: children, relationships, home, and financial stability.[88] Clients predictably experience trauma in response to the interpersonal conflict, lack of control over the outcome, stakes, and uncertainty/expense.[89]

Trauma negatively impacts the brain's executive functioning structures. In traumatized individuals, there are physical, observable changes to critical brain structures, including a "diminished frontal lobe" and "significantly smaller hippocampi."[90] Trauma thus impedes impulse control, emotional regulation, and the

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[84] David M. Johnson, *In Praise of Those Who Choose Family Law*, 38 COLO. LAW. 5, 5 (2009) ("The breakup of a family often is accompanied by emotional trauma . . . ."). *See also* AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 151–52 (1995) (explaining that a substantial proportion of family law clients are in "some form of personal crisis . . . .").

[85] Thomas H. Holmes & Richard H. Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RSCH. 213, 215–16 (1967) (study finding divorce and marital separation to be amongst the top three most stressful life events).

[86] According to a 2022 Report by the Center for Disease Control, approximately 1 in 4 women and 1 in 9 men experience intimate partner violence during their lifetime, suggesting a substantial proportion of family law cases may involve domestic violence. Ruth W. Leemis, Norah Friar, Srijana Khatiwada, May S. Chen, Marcie-jo Kresnow, Sharon G. Smith, Sharon Caslin & Kathleen C. Basile, *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence*, NAT'L CTR. FOR INJ. PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION 5, 11 (2022). *See also* Brandi Ries & Hilly McGahan, *Sometimes the Cases that Nobody Wants Can Have the Greatest Impact*, 40 MONT. LAW. 14, 14 (2015) (citing Susan L. Keilitz, Courtenay V. Davis, Carol R. Flango, Vanessa Garcia, Ann M. Jones, Meredith Peterson & Dawn Marie Spinozza, *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers*, R-202 NATIONAL CTR. FOR STATE COURTS, 5, 7 (1997), http://www.ncjrs.gov/pdffiles1/Digitization/169016NCJRS.pdf).

[87] Elizabeth A. Newnham, Yanyu Chen, Lisa Gibbs, Peta L. Dzidic, Bhushan Guragain, Satchit Balsari, Enrique L. P. Mergelsberg, Jennifer Leaning, Commentary, *The Mental Health Implications of Domestic Violence During COVID-19*, 66 INT'L J. PUB. HEALTH, at 1, 1 (2022) ("The mental health effects of domestic violence are likely to be severe and long-lasting. Exposure to violence and abuse increases one's risk of experiencing post-traumatic stress disorder, depression, anxiety, substance use, and suicidal behaviours."). *See also* Elrod, *supra* note 44, at 513–14.

[88] William D. Slease & Sarah M. Armstrong, *The Closer You Get, the Harder You Fall: Practical and Ethical Challenges for Family Law Practitioners*, 31 J. AM. ACAD. MATRIM. LAWS. 463, 464 (2019).

[89] Kiley Tilby & James Holbrook, *Secondary Traumatic Stress Among Lawyers and Judges*, 32 UTAH BAR J. 20, 20 (2019).

[90] Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 214 (2018); Kirstie MacEwan, *Trauma Informed Care: What Lawyers Representing Children and Teens Need to Know*, 62 BOS. BAR J. 22, 22 (2018) ("A brain that has experienced trauma has significantly diminished frontal lobe structure."); Mark W. Louge et al., *Smaller Hippocampal Volume in Posttraumatic Stress Disorder: A Multisite ENIGMA-PGC Study: Subcortical Volumetry Results from Posttraumatic Stress Disorder Consortia*, 83 BIOLOGICAL PSYCHIATRY 244 (2018) (finding that people experiencing post-

ability to make well-considered decisions.[91] The 2012 Adverse Childhood Experiences Study (ACEs) confirms that childhood exposure to trauma disrupts the brain's healthy development and negatively impacts adult life.[92] The prevalence of trauma and emotional distress in the family law client population suggests that they are particularly vulnerable to destructive decision-making.[93]

The leading family law practice organization, the AAML, prepared a practice guidance document, *The Bounds of Advocacy*, which acknowledges the "turmoil" experienced by some family law litigants, and how that might impact their decision-making. Specifically, the AAML comments: "The economic and emotional turmoil caused by marital disputes often affects a client's ability to make rational decisions in [their] own best interest."[94] As the existence of guidance like this from the AAML suggests, family law clients sometimes look to ventilate intense emotions through the adversarial litigation process, even when the expression of that intense emotion may be detrimental to their own interests and to their family's interests.[95] The aforementioned Kassenoff litigation may be one such example: the father, Allan, spent over $3 million litigating custody, with the process and ultimate outcome being extraordinarily damaging to all involved, including Allan.[96] Fees of such an

traumatic stress disorder have "significantly smaller hippocampi" than the general population). *See generally* BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2014); Jack P. Shonkoff & Andrew S. Garner, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 AM. ACAD. PEDIATRICS e232 (2012).

91 MacEwan, *supra* note 90, at 22.

92 Shonkoff & Garner, *supra* note 90, at e236.

93 *See* Gold, *supra* note 90, at 209 ("Due to physiological changes in the brain, including the increased release of stress hormones and alterations in systems that detect danger and safety, people experiencing trauma can feel intense fear, helplessness, horror, emotional numbing, or detachment."); MacEwan, *supra* note 90, at 22 ("[A] brain that has experienced trauma has significantly diminished frontal lobe structure. The frontal lobe is the executive of our brain. This region is the command center that helps us control our impulses, regulate our emotions, and make thoughtful decisions."). *See generally* Thomas E. Schact, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 568 (2000) ("Divorce conflict may be expressed in behavior designed to humiliate, punish, or avenge []such as self-destructively expending assets on attorneys to prevent the spouse from gaining them . . . ."). Lori Gottlieb, *Dear Therapist: I Don't Know How to Help My Best Friend Through Her Divorce*, THE ATLANTIC (Aug. 29, 2022), https://www.theatlantic.com/family/archive/2022/08/best-friend-divorce-healthy-boundaries-advice/671261.

94 AAML Standards of Conduct, *supra* note 8, at 18.

95 *See* Huntington, *Repairing Family Law*, *supra* note 10, at 1285 ("Familial disputants do not necessarily act rationally in family law cases. Instead, their emotional responses can affect cognitive reasoning and lead disputants to engage in a range of self- and relationship-destructive behaviors.").

96 Griffin, *supra* note 1. On May 31, 2023, just three days after Catherine's suicide, TikToker Robert Harvey uploaded to TikTok more than 20 videos that Catherine had previously shared on Facebook. Justin Wise, *Ex-Greenberg Traurig Lawyer Sues Media Influencer on Abuse Claim*, BLOOMBERG LAW (Sept. 6, 2023, 5:34 PM), https://news.bloomberglaw.com/business-and-practice/ex-greenberg-traurig-lawyer-sues-media-influencer-on-abuse-claim. The videos went viral and, after substantial public opprobrium, in June 2023, Allan Kassenoff retired from his law firm, Greenberg Traurig. On September 5, 2023, Allan sued Robert Harvey for defamation, cyberstalking, and intentional infliction of emotional distress, seeking over $150 million in damages. *Id.*

extraordinary amount may indeed facially suggest that Allan abused the process, to his family's and his own ultimate detriment. For some family law clients, the perceived emotional or dignitary value of "winning" against a spouse or co-parent may viscerally feel more important than their long-term economic or emotional well-being. In the case of paying divorce clients, the cumulative lawyers' fees frequently trump any financial advantage that one could reasonably expect to obtain through a contested litigation process.[97] Even the non-monetary costs of litigation are so high that they tend to undercut any assertion that either party "won" the dispute.[98] Notably, attorneys are the direct financial beneficiaries of harmful client impulses, so they bear additional responsibility to affirmatively ensure that they do not casually or ignorantly perpetuate dysfunctional interpersonal dynamics that are damaging to their client and their client's family.

*2. Unfamiliar Legal Process and Dissatisfaction*

Family law clients are frequently dissatisfied with the family court process, in part because of misapprehensions about what that process can do for them. For many family law clients, their case represents their first experience with lawyers, litigation, and being inside a courtroom; clients gain a kind of legal education in the divorce process.[99] As clients quickly learn, however, the legal system addresses intimate, family relationship issues in an abstract, distanced and fundamentally unfamiliar way.[100] Family litigants often feel frustrated as they try to translate their lived personal experiences and relationships into terms cognizable by the court. What a client believes is critically necessary for the judge to hear may be viewed by the court, or even their own attorney, as irrelevant.[101] For judges and attorneys, wading into and understanding the emotional dynamics between parties is inordinately taxing and time consuming. As discussed further below, it is also entirely outside the family law attorney's ken—at least in terms of their professional training.[102] Although critical to the underlying emotional dispute that led to the legal proceeding, the court and lawyers may very well see much of the daily tit for tat of relationships as immaterial to the adjudication, to many family law clients' great frustration.

In addition, misconceptions about unfamiliar legal terminology (*e.g.*, the technical meanings of sole versus joint custody, legal versus physical custody, burdens of proof, etc.) and formal court processes (*e.g.*, court rules and procedures) may aggravate anxiety, stress, and confusion for parties in family law cases. One example is the degree to which legal terms like sole and joint physical custody become flash

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97 Huntington, *Repairing Family Law*, *supra* note 10, at 1284.

98 *See* AAML Standards of Conduct, *supra* note 8, at 8 ("Matrimonial law is not simply a matter of winning or losing. At its best, matrimonial law should result in disputes being resolved fairly for all parties, including children. An alternative to court-room confrontation may achieve a fair outcome. Parties are more likely to abide by their own promises than by an outcome imposed by a court. In some cases, alternative dispute resolution mechanisms may not be appropriate or workable due to the nature of the dispute or the animosity between parties. Under certain circumstances, litigation may be the best course, but a negotiated resolution is desirable in most family law disputes.").

99 SARAT & FELSTINER, *supra* note 84, at 3.

100 *See id.* at 4–5.

101 Weinstein, *supra* note 42, at 99.

102 *See* discussion *infra* p. 499–500.

points for parental conflict. The charged cultural and symbolic import of having a custody arrangement deemed sole versus joint is counterproductive. Regardless of whether a physical custodial arrangement is termed sole or joint, it is ultimately an allocation of *parenting time*. And that allocation of parenting time can properly be called joint if it involves *any* shared allocation of parenting time.[103] Thus, the degree to which parties fight over symbolic terms like sole versus joint custody, when the practical parenting schedule may not differ at all between the two, is proof positive that the legal terminology used by the court, often misunderstood by the parties, needlessly contributes to conflict-ridden dynamics facing families.

After the financial and emotional devastation of a family law case, predictably, clients are often dissatisfied with the outcome, the process, or their lawyer—even in cases where the client ostensibly obtained their sought-after outcome.[104] In jurisdictions that track attorney grievances by practice areas, family law clients often lodge a greater percentage of grievances than do any other type of client.[105] At least part of the dissatisfaction, in the case of private clients, comes from the client having paid extraordinary sums to an attorney, sometimes the lion's share of a family's resources, with little or no material benefit.[106] Client dissatisfaction also results because the legal process does little to address the underlying emotional dynamics, and in fact very often worsens those dynamics. As noted previously, the relationship between parties often persists even after divorce, particularly when children are involved. If the underlying relationship issues are worse off at the legal process's "end," and the client must continue to work with the opposing party to further their children's interests, then the client is likely to be quite unhappy. It is difficult for

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103 *See, e.g.*, Hutchins v. Compton, 917 A.2d 680, 682 (D.C. 2007) ("The practical difference between arrangements that are variously labeled as 'sole physical custody with rights of visitation' and 'joint physical custody' is often imperceptible."). *See generally* Taylor v. Taylor, 508 A.2d 964, 966 (Md. 1986) (describing custody law as "unfortunately afflicted with significant semantical problems . . . ."). In D.C., at least, the Council for the District of Columbia "specifically refrained from defining the terms 'sole physical custody' or 'joint physical custody,' intending to maximize the trial court's 'flexibility in determining which type of custodial arrangement would be in the child's best interest.'" *Hutchins*, 917 A.2d at 682 (quoting COMM. ON JUDICIARY, REPORT ON BILL 11-26, THE "JOINT CUSTODY OF CHILDREN ACT OF 1995", at 4 (D.C. Oct. 25, 1995)).

104 Fines & Madsen, *supra* note 25, at 972–73. *See generally* Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283 (1999) (studying divorcing parents, the authors found that most clients were unhappy with the roles of their attorney and the legal system in their divorce). In New York, a study revealed that only 44% of defendants felt that their cases were treated fairly in family court, and over 75% of defendants "reported being unhappy with the judge's decision in their family court case." Rhona Mae Amorado, *"I Plead the Fifth": New York's Integrated Domestic Violence Courts and the Defendant's Fifth Amendment Dilemma*, 32 TOURO L. REV. 709, 726 (2016) (citing SARAH PICARD-FRITSCHE, CTR. FOR CT. INNOVATION, LITIGANT PERSPECTIVES IN AN INTEGRATED DOMESTIC VIOLENCE COURT: THE CASE OF YONKERS, NEW YORK 12, 18 (2011)).

105 *See, e.g.*, Fines & Madsen, *supra* note 25, at 970–71 (citing COLO. SUP. CT., 2005 ANNUAL REPORT OF THE OFFICE OF ATTORNEY REGULATION COUNSEL (2005), https://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2005%20Annual%20Report.pdf). *See also* Freeman & Hauser, *supra* note 45, at 18 ("[F]amily lawyers receive 20% more grievances than any other area of law, even though most of the complaints are proven to be unfounded.").

106 *See, e.g.*, Freeman & Hauser, *supra* note 45, at 15.

parents to mount all-out legal assaults against one another in court while simultaneously trying to find a way to work together for their children, because the adversarial process itself involves impugning the other's parenting capabilities and track record. The fact that custody is always modifiable means the specter of additional legal battles is ever-present, threatening to disrupt any hard-fought status quo.[107] The legal system's inappositeness to resolving emotional disputes contributes to family law clients' frequently dissatisfied feeling vis-à-vis the family court process. Part of this dissatisfaction may also be a result of the difference between the client's initial view, "enmeshed in the hope" associated with a belief "that the law has greater power to do 'good' than to do 'bad,'"[108] and their ultimate lived reality of the family court system.

## II. FAMILY LAW ATTORNEYS AND THEIR DISCONTENTS

Family law attorneys operate in the fraught context described above. As a creature of the adversarial process by training, the family law attorney is similarly ill-equipped to address most of the family law client's problems. Indeed, as Part I argues, many of the typical legal tools available to a family law attorney predictably worsen relationship problems between parties. The law has little predictive value and can provide only limited (and often quite delayed) relief for the underlying issues affecting their clients. The family law client population is often in crisis[109] and serving them well as a family law attorney requires attention to the parties' emotional dynamics (and the attorney's own emotional state). Apart from clinical legal education, the law school curriculum does very little, if anything, to prepare attorneys for the range of human dynamics seen in a typical family law practice. Unlike psychologists and therapists, family law attorneys have no requisite training to deal with the long-term effect of their repeated exposure to intense client emotions on their own well-being and decision-making; for example, they have no training on critical psychological concepts like transference and countertransference.[110] This lack of training makes family law attorneys even more susceptible to amplifying conflict and harm. Family law attorneys thus operate in an extremely difficult human and legal space with inadequate guidance, training, and support.

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[107] *See, e.g.*, D.C. CODE § 16-914 (f)(1) (2024) ("An award of custody may be modified or terminated upon the motion of one or both parents, or on the Court's own motion, upon a determination that there has been a substantial and material change in circumstances and that the modification or termination is in the best interest of the child.").

[108] GOLDSTEIN ET AL., *supra* note 24, at 50–51.

[109] *See* Erik Oftedahl Næss, Lars Mehlum & Ping Qin, *Marital Status and Suicide Risk: Temporal Effect of Marital Breakdown and Contextual Difference by Socioeconomic Status*, 15 POPULATION HEALTH 2 (2021).

[110] Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 272 (1999) ("Neither law students nor attorneys generally receive any such training . . . and thus they generally have no access to a structured protocol for addressing countertransference.").

*A. Complex Practice, Lack of Training, and Inadequate Remedies*

Few practice areas call upon as diverse a skill set and provide for as much creativity as family law.[111] And there is no doubt that the stakes are high in this practice context. Successful family law practitioners must possess knowledge in many areas, including constitutional law, remedies, contracts, tax, trusts and estates, civil procedure, torts, property, criminal law, insurance, and public entitlements.[112] They must also stay abreast of a rapidly changing field, given reproductive technology and expanding definitions of family,[113] as well as increasingly common alternative relationship structures, like polyamorous domestic partnerships.[114] Family law attorneys must also work with unique rules and doctrines that have no corollary in other areas of law.[115] When raised in the family law context, legal doctrines often take on unique, peculiar patinas.[116] The practice of family law is further complicated by family law's localized nature, with rules and procedures that may vary considerably state-by-state.[117]

The required skill set for a family law attorney includes, but is not limited to, "client counseling, strategizing, coordinating, referring, cajoling, and problem-solving in addition to negotiation, litigation, and motion practice. . . ."[118] Successful family law attorneys also must have strong math skills and personal finance knowledge, as advising a client on equitable distribution or support necessarily requires some modicum of financial literacy and planning skills. In addition, family law cases often involve contested evidentiary hearings, so family law attorneys must also be skilled in courtroom advocacy.[119] On top of all these skills, given the

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111 *Cf.* SARAT & FELSTINER, *supra* note 84, at 152 ("And because divorce law is itself at one end of the rules-discretion continuum, the opportunity for creativity in interpreting the legally possible is greater than in fields in which rules narrow the scope of interim maneuvers and acceptable outcomes.").

112 Mary Pat Treuthart, *A Perspective on Teaching and Learning Family Law*, 75 UMKC L. REV. 1047, 1048 (2007).

113 *See generally* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) (addressing the law's treatment of families formed through assisted reproductive technologies).

114 *See, e.g.*, Press Release, Polyamory Legal Advoc. Coal., Cambridge Becomes 2nd US City to Legalize Polyamorous Domestic Partnerships, (Mar. 9, 2021), https://static1.squarespace.com/static/602abeb0ede5cc16ae72cc3a/t/604747971135b1744e8a4002/1615284120965/2021-03-08+PLAC+Press+Release.pdf. *See also* Jeremy C. Fox, *Somerville Recognizes Polyamorous Relationships in New Domestic Partnership Ordinance*, BOSTON GLOBE, https://www.bostonglobe.com/2020/07/01/metro/somerville-recognizes-polyamorous-relationships-new-domestic-partnership-ordinance (July 1, 2020, 11:21 PM).

115 *See* Fines & Madsen, *supra* note 25, at 966 ("[D]ivorce cases may be the only type of action in which personal presence in the state is neither necessary nor sufficient to confer jurisdiction on the trial court." (citing UNIF. CHILD CUSTODY JURISDICTION AND ENF'T ACT § 201(c) (UNIF. L. COMM'N 1997))).

116 *Id.*

117 *Id.* at 967.

118 Treuthart, *supra* note 112, at 1048.

119 Brandon Shavers, *How is Financial Literacy Connected to Family Law?*, RENEAU (May 9, 2022), https://www.reneaulawgroup.com/article/how-is-financial-literacy-connected-to-family-law (commenting on the need for financial literacy among family law practitioners). *See, e.g.*, James

centrality of emotional family dynamics, family law practice necessarily requires noncognitive interpersonal skills like empathy and listening far more than other practice areas. Indeed, the underlying emotional aspects of the case are frequently more difficult, time-consuming, and complex than the legal issues.[120] Family law practice thus requires a well-rounded, balanced skill set, including both analytical and interpersonal skills. Despite family law practice's challenging reality, many in the legal community misapprehend its complexity and significance, dismissing it as simple or "low status."[121]

Anecdotally, those who affirmatively choose to enter the field of family law often do so out of a genuine desire to help others through times of crisis. But family law attorneys are fundamentally creatures of the adversarial system—legal problem solvers for disputes that are emotional at their core.[122] Professor Lynn Wardle has compared divorce and other family break-up issues to "emotional amputations without anesthetic . . . ."[123] Continuing Professor Wardle's analogy here: in the family law context, lawyers—the "doctors" performing the "emotional amputations"—have no formal, mandatory training in empathy, listening, or other client-counseling skills.[124] Family law attorneys have no specialized background on the psychological dynamics of divorce and the break-up process's impacts on their client and their client's children.[125] High levels of emotional content may make it extraordinarily difficult for attorneys to understand, communicate with, and manage the expectations of, their clients, impeding their ability to provide clients with the full benefit of legal representation.[126]

Apart from clinical legal education, law schools prepare new attorneys very little for the wide range of skills required for a competent family law practice.[127]

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Herbie Difonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 104 (2001) (noting the prevalence of contested evidentiary hearings in family law cases).

120 Elrod, *supra* note 44, at 501.

121 Martha Minow, "*Forming Underneath Everything that Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 819 (1985) (noting that family law's "low status within the profession is well-known"). *See also* Weaver, *supra* note 75, at 2712 ("Often attorneys and laypersons underestimate the complexities of family law . . . . Family law is transubstantive, and the family law practitioner must be well versed in diverse areas of law in order to provide competent and comprehensive representation to clients.").

122 *See generally* Lynn D. Wardle, *Counselors and Gatekeepers: The Professional Responsibilities of Family Lawyers in Divorce Cases*, 79 UMKC L. REV. 417 (2010).

123 *Id.* at 433.

124 "In the past, empathy was considered an inborn trait that could not be taught, but research has shown that this vital human competency is mutable and can be taught to healthcare providers." Helen Riess, *The Science of Empathy*, 4 J. PATIENT EXPERIENCE 74, 74 (2017). *See also* Emily J. Gould, *The Empathy Debate: The Role of Empathy in Law, Mediation, and the New Professionalism*, 36 VT. BAR. J. 23, 23–24 (2010).

125 Freeman & Hauser, *supra* note 45, at 8–9.

126 *See* Slease & Armstrong, *supra* note 88, at 464. *See also* SARAT & FELSTINER, *supra* note 84, at 3.

127 *See, e.g.*, Freeman & Hauser, *supra* note 45, at 7 ("[L]aw schools continue to prepare family law attorneys to deal with the break-up of a marriage much as they would the dissolution of a business partnership. [Knowledge of the law] . . . is only the beginning, not the end, of the education.").

There is reason to think that attorneys, as a population, actually may score lower than the general population on critically important interpersonal traits like empathy and listening.[128] Law schools do not emphasize emotional or interpersonal concerns in dispute resolution.[129] The traditional law school pedagogy trains lawyers to believe that their knowledge of the law and ability to apply it are paramount.[130] Despite little to no formal training required on counseling, listening, empathy, or trauma, family law attorneys regularly represent clients, like Catherine Kassenoff, who are vulnerable and at risk. A study published in June 2021 found high suicide risk strongly associated with marital separation: "The stress and loss of support induced by a marital dissolution are important contributing risk factors for suicide . . . ."[131] Family law attorneys, having received no training in these critical skills, as compared to other professionals working with traumatized populations, must draw upon their on-the-job experience and personal, pre-existing experience or strengths in those areas. Family law attorneys address delicate, highly charged family disputes with little to no training on how to work with traumatized populations and deal with the long-term negative impact of their exposure to that trauma on themselves as professionals.

In addition to lacking formal training in areas critical to family representation, the lawyer's paradigmatic litigation tools, as well as the legal process more generally, have great potential to worsen, rather than improve, the underlying issues facing clients. Professor Anne Alstott's quote at the top of Part I reads: "there is little that the law can do when families self-destruct . . . ."[132] The quote should be amended to read that there is little the law can do *to help* when families self-destruct. The law can do quite a lot of harm. Legal machinations often aggravate emotional problems underlying the legal action, leaving aside financial costs for a moment. For non-paying clients, filing a motion for contempt, for example, may further inflame conflict-ridden dynamics between the parties, and therefore any relief potentially obtained must be weighed against the risk of future harm to the client's interests posed by even further relationship deterioration.[133] The court system itself can often take many months to render a decision in a contested case, impeding the parties' respective capacities to move past the conflict. Attorneys are at risk of increasing hostility between parties, thereby decreasing the parties' respective parenting ability and harming any children involved.

A combination of complex practice, lack of training, and inadequate remedies to address the client's very real emotional problems all serve to contribute to the

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128 *See* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 94 (2001) ("Deep listening is difficult for students to master because many western cultures undervalue listening. Most students who were encouraged in their childhood to pursue a legal career probably received this advice because they displayed a tendency to argue, not because they were good listeners.").

129 Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 5–6 (2006).

130 Marjorie A. Silver, Sanford Portnoy & Jean Koh Peters, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship*, 19 TOURO. L. REV. 847, 849 (2004).

131 Næss, Mehlum & Qin, *supra* note 109, at 1. *See also* Wardle, *supra* note 122, at 434.

132 Alstott, *supra* note 31, at 3. *See also* Fines & Madsen, *supra* note 25, at 969.

133 Elrod, *supra* note 44, at 501–02.

fraught context in which family law attorneys practice. Family law attorneys must be cognizant and self-aware of their limited ability to address the underlying problems facing clients. A strong dose of professional humility about advising the client to take legal action is warranted under such circumstances.

### *B. The Billable Hour's Violent Intrusion on the Attorney-Client Dynamic*

It is critical to note a nose-in-the-face obvious conflict of interest that private attorneys encounter when representing paying family law clients: the billable hour.[134] The billable hour violently intrudes on the attorney-client relationship in all cases involving paying clients, but particularly in family law cases. Because family law work often involves fighting over what is, or what feels like, scarce financial resources, any work the attorney might do must be carefully and constantly weighed against the financial cost of that work (not to mention its emotional impacts on the client and the client's family, discussed above), as the financial cost of their own work, ostensibly in furtherance of the client's interests, in fact constitutes a concrete, measurable, and certain source of harm to the client.[135] Indeed, in family law cases, because non-monetary, family relationship interests often play such critical roles, the financial harm posed by attorneys' fees is often the most easily identifiable and measurable source of harm facing a private client.[136] This places the attorney in a deeply uncomfortable position with respect to their relationship with their own work and its actual value to the client.

The billable hour fosters an environment in which the private family law attorney's pecuniary interest incentivizes an approach of action as opposed to inaction. This is a dangerous dynamic, compounding risks from a client's initial impulses, which also often reflect a bias in favor of legal action. Given the combination of their pecuniary interest and the client's vulnerability, as well as the adversarial system's inappositeness to resolving family disputes, the family law attorney operates in a high-risk environment where compounding ethical risk factors collide. Before taking any action on a family client's behalf, a family law attorney must carefully consider with the client whether the likely impact of that action is going to help or harm the client and the client's family, because adversarial action in the family law system has such substantial and often devastating costs.

Data supports the conclusion that, in civil litigation more generally, most plaintiffs who reject settlement and go to trial end up receiving less money than they

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134 *See generally* William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991) (noting that attorneys are incentivized to maximize billable hours, in opposition to any given client's interest in minimizing their own costs).

135 *See* Rebecca Aviel, *Counsel for the Divorce*, 55 BOS. COLL. L. REV. 1099, 1101–02 (2014) [hereinafter Aviel, *Counsel for the Divorce*] ("Where both lawyers are getting paid out of a finite set of marital assets, every dollar spent on legal fees inures to the detriment of both spouses, who will share a depleted resource after the lawyers have been paid. Speaking strictly in financial terms, this is justifiable only from the point of view of an individual spouse who expects that his lawyer's zealous advocacy will result in an award that more than offsets that client's share of the lawyer's fees . . . . [T]his expectation cannot simultaneously bear fruit for both spouses, creating a sort of prisoner's dilemma.").

136 *Id.* at 1102.

would have had they settled in the first instance.[137] According to a 2008 empirical study based on approximately 2000 cases that went to trial, the marginal cost for plaintiffs of going to trial instead of settling is, on average, ~$43,000. For defendants, on average, the marginal cost of going to trial instead of settling is ~$1.1 million.[138] Lawyers' inability or refusal to tell clients that their case is not a strong one surely contributes to this harmful loss scenario. The optics of this dynamic damage the legal profession. The caricature is that of a family law attorney becoming overly aligned with their client, unwilling or unable to advise and challenge poor decision making, amplifying destructive conflict, all while reaping financial reward in the process.

### *C. Secondary Trauma and the Family Law Attorney*

The family court process's highly charged, adversarial nature also harms legal professionals.[139] Wading into high-conflict family disputes puts lawyers and judges in real danger of physical harm, as recent, high-profile examples demonstrate. In October 2023, a man shot and killed a Maryland family court judge who had awarded child custody to the man's estranged wife just hours earlier.[140] In December 2022, a man murdered his ex-wife's family law attorney, to whom the man was ordered by the family court to pay $30,000.[141] Data supports the conclusion that family law attorneys experience threats and violence at a greater rate than lawyers in other practice areas; indeed, even though their work is civil, a staggering 92.8 percent of family law attorneys surveyed reported experiencing some kind of threat or violence related to their work.[142]

In addition to facing risk of threats and actual violence, family law attorneys are vulnerable to what is known as "vicarious" or "secondary" trauma. Such trauma is the result of continuous or repeated exposure to the "emotional upheaval" of

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[137] Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html (discussing Randall L. Kiser, Martin A. Asher & Blakely B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551, 566 (2008)).

[138] Glater, *supra* note 137 (discussing Kiser, Asher & Blakely, *supra* note 137, at 566–67).

[139] Huntington, *Repairing Family Law*, *supra* note 10, at 1286 (noting that there are numerous symptoms of this, including increased risk of violence to family law attorneys and judges' reluctance to hear family cases).

[140] Justin Jouvenal & Omari Daniels, *Suspect in Slaying of Maryland Judge Andrew Wilkinson is Found Dead*, WASH. POST, https://www.washingtonpost.com/dc-md-va/2023/10/26/suspect-maryland-judge-killing-body-found/ (Oct. 26, 2023 1:26 PM). In the wake of Judge Wilkinson's tragic death, the Maryland General Assembly is considering the Judge Andrew F. Wilkinson Judicial Security Act, which would provide a mechanism for judges and their families "to request their personal information not be made public, posted on the internet or social media." Darcy Spencer, *Proposed Maryland Law Would Protect Judges' Personal Information*, NBC4 WASHINGTON, https://www.nbcwashington.com/news/local/proposed-maryland-law-would-protect-judges-personal-information/3535580/ (Feb. 5, 2024, 9:13 PM).

[141] Joe Henke, *Man Arrested in Divorce Attorney's Death Owed Him Nearly $30,000*, 11 ALIVE, https://www.11alive.com/article/news/crime/man-arrested-divorce-attorneys-death-owed-30000-allen-tayeh-doug-lewis/85-24519c63-8630-4709-b070-d986c8d9d783 (Dec. 9, 2022, 4:47 PM).

[142] Lorelei Laird, *The Job is Killing Them: Family Lawyers Experience Threats, Violence*, ABA J., Sept. 2018, at 54, 56.

clients who are experiencing trauma.[143] It is an "occupational hazard" of individual representation lawyering more generally.[144] Secondary trauma is the natural consequence of opening oneself up to another human being's lived experiences; "removing vicarious trauma would require . . . refrain[ing] from empathizing . . . ."[145] Family law attorneys, and judges to a lesser degree, absorb and mediate clients' emotions day-in and day-out. According to the American Bar Association, family law attorneys "are regularly exposed to human-induced trauma" and are regularly called upon to "empathetically listen to victims' stories."[146] Family law is recognized as a "high-risk practice area[]" for "the incidence of secondary traumatic stress."[147]

A 2012 study on the effect of attorneys' work with trauma-exposed clients found a strong negative impact on the attorneys. Attorneys with higher levels of exposure to trauma-exposed clients had higher sustained rates of PTSD, depression, and functional impairment.[148] Although this study looked at public defenders, the implications are stark for family law attorneys.[149] Due to the nature of family law practice, similar in certain ways to criminal defense practice, vicarious or secondary trauma is widespread in the family law bar, with substantial negative impacts. Other scholars have called for the legal profession to address the impact of secondary trauma on lawyers in high-risk practice areas, specifically mentioning family law.[150]

Lawyers have no requisite training to acknowledge and address secondary trauma, unlike medical professionals, mental health professionals, social workers, law enforcement, and other professionals regularly dealing with traumatized

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143 Slease & Armstrong, *supra* note 88, at 475–76 (citing Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 245 (2003)).

144 JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 467 (Dennis Leski ed., 3d ed. 2007). Professor Koh Peters described secondary trauma as follows: "The raging river is the client's life. The boulder falling is the trauma occurring. The image of secondary trauma is a lawyer standing in the river. They don't get hit by the boulder, but they feel the ripple . . . ." Jean Koh Peters, *quoted in* Arin Greenwood, *Ripple Effects: Education and Self-Care Can Help Lawyers Avoid Internalizing Client Trauma*, ABA J., Jan. 2006, at 20, 20.

145 Kate Aschenbrenner, *In Pursuit of Calmer Waters: Managing the Impact of Trauma Exposure on Immigration Adjudicators*, 24 KAN. J.L. & PUB. POL'Y 401, 442 (2015).

146 *Compassion Fatigue*, ABA, https://www.americanbar.org/groups/lawyer_assistance/resources/compassion_fatigue/ (last visited Aug. 1, 2024). *See also* Samuel D. Hodge, Jr. & Lauren Williams, *Vicarious Trauma: A Growing Problem Among Legal Professionals that May Become a More Prevalent Cause of Action*, 53 Tex. Tech L. Rev. 511, 514 (2021).

147 Jennifer Brobst, *The Impact of Secondary Traumatic Stress Among Family Attorneys Working with Trauma-Exposed Clients: Implications for Practice and Professional Responsibility*, 10 J. HEALTH & BIOMEDICAL L. 1, 18 (2014).

148 *See generally* Andrew Levin, Avi Besser, Linda Albert, Deborah Smith, & Yuval Neria, *The Effect of Attorneys' Work with Trauma-Exposed Clients on PTSD Symptoms, Depression, and Functional Impairment: A Cross-Lagged Longitudinal Study*, 36 L. HUM. BEHAV. 538 (2012).

149 Brobst, *supra* note 147, at 16 ("[A]ttorneys are relatively late in addressing the impact of secondary trauma on the profession."). *See also* Fines & Madsen, *supra* note 25, at 992; Levin & Greisberg, *supra* note 143, at 245 (noting a survey that found that attorneys in family law "*experienced more symptoms* of secondary trauma and burnout compared with comparison groups of mental health providers and social workers.").

150 Brobst, *supra* note 147, at 53. *See also* Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 WASH. U. J. L & POL'Y 17, 26–29 (2001).

individuals.[151] Lawyers are comparatively late in recognizing and addressing secondary trauma's impacts.[152] In contrast, mental health professionals receive specific training on trauma and have access to trauma-informed peer support systems. Mental health professionals are better equipped to manage and address their exposure to trauma than family law attorneys who receive no such training.[153] A survey found that family law attorneys experience more symptoms of secondary trauma than do mental health providers working with similar populations.[154]

As compared to mental health counselors, family law attorneys become significantly more involved in their client's family dispute. In some real senses, mental health professionals stay on the sidelines; for example, therapists do not draft legal memoranda to the opposing party on their patient's behalf. Therapists do not negotiate settlements, issue subpoenas, or depose witnesses. Due to their professional role, family lawyers are called upon to act in ways that put them in the middle of the family conflict. Despite attorneys' greater active involvement in their client's lives and disputes (and therefore greater risk), "[t]ransference" and "countertransference" are not topics even remotely within a family law attorney's ken.[155] This is a shocking fact, considering that the more emotionally intense the representation, "the greater the likelihood that transference and countertransference may *interfere* with competent representation."[156] Countertransference constitutes a major risk to competent representation in family law practice.[157] In contrast to lawyers, social workers and mental health counselors are trained to anticipate, address, and mitigate the effects of transference and countertransference in client relationships.[158] Family law attorneys are thus operating unaware, in a real sense, to these and other critical concepts that other trauma-informed professions utilize conversantly on a day-to-day basis. Family law attorneys are woefully ill-prepared, as compared to mental health professionals, to affirmatively address the impact of vicarious trauma and transference/countertransference in their emotionally charged field.[159]

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151 Slease & Armstrong, *supra* note 88, at 476.

152 Brobst, *supra* note 147, at 16–17 (citing Linda Albert, *Keeping Legal Minds Intact: Mitigating Compassion Fatigue Among Government Lawyers*, INSIDE TRACK (State Bar of Wis., Madison, Wis.), Apr. 15, 2019, https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=1&Issue=6&ArticleID=7570).

153 Kristine Kuzemka, *Secondary/Vicarious Trauma and Compassion Fatigue*, 29 NEV. LAW. 8, 9 (2021).

154 Levin & Greisberg, *supra* note 143, at 250.

155 Maria Kahn, *Jurisprudential Countertransference*, 18 TOURO L. REV. 459, 465–66 (2002) (defining transference as "a psychological process by which people impose or project feelings that originated in prior relationships, onto new relationships" and countertransference as "when the object of transference (psychologist, attorney, judge) has a reaction to the projected feelings of the client (the transference), that also are colored by prior relationships in his or her own experience (countertransference)."). *See generally* Rhoda Feinberg & James Tom Greene, *Transference and Countertransference Issues in Professional Relationships*, 29 FAM. L. Q. 111 (1995); Silver, *supra* note 110.

156 Silver, *supra* note 110, at 299 (emphasis added).

157 *Id.* at 299–300.

158 *See* Fines & Madsen, *supra* note 25, at 992.

159 Brobst, *supra* note 147, at 16 ("[A]ttorneys are relatively late in addressing the impact of secondary trauma on the profession."). *See also* Fines & Madsen, *supra* note 25, at 992 (noting a survey that found that attorneys in family law "experienced more symptoms of secondary trauma

Many negative consequences flow from family law attorneys' experience of—and failure to address—secondary trauma. Among the symptoms and effects of unaddressed secondary trauma, the American Bar Association lists "[b]ecoming emotionally detached and numb in professional and personal life," "[b]ecoming pessimistic, cynical, irritable, and prone to anger," and "[b]ecoming less productive and effective professionally and personally."[160] The attorney may experience "diminished concerns and regard for the client, which may cause a deterioration in the quality of care and attention that the client receives . . . ."[161] Secondary trauma impedes family law attorneys' ability to manage and respond to clients' poorly-reasoned decision-making. A family law attorney with unaddressed secondary trauma may easily reflect, amplify, or facilitate a client's poorly reasoned decision-making to their own financial benefit (in the case of private practice attorneys, distressingly), and to the client's long-term emotional and financial detriment.

Quite often, the family law attorney's path of least resistance with a client is to simply acquiesce to the client's stated demands, which may well be counterproductive or even harmful. Such an approach temporarily placates the client and, in the case of private attorneys, financially rewards the attorney. Family law clients generally do not enjoy receiving tough advice that challenges their positions and preconceptions.[162] In fact, when the family law attorney gives such advice, it often serves as a major source of disconnect between the attorney and client. Providing tough advice is often the hardest and most important part of the family law attorney's job. But it may well lead the client to believe that the attorney is not on their side or is not sufficiently supportive.[163] It can rupture the relationship. Therefore, it is also against the private family law attorney's pecuniary interest (at least in the short term) to give such advice.[164] The more a family law attorney is subject to symptoms of secondary trauma, like "emotional[] detach[ment]", "becoming pessimistic [and] cynical," the more likely an attorney will contribute to parties' "dysfunctional patterns of dealing with each other"[165] by merely acquiescing to a client's demands, or initial stated wishes.

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and burnout compared with comparison groups of mental health providers and social workers." (citing Levin & Greisberg, *supra* note 143, at 245)).

160 *Compassion Fatigue*, *supra* note 146.

161 Hodge & Williams, *supra* note 146, at 514.

162 David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 356–57 (2017).

163 *Id.* at 354–57. *See also* SARAT & FELSTINER, *supra* note 84, at 109 ("Lawyers worry that as they advise clients to negotiate, compromise, and settle they will be seen as selling out rather than providing zealous advocacy.").

164 Indeed, advocating strategic patience, counseling against initiating adversarial legal action absent exigent circumstances, etc., are directly in conflict with a private family law attorney's billable hour requirement. For private practice attorneys, there is thus a perverse incentive in favor of action, as opposed to inaction.

165 *Compassion Fatigue*, *supra* note 146; Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 542 (1994) (quoting ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 55 (1992)).

*D. Reparative Family Law Attorneys and the (In)visibility of Reparative Efforts*

There are many currently-practicing family law attorneys who strive to exemplify a reparative, harm-reduction approach with their clients.[166] Such attorneys work to address and limit, not amplify, their client's self-destructive impulses; they listen empathetically and counsel against increased conflict, as well as advise the client on the value of settlement and productive cooperation. Such attorneys view each case on its individual merits and address the impacts of secondary trauma through self-care and other mental health resources. They are reparative-oriented in the sense that they are aware of divorce's emotional dynamics and actively work to avoid contributing to the parties' "dysfunctional patterns of dealing with each other."[167] In the case of private attorneys, they repeatedly advise against their own short-term pecuniary interest in favor of courses of action less invasive and harmful than litigation.[168] They are cognizant of the law's limitations and are under no misapprehension that "the law has greater power to do 'good' than to do 'bad'" in the intimate family context.[169]

Despite many attorneys who currently operate in this manner, much of their work is invisible from the outside when they encounter clients who, despite the attorney's best efforts, reject reparative advice and insist on a scorched-earth approach. Or they may encounter an opposing counsel who appears to be needlessly adversarial, seeking to exploit the process by, for example, fighting over custody when the client just wants to pay less support; by refusing to produce discoverable financial information; or by issuing large amounts of discovery or motions practice to increase fees and overwhelm an opposing party. In addition, many general practice attorneys who occasionally handle family law cases "underestimate" the practice's complexity and "lack[] the skills and knowledge necessary to practice in today's complex and specialized family law atmosphere."[170] Dilettante family law attorneys are particularly likely to aggravate family dynamics by ignoring or downplaying the peculiarities and specialized nature of family law practice. In the worst-case scenarios, there is a combination of high-conflict client(s) with non-cooperative attorney(s).

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166 *See, e.g.*, SARAT & FELSTINER, *supra* note 84, at 111–12 ("In those conversations the lawyers' message is overwhelmingly pro-settlement. They consistently emphasize the advantages of informal as opposed to formal resolution. Adjudication is presented in an unfavorable light, as an alternative to be avoided . . . . Thus the image of the lawyer as "shark," eagerly stirring up trouble, fanning the flames of contention, does not describe the lawyers we observed.").

167 ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 55 (1992).

168 Notably, such advice flies directly in the face of the general law firm model, which bills attorney time by the hour—the notorious "billable hour." Litigation and trial necessarily involve substantial billable hours and thus substantial revenue for the private law firm. Advising clients to reduce litigation and avoid trial whenever possible cuts against a private attorney's pecuniary interest.

169 GOLDSTEIN ET AL., *supra* note 24, at 51.

170 Michele N. Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. TEX. L. REV. 159, 184 (2014) (quoting Barbara Glesner Fines, *Fifty Years of Family Law Practice-The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIM. LAW. 391, 405 (2012)).

High-conflict parties and non-cooperative attorneys limit the effectiveness and visibility of a family law attorney's reparative efforts. In a real sense, a reparative approach requires both parties' and their respective attorneys' buy-in. If one side is reparative-oriented, and the other adversarial, the reparative-oriented party will almost necessarily be drawn into the fray, leading to a pox-on-all-houses scenario.[171] Even if an attorney is reparative-oriented, the visibility of that reparative orientation may be limited due to the client, the opposing party, or the opposing party's attorney. This prisoner's dilemma-esque scenario contributes to a sense of helplessness and cynicism in the family law attorney's practice.

## III. REPARATIVE IMPLICATIONS FOR THE ATTORNEY AS ADVISOR: MODEL RULES OF PROFESSIONAL CONDUCT IN THE FAMILY LAW CONTEXT

### *A. Clare Huntington's Reparative Model of Family Law*

As a theoretical alternative to the traditional adversarial system, Professor Clare Huntington proposes a "Reparative Model" of family law.[172] A Reparative Model is sensitive to the role of emotions in human relationships, and incorporates "key, missing elements of guilt and reparation" into family law's practice, substance, and procedure.[173] A Reparative Model acknowledges that intimate family relationships are emotionally complex; it does not propose "a kiss-and-make-up" concept of reparation.[174] Reparation in this context emphasizes the need for both parties to

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[171] *See* Maria Cristina González, *Family Law: Above and Beyond the Call of Duty*, 14 INTERCULTURAL HUM. RTS. L. REV. 263, 276 (2019) ("It takes remarkable restraint not to engage when confronted with the unreasonable, antagonistic, and aggressive opposition.").

[172] Huntington's scholarship on a "reparative" or "flourishing" model of family law is part of an expanding movement in legal academia to examine the interrelationship between law and emotion, which have traditionally been considered disparate subjects. *See* HUNTINGTON, *supra* note 7; Huntington, *Repairing Family Law*, *supra* note 10, at 1294. The legal field historically "construed legal thought as a professionally instilled cognitive process, which could be powerfully unsettled by affective response." *See* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2003 (2010). In the past 25 years or so, scholars like Professors Dan Kahan and Rachel Camp have examined the expressive function of laws and the role of shame. *See, e.g.*, Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591–94 (1996); A. Rachel Camp, *From Experiencing Abuse to Seeking Protection: Examining the Shame of Intimate Partner Violence*, 13 U.C. IRVINE L. REV. 103, 103–04 (2022). Others, like Professor Rachel Barkow, have investigated the way in which emotions drive legal policy. *See, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 1–3, 5 (2019) (suggesting that criminal law policy is driven by emotions as opposed to studies). In the family law context, Professor Clare Huntington interrogates the law's ability to nurture positive, productive emotions and support human flourishing. Huntington, *Repairing Family Law*, *supra* note 10, at 1256.

[173] Guilt and reparation are important expressive emotions in fostering cooperative, prosocial behaviors between human beings. Huntington, *Repairing Family Law*, *supra* note 10, at 1294. Apologies have a "remarkable effect . . . in resolving conflicts and repairing relationships." *Id.* at 1270.

[174] *Id.* at 1295.

recreate their relationship productively, not that parties reconcile.[175] A Reparative Model strives to foster a legal adjudicatory environment that better supports the possibility of this kind of repair for the parties; it rejects the adversarial system's "Love/Hate" binary that stymies the natural cycle of human intimacy.[176] Huntington argues that, in practice, a Reparative Model encourages measures (1) to "decrease litigation," (2) to "de-emphasiz[e] adversarial decisionmaking," and (3) to "modify the substance of family law to recognize the ongoing relationships that often persist even after legal relationships are altered."[177]

Considering a Reparative Model's implications for the attorney's role, Huntington argues that it would likely necessitate major changes to the practice of family law, including possibly reconceiving of the family law attorney's role in the Model Rules of Professional Conduct to require that the attorney render "holistic advice rather than merely advocating for the stated interests of a client."[178] The reconceived Model Rules would require that the family law attorney account for the family's interests and look for ways to accommodate the parties' and children's interests.[179] As an alternative to the above proposal, Huntington argues that family law attorneys should "try to persuade their clients of the benefits of following a reparative path" and themselves "model reparative behavior … by not adopting a win/lose attitude in their approach to cases."[180] Acknowledging the critically important role a family law attorney's mindset has on clients' experiences,[181] Huntington states that reparative-minded family law attorneys take a broad view of conflict and question their own role in contributing to or mitigating damaging interpersonal dynamics.[182]

### *B. Current Reparative Trend*

Given widespread recognition of the adversarial system's harmful effects on families, there is a long-standing trend in contemporary family law that is increasingly "reparative" in practice and substance.[183] Developments like mandatory/widespread alternative dispute resolution, Collaborative Law, and others,[184] represent important steps away from the traditional adversarial system. A modest number of states now mandate mediation before allowing family litigation to proceed,

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175 HUNTINGTON, *supra* note 7, at 276 n.5 (defining "reparative" to mean "the idea of mending or repairing relationships in preparation for the ongoing relationships that will continue after the end of the legal action").

176 Huntington, *Repairing Family Law*, *supra* note 10, at 1301.

177 *Id.* at 1246, 1302.

178 *Id.* at 1310.

179 *Id.*

180 *Id.* at 1309.

181 *Id.* at 1308.

182 *Id.*

183 *See id.* at 1251–52.

184 *See* Jill C. Engle, *Sexual Violence, Intangible Harm, and the Promise of Transformative Remedies*, 79 WASH. & LEE L. REV. 1045, 1070–72 (2022) (describing therapeutic justice); Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U.L. REV. 1057, 1078–79 (2023) (describing unified family courts).

excepting certain cases, like those involving domestic violence. Many states give courts discretion to make such mediation mandatory.[185] Mediation is a key reparative component in that it seeks to spare parties from the adversarial process—empowering parties to focus on the future and emphasizing their ongoing responsibilities as parents.[186]

Collaborative law is an alternative dispute resolution process in which represented parties work to resolve their dispute entirely outside of the court process. Parties sign a participation agreement, committing to not go to court while participating in the Collaborative process. If either party files an action in court, the parties' Collaborative law attorneys are disqualified from representing the parties in the litigation and must withdraw from any further representation.[187] Collaborative law is also distinctive for its wrap-around, holistic approach to the family break-up process. Collaborative law involves other professionals, like financial neutrals, divorce coaches, real estate/mortgage specialists, and child specialists, who all work together to reach an outcome that is best for the family.[188] Collaborative law is distinctly reparative in its recognition of divorce's emotional trauma and the need for the parties themselves to develop the capacity to resolve their issues. Collaborative law structurally recognizes that lawyers are not the only, or even the most important, professionals who should be involved in the divorce process. Collaborative law remains the exception, not the rule, and often results in substantial fees, simply given the number of professionals engaged in the process. Wealthy people disproportionately benefit from Collaborative law, given its financial cost.[189]

The reparative trend in family law goes back as far as the 1970s. No-fault divorce's advent in the 1970s was in part based upon an effort to limit harm and trauma from family dissolution, particularly for children.[190] Despite the best intents behind no-fault divorce's widespread adoption, parental conflict simply migrated from fault to collateral issues like property distribution and custody.[191] As a general matter, courts have increasingly shifted from focusing upon adults' conduct to focusing upon children's well-being.[192] In addition, state legislatures across the United

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185 Melissa Schmitz, *Does My State Require Me to Participate in Divorce Mediation?*, HELLO DIVORCE (July 18, 2023), https://resources.hellodivorce.com/does-my-state-require-me-to-participate-in-divorce-mediation.

186 *But see* Aviel, *Counsel for the Divorce*, *supra* note 135, at 1112 (noting that "critics have been vocal about the potential for mandatory mediation to exacerbate power imbalances between parties"). This concern, however, must be weighed against the concern that the litigation process will exacerbate damaging parental conflict, to children's detriment. This concern underscores the important role family law attorneys can play in mediation, providing the client with a scope of reasonable outcomes and working to encourage productive settlement negotiations.

187 Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 239 (2008).

188 Freeman & Hauser, *supra* note 45, at 7. *See also* Rachel Rebouché, *A Case Against Collaboration*, 76 MD. L. REV. 547, 549 (2017).

189 *See* Rebouché, *supra* note 188, at 589.

190 Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1154, 1176–77 (1999).

191 Aviel, *Family Law*, *supra* note 39, at 2281.

192 Murphy, *supra* note 190, at 1177.

States have passed laws that require divorcing parents or co-parents in a custody battle to attend co-parenting classes.[193]

Given nearly uniform recognition of the adversarial family process's harms,[194] the reparative trend should certainly continue. Although there are heartening developments in the trend towards a more reparative vision of family law, these changes do not sufficiently address the attorney's role in these processes. To the extent parties engage attorneys, those attorneys have a role to play in advising and assessing the case for the client, including advising the client on reasonable ways to proceed under the circumstances of the case. Attorneys guide clients towards different dispute resolution processes, funneling cases towards mediation, Collaborative law, or, if circumstances call for it, litigation. Given the grave consequences of these decisions, and the gray ethical area, further guidance on the family law attorneys' reparative role is necessary to support other reparative reforms that seek to protect children and families during the family break-up process.

In terms of professional reparative guidance, starting in the early 1990s, the AAML first promulgated a document, *The Bounds of Advocacy*, that acknowledges family law's unique nature, and the need for particularized guidance on family law attorneys' ethical challenges.[195] The core idea behind this document is that family law attorneys' ethical responsibilities vary in critical ways given "the impact their representation has on children . . . ."[196] In its preliminary statement, *The Bounds of Advocacy* states that "[e]xisting codes often do not provide adequate guidance to the matrimonial lawyer."[197] The ABA's Model Rules of Professional Conduct are "addressed to all lawyers, regardless of the nature of their practices."[198] *The Bounds of Advocacy* further notes that it is "difficult for [family law attorneys] to represent the interests of their clients without addressing the interests of other family

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193 Susan L. Pollett & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 FAM. CT. REV. 375, 376 (2008). *See also* Karen Oehme, Anthony J. Ferraro, Nat Stern, Lisa S. Panisch & Mallory Lucier-Greer, *Trauma-Informed Co-Parenting: How a Shift in Compulsory Divorce Education to Reflect New Brain Development Research Can Promote Both Parents' and Children's Best Interests*, 39 U. HAW. L. REV. 37, 38 (2016) (arguing that co-parenting education must be "adequately *trauma-informed* . . . to help parents understand why they may be struggling, learn the role of unresolved prior trauma in their lives, obtain resources, and protect themselves and their children from recurring trauma" (emphasis in original)).

194 *See, e.g.*, Williams, *supra* note 45, at 1117 (noting that litigation "is just about the only thing that people agree is *not* in the best interest of children"); Huntington, *Repairing Family Law*, *supra* note 10, at 1294 (current "reforms remain undertheorized and are still incomplete"); Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L. J. 2106, 2120 (2013).

195 *See generally* AAML Standards of Conduct, *supra* note 8. The AAML's most recent revision is available via their website. *Bounds of Advocacy*, AM. ACAD. MATRIM. LAW. (2012), https://aaml.org/wp-content/uploads/bounds_of_advocacy.pdf [hereinafter *Bounds of Advocacy* (2012)].

196 Schepard, Kramer vs. Kramer *Revisited*, *supra* note 25, at 700.

197 *Bounds of Advocacy supra* note 195, at iii. *The Bounds of Advocacy* notes the absence of a "universally accepted designation" for an attorney who practices family law, and therefore uses the term "matrimonial lawyer." *Id.* at vi.

198 *Id.* at iii.

members."[199] By its own terms, *The Bounds of Advocacy* is "aspirational"—above and beyond the Model Rules' minimum requirements.[200]

At its core, *The Bounds of Advocacy* claims to "promote a problem-solving approach that considers the client's children and family as well [as] . . . encourage[s] efforts to reduce the cost, delay and emotional trauma . . . ."[201] *The Bounds of Advocacy* also "urge[s] interaction between parties and attorneys on a more reasoned, cooperative level."[202] Among other reparative imperatives, *The Bounds of Advocacy* requires that the attorney: (1) "advise the client of the emotional and economic impact of divorce and explore the feasibility of reconciliation"; (2) "attempt to resolve matrimonial disputes by agreement"; and (3) help "the client develop realistic objectives … with the least injury to the family."[203] It further argues that, with respect to children's interests, parents are fiduciaries for children, and attorneys for other fiduciaries have ethical obligations to the beneficiaries to whom the fiduciary's obligations run.[204] *The Bounds of Advocacy* acknowledges the highly emotional nature of the conflict, and how attorneys should "strive to lower the emotional level of marital disputes by treating counsel and the parties with respect."[205]

The leading family law practice organization, the AAML, thus recognizes and endorses the family attorney's reparative role.[206] Despite this guidance document having existed for over 30 years, family law attorneys nevertheless continue to lack "clear guidelines for their behavior" due to "uncertainty in the standards for ethical advocacy."[207] Further clarification and education on the family law attorney's role is necessary to effectuate a meaningful practice norm shift.

### *C. The Model Rules of Professional Conduct's Contextual Contours*

Context matters when discerning ethical obligations: obligations arising under the Model Rules necessarily depend on context. "Competence" under Model Rule 1.1, for example, in the family law context means something very different from "competence" in the toxic tort or public benefits contexts.[208] While a family law attorney arguably needs or is obliged to be conversant and aware of the psychology of divorce and child development, a corporate lawyer has no such need or

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199 *Id.* at iv.

200 *Id.* at i, vi.

201 *Id.* at vi.

202 *Id.*

203 *Id.* at 2, 5.

204 MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. [11] (AM. BAR ASS'N 2024).

205 *Bounds of Advocacy* (2012), *supra* note 195, at 44.

206 As noted above, the Florida Bar Family Law Section adopted an updated and revised version of the Bounds of Advocacy in 2004. Schepard, Kramer vs. Kramer *Revisited*, *supra* note 25, at 701–02.

207 Fines, *supra* note 9, at 369, 371. Although, it is noteworthy that some courts have limited adversarial zeal in the family law context. *See id.* at 373–374 (discussing a case in which a family law practitioner concealed information and threatened opposing counsel in a manner prejudicial to the administration of justice). *See generally In Re Eisenstein*, 485 S.W.3d 759 (Mo. 2016).

208 *See* Struffolino, *supra* note 170, at 162 (noting that "competency" requires familiarity with specialized areas of law, like domestic-relations law).

obligation.[209] In the context described above in Parts I and II, consider, for example, the duty of zealous advocacy.[210] Zealous advocacy suggests that the client's interests are paramount, and that the lawyer must eagerly strive to achieve the client's goals, including a desire to "win" the dispute.[211] But surely a duty of zealous advocacy to the client, above all else, requires attorneys to try to do work that actually benefits clients: what worth is zealous advocacy if it harms the client's interests?[212] The underlying obligation to strive to ensure that the work *benefits* clients, when applied to the family law context, underscores the critical importance of a robust *advisory* role for the family law attorney under Rules 1.1, 1.4, and 2.1.[213] The

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[209] *See* Fines & Madsen, *supra* note 25, at 983.

[210] The only reference to zealous advocacy in the Model Rules comes from a Comment under Rule 1.3 – Diligence:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client . . . .

MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. [1] (AM. BAR ASS'N 2024). "Zealousness" is also referenced in the preamble to the Model Rules: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."; the principles underlying the Model Rules "include the lawyer's obligation zealously to protect and pursue a client's legitimate interests . . . ." *Id.* at Pmbl. & Scope [2], [9].

[211] Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381, 386 (2012).

[212] Weinstein, *supra* note 42, at 122–23.

[213] MODEL RULES OF PRO. CONDUCT r. 1.1, 1.4, 2.1. cmt. [1] (AM. BAR ASS'N 2024); There are of course other Rules that may have potential reparative implications. For example, Model Rule 1.14 states that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." *Id.* at r. 1.14. There are many scenarios in which family law attorneys may have reason to believe that their client's "capacity to make adequately considered decisions . . . is diminished" and therefore it is incumbent upon the family law attorney to counsel, advise, and connect the client with mental health professional who can provide support to the client to increase their reasoned decision-making capacity. *See* Barry Kozak, *The Forgotten Rule of Professional Conduct – Representing a Client with Diminished Capacity*, 49 CREIGHTON L. REV. 827, 827 (2016) ("If the attorney determines that … a particular client has diminished capacity, then Model Rule 1.14 requires the attorney to take whatever extra steps are required to maintain a normal client-lawyer relationship."). Regardless of whether 1.14 is arguably implicated in many family law scenarios, family law attorneys must be responsive to a client's emotional dynamics and how those dynamics impact decision-making. Such an obligation is distinctly reparative insofar as it is attentive to the role of emotions and seeks to decrease harmful, relationship-destroying, adversarial decision-making. Literature suggests that most lawyers "either are ignorant of Model Rule 1.14 or simply assume complete mental capacity in all of their clients without any further investigation." *Id.* at 845. Such ignorance or assumption may very well be a factor in contributing to the amplification of the client's poor decision-making. Family law attorneys should probe, test, and challenge the client's reasoning both to assist the client in making a well-reasoned decision and to determine whether the client's view is rational. In addition, Model Rule 1.16 could arguably have reparative implications insofar as it permits a lawyer to withdraw from representing a client if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." MODEL RULES OF PRO.

client of course makes the ultimate decisions about the goals of the representation, and it is ultimately their decision that matters as to what is or is not a benefit to them. But it is the attorney's role to ensure that clients make those decisions from a well-informed place, considering the context and universe of likely outcomes (including non-legal ramifications).[214] This is particularly true in the family law context, where attorneys represent individuals who are often dealing with trauma and high levels of stress. Well-informed decisions require knowledge of risks associated with the litigation process, including possible financial devastation, relationship destruction, inadequate remedies, etc., so that the client is disabused of any notion that the process is without substantial consequences and risks—monetary and non-monetary. Zealous pursuit of the client's interests in the family law context necessarily entails presumptively advising the client to consider compromise and cooperation, to lower the tenor of conflict wherever possible.[215] The transaction costs of a contested process are simply too high in most cases.

When considered carefully in the family law context, the current Model Rules—specifically, 1.1 (Competence), 1.3 (Diligence), 1.4 (Communications), and 2.1 (Advisor)—support the family law attorney's critical reparative advisory role. Professor Huntington's suggestion that a Reparative Model requires that the Rules of Professional Conduct be "reconceive[d]" "to require that the attorney provide holistic advice rather than *merely advocating for the stated interests of a client*" is thus misplaced.[216] The suggestion that the standard, default approach of family law attorneys is "*merely advocating for the stated interests of a client*" ignores the ethically required role of the family law attorney as *advisor* to the client.[217] In their advisory role, family law attorneys proactively work to limit harm to their client and their client's family.

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CONDUCT r. 1.16 (AM. BAR ASS'N 2024). Family law attorneys thus have an escape valve to avoid being used as a tool to perpetrate harm.

214 Fines & Madsen, *supra* note 25, at 980 ("The ethical obligation of attorneys is not only to respect the client's choices, but also to insure that the client has been adequately informed in arriving at these decisions.").

215 Some scholars have labeled this a "professional dilemma." *See* SARAT & FELSTINER, *supra* note 84, at 108 ("Although not all lawyers are equally dedicated to reaching negotiated agreements, most of those we observed advised their clients to try to settle the full range of issues in the case. This advice highlights what Kenneth Kressel labels a "professional dilemma." As Kressel explains, 'While the official code of conduct prescribes a zealous pursuit of the client's interests, the informal norms and the realities of professional life prompt compromise and cooperation.'"); KENNETH KRESSEL, THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS 159 (1985). *But see* Aviel, *Family Law*, *supra* note 39, at 2282 ("While it might seem inevitable, for example, that divorcing spouses will be adverse to one another on what appear to be zero-sum financial matters, the transaction costs of proceeding in an adverse posture can quickly overtake whatever financial gains might result from litigating to the hilt. A sophisticated system will help divorcing spouses see and avoid these costs, offering them the infrastructure to recognize the shared gains to be had from cooperation."); MODEL RULES OF PRO. CONDUCT r. 2.1 cmt. [5] (AM. BAR ASS'N 2024) ("[W]hen a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.").

216 Huntington, *Repairing Family Law*, *supra* note 10, at 1310 (emphasis added).

217 *Id.* (emphasis added).

*1. Model Rule 1.1*

Model Rule 1.1 (Competence) states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[218] The duty of competent representation under Rule 1.1 is in many ways the rubric under which all other Model Rules can be read.[219] Competent representation under Rule 1.1 requires the attorney to perform their obligations under other Rules, including 1.3, 1.4, and 2.1, which flesh out some of the specific obligations that constitute competent representation regarding attorney-client communication and the role of the attorney as advisor.[220]

Competence for a family law attorney means far more than knowledge and familiarity with legal doctrines and court processes.[221] Family law attorneys, as compared to other attorneys, must possess skill and knowledge in understanding and dealing with human emotions. Precisely because the problems presented are relationship problems, a family law attorney must understand that emotions feature prominently in their effective "problem solving and planning."[222] Although client emotions and attitudes are relevant in other areas of law, in family law it tends to be a core consideration.[223] Family law attorneys cannot ignore the role of client and family emotion in their representation of clients.[224]

For example, sometimes "the simple passage of time" is necessary before making any real attempt at settling a case; although often not possible, it is best for both parties to have mentally accepted the divorce (or family break up) before attempting to settle the matter.[225] Family law attorneys therefore must be attentive to the emotional dynamics facing a client when advising next steps.[226] Given the family law client population's unique vulnerabilities, competent representation requires awareness of the emotional and psychological dynamics of divorce, as well as a recognition that the client's initial stated wishes may not reflect reasoned, well-informed

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218 MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2024).

219 William D. Hauptman & Kendra N. Beckwith, *The Duty of Competence in the New Normal*, COLO. LAW. (July 2021), https://cl.cobar.org/features/the-duty-of-competence-in-the-new-normal/ ("A lawyer's failure to comply with duties under other ethics rules may constitute a lack of competence."). *See also* Wardle, *supra* note 122, at 436 ("Rule 1.1 should be read in tandem with Rule 2.1 'to provide unconditionally that such lawyers should be prepared and competent to render the nonlegal advice covered by Rule 2.1.' On its face, Rule 1.1 could be found to have been violated by an attorney giving incompetent non-legal advice."). *See generally* ELLEN J. BENNETT, HELEN W. GUNNARSSON, & NANCY G. KISICKI, ANN. MOD. RULES PROF. COND. § 1.1 (10th ed. 2023).

220 *See* MODEL RULES OF PRO. CONDUCT r. 1.1, 1.3, 1.4, 2.1 (AM. BAR ASS'N 2024).

221 Fines & Madsen, *supra* note 25, at 983.

222 *Id.* at 968.

223 *Id.*

224 *Id.* at 982 ("Feelings are facts that are relevant to the client's informed decision-making.").

225 SARAT & FELSTINER, *supra* note 84, at 149.

226 Wardle, *supra* note 122, at 436; Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 396 (2005) ("Attorneys . . . should consider whether traditionally 'nonlegal' issue [sic] have become so intertwined with the legal ones in their field that they should acquire knowledge of those issues or at least associate with an expert to whom they can refer clients.").

decision-making and therefore may be destructive to the family, and thus destructive to the client. They must be able and willing to engage with the client's emotions to understand how to provide helpful advice and guidance. They must simultaneously be deft in acknowledging a client's feelings but also redirecting the client to focus on the least damaging path forward (all while not rupturing the attorney-client relationship).

Competent representation also requires the family law attorney to address and manage *their own* emotional state in the representation. They must be keenly self-aware of the effect of their own emotions, including concepts of transference and countertransference, to avoid becoming overly aligned with their client's perspective and to maintain the sober-minded, individualized case assessment that competent representation requires.[227] Family law attorneys must cultivate and nurture presence of mind and general emotional intelligence to avoid projecting their own issues onto the litigation.[228] They must also prevent their own ego from becoming overly invested in the idea of "winning" on the client's behalf. As discussed above, family law attorneys accumulate substantial emotional baggage from representing numerous traumatized clients in difficult family situations.[229] The repeated and continuous exposure to client trauma results in the attorney experiencing vicarious or secondary trauma. For lawyers frequently operating in this space, then, it is an "ethical imperative" that they both "contain . . . counter-transference in any individual case" and "address . . . vicarious traumatization as the overall context of . . . ongoing work for all of our clients . . . ."[230] It is critical that attorneys "learn to work with . . . countertransference to avoid subjecting our clients to our own hopes and dreams."[231] Given the continuous, ongoing nature of vicarious trauma, attorneys must learn to "repair that on a regular basis."[232] Family law attorneys must address their own vicarious trauma and its impacts on their work in order to maintain competence in representation. Some form of therapy or mental health counseling may be necessary to mitigate the impact of any transference/countertransference in family law attorneys' emotionally charged work.[233]

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227 *See* Silver, *supra* note 110, at 292 ("We must be open to the possibility that emotions we don't understand, and of which we are often oblivious, may affect how we act towards our clients.").

228 *See* González, *supra* note 171, at 268–70.

229 *See supra* Section II.C.

230 *See* PETERS, *supra* note 144, at 468.

231 *Id.* at 467.

232 Silver, Portnoy & Peters, *supra* note 130, at 853–54.

233 *See* Silver, *supra* note 110, at 299. ("[A]lthough therapy or analysis may not be necessary for all lawyers, lawyers who find they repeatedly experience problematic emotional reactions to clients that interfere with their practice may require professional treatment."). *Cf.* Nina Chamlou, *Why Mental Health Workers Need Therapy Too*, PSYCHOLOGY.ORG, (Aug. 17, 2022), https://psychology.org/resources/mental-health-workers-need-therapy-too/; Rose Hackman, *When Therapists Also Need Therapists: 'Suffering is Not Unique to One Group'*, THE GUARDIAN (Apr. 19, 2017, 12:26 PM), https://www.theguardian.com/society/2017/apr/19/therapists-go-to-therapy-prince-harry-mental-health (four psychotherapists discussed the importance of seeing mental health treatment in their careers); Tamara Stevens, *Why Therapists Need Therapy Too*, TALKSPACE (Aug. 15, 2019), https://www.talkspace.com/blog/therapists-experience-in-therapy/ (a psychologist in private practice commenting on the need for therapists to seek therapy themselves).

In addition to addressing their own emotions' impacts, family law attorneys must further be prepared to connect clients with non-legal resources, like mental health professionals, divorce coaches, and financial experts, when necessary.[234] Connecting the client with supporting resources in the dissolution process is a critical aspect of the family law attorney's role. The ABA acknowledges that non-legal professional expertise is "particularly valuable" in a family law practice, stating that "referral or consultation with such other professionals is not just permissible but may be expected to be 'something a competent lawyer would recommend' in some cases."[235] Many issues that arise in family law cases are primarily within the wheelhouse of mental health professionals or financial planning experts, not lawyers. Given the client population and the issues that arise, competent representation in a family law case requires strong client management skills, the ability to spot issues that other professionals might better address, and connecting the client with appropriate resources.[236] Family law attorneys have an obligation to connect their clients with mental health professionals or others (including financial professionals) who may be able to work with the client to better assess the decisional landscape and help the client make a reasoned decision that is in their best interests.[237] Such obligations under Model Rule 1.1 are reparative in their focus on addressing underlying mental health and emotional issues that may contribute to the underlying harmful dynamics.[238]

*2. Model Rule 1.3*

Model Rule 1.3 (Diligence) states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[239] Comment [1] to Rule 1.3, discussing the Client-Lawyer Relationship, makes clear that "[a] lawyer is not bound … to press for every advantage that might be realized for a client" even though "[a] lawyer must . . . act with . . . zeal in advocacy upon the client's behalf."[240] By the Rule's own language in the Comments, zealous advocacy does not mandate a "win-lose" mindset or excessive adversariness in any context, much less the family law context.[241] The pursuit of zealous advocacy does not provide an excuse for attorneys to engage in or facilitate conduct that is obviously damaging to the client, the client's family, and the legal profession's reputation more generally. Zealous representation in the family law context requires a presumptive harm-limiting advisory posture and does not justify excessive litigiousness or gamesmanship. Indeed, for family law attorneys, zealous advocacy must be understood in the context of

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234 Struffolino, *supra* note 170, at 162, 164–65.

235 Wardle, *supra* note 122, at 431; MODEL RULES OF PRO. CONDUCT r. 2.1 cmt. [4] (AM. BAR ASS'N 2024). *See also* Struffolino, *supra* note 170, at 165 ("Because of the increasing complexity of parenting and financial issues, family law attorneys must often rely on social science or financial experts.").

236 Wardle, *supra* note 122, at 425–26.

237 *Id.* at 431–32, 434.

238 *Id.* at 433–34.

239 MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2024).

240 *Id.* at r. 1.3 cmt. [1].

241 As discussed above, the only mentions of "zeal" in the Model Rules come in the preamble and in comments to Rule 1.3. *Id.* at Pmbl. & Scope [2], [8], [9], r. 1.3 cmt. [1].

"decades of critique" of the adversarial system's "negative effects on children, families, the judicial system, and the public's confidence in that system."[242] That context demands a different conception of zealous advocacy.

Recent disciplinary cases like *In re Eisenstein*, which imposed discipline on a family law attorney, suggest that courts are less willing to countenance partisan adversariness in the family law context, particularly in relation to evidence gathering and civility.[243] Attorney Eisenstein represented a husband in a divorce action. The husband repeatedly accessed his wife's personal email account (without her knowledge) and gained access to payroll documents and attorney-client communications between his wife and her lawyer (including draft direct examination questions). During the divorce trial, the wife's attorney became aware of the improperly accessed information, and Attorney Eisenstein admitted on the record that he had viewed the improperly accessed information and did not alert the opposing counsel.[244] Following the hearing, Attorney Eisenstein emailed the opposing counsel: "Rumor has it that you are quite the gossip regarding our little spat in court. Be careful what you say. I'm not someone you really want to make a lifelong enemy of, even though you are off to a pretty good start."[245] In addition to other violations, the Missouri Supreme Court found that Mr. Eisenstein's email constituted an independent violation of the Rules of Professional Conduct governing the Missouri Bar: specifically, Missouri Rule 4-8.4's prohibition of attorneys "engaging 'in conduct that is prejudicial to the administration of justice.'"[246] Professor Barbara Glesner Fines notes that, by disciplining attorney Eisenstein based on this email, the court "appears to extend the current legal limits on adversarial zeal" and "sends a message that civility is a required component of family law representation and that even one egregious threat or act of incivility may violate the rules of professional conduct."[247] Professor Glesner Fines rightly cautions family law attorneys to "recognize the risk of differential interpretations" when the Rules of Professional Conduct are considered in the sui generis family law context.[248]

*3. Model Rules 1.4 and 2.1*

Model Rule 1.4 (Communications) states that "[a] lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[249]

Model Rule 2.1 (Advisor) states that, "[i]n 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 to other considerations such as moral, economic,*

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242 Fines, *supra* note 9, at 370 (citing JANE C. MURPHY & JANA B. SINGER, DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION 26-34 (2015)).

243 *Id.* at 374–75. *See In re* Eisenstein, 485 S.W. 3d 759, 761, 764 (Mo. 2016).

244 *Eisenstein*, 485 S.W.3d at 761 (Mo. 2016).

245 *Id.*

246 *Id.* at 763; MO. SUP. CT. R. 4-8.4 (2024).

247 Fines, *supra* note 9, at 375.

248 *Id.* at 369.

249 MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2024).

*social and political factors, that may be relevant to the client's situation*."[250] Rule 2.1 also includes the following key Comments:

> [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.[251]
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> [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.[252]

Competent representation under Rule 1.1 in the family law context requires robust communication and advice under Rules 1.4 and 2.1. As discussed above, clients work with their family law attorney to determine the reasonable and achievable goals of the representation. In practice, a client's stated interests ultimately represent a joint effort between client and attorney.[253] The obligation to communicate under Rule 1.4 "requires a two-way street of communication: the purpose of the attorney's communication with the client is not only to inform the client but to assist the client in making informed decisions."[254] The comments to Rule 2.1 acknowledge the following: "technical legal advice . . . can sometimes be inadequate"; Rule 1.4 may obligate the lawyer to offer advice "when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client"; and that "it may be necessary" to give the client information about alternative dispute resolution.[255] Much of that two-way street of communication necessarily involves counseling on non-legal issues. Considering the severe and "long-lasting consequences that are non-legal but profound, including psychological, social, economic, emotional, relational, child-developmental, etc.," providing "purely 'technical' legal advice without considering the non-legal

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[250] *Id.* at r. 2.1 (emphasis added).

[251] *Id.* at r. 2.1 cmt. [2].

[252] *Id.* at r. 2.1 cmt. [5].

[253] *Cf. Id.* at r. 1.16 ("[A] lawyer may withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.").

[254] Fines & Madsen, *supra* note 25, at 980.

[255] MODEL RULES OF PRO. CONDUCT r. 2.1 cmt. [2, 5] (AM. BAR ASS'N 2024).

implications could be disastrous for the client and for others connected with [them]."[256] In advising their clients, family law attorneys cannot ignore the non-legal consequences (including to third parties) of family law litigation and must robustly advise their client on legal *and* non-legal considerations in order to provide ethical representation under this Rule.

In addition to other messages, like the limits of the law and legal solutions,[257] part of the core of the family law attorney's advisory role under Rules 1.4 and 2.1 is the message that family law parties have a "unique interdependent and fiduciary relationship," including common interests in raising children moving forward, supporting the conclusion that the family law parties have reasons to work together moving forward that other civil litigation parties may not.[258] Family law cases involve family members, not typical civil litigation adversaries, and the lawyer must be cognizant of the importance of those various family members to their client's long-term well-being and outcome. Except in the rare cases, family law attorneys should not encourage a "win-lose" mindset against the opposing party. In their advice to a client, the family law attorney must recognize and give appropriate weight to the reality that the parties very likely have strong reasons to cooperate. Failing to do so would violate the competency requirement of representation.

Further, family law litigation greatly impacts non-parties (*i.e.*, children), and that impact on non-parties affects the client and influences their decision making. The family law attorney thus "must consider the practical impact" of various courses of action on non-parties, to the extent those non-parties affect the client's interests.[259] In custody cases, for example, parents generally care a great deal about the process's effect on their children and on their own relationship with their children. The family law attorney is thus obliged to advise the client strongly about the fact that relationships between co-parents are likely to persist, in one way or another, even after legal ties are severed; therefore, if there is any possibility to preserve or limit additional harm to the co-parental relationship, it is advisable to do so. In cases where child placement is at issue, the core empirical data indicates that the nature of the parents' relationship is the biggest indicator of child success.[260] That information should be shared with the client, too.

Competence in communicating with family law clients requires particular emphasis. Family law work calls upon strong interpersonal communication skills: to effectively advise their client, the attorney must be adept at communicating with clients experiencing extreme distress. An attorney is ethically obliged to ensure that their client "has been adequately informed" in making decisions about the

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256 Wardle, *supra* note 122, at 425.

257 *Id.* at 426.

258 Aviel, *Family Law*, *supra* note 39, at 2295–96.

259 Fines & Madsen, *supra* note 25, at 969.

260 *See* Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535, 1538–40 (2016) ("[S]upportive coparenting appears to be more important for children than their parents' particular custody arrangement."). *See also* Weinstein, *supra* note 42, at 85 ("A significant body of social science research informs us that the best interest of the child is almost always to have an ongoing relationship with her parents.").

representation.[261] The attorney is obliged to "assist the client in making informed decisions."[262] But communicating with family law clients can be very difficult due to trauma and strong emotion: "Clients in many situations of family representation are dealing with difficult emotions and are under significant stress."[263] Some empirical studies of family law clients "indicate that attorneys are failing in this duty more than any other. Clients feel that they are neither informed nor empowered by their attorneys."[264] Part of that feeling on the part of family clients surely is animated by attorneys' reluctance or failure to engage and communicate difficult messages with their clients due to concerns over the client's reaction and their own burnout or vicarious trauma.

Although not explicit, under Rules 1.4 and 2.1 (under the broader rubric of "competent representation"), family law attorneys have a presumptive obligation to advise and encourage the client to explore and consider alternatives less detrimental than court and provide candid advice on the litigation process's harms, prior to initiating any adversarial legal action on behalf of a client in family court. The attorney is also obligated to provide information to the client on the benefits of cooperation in the family law context. For private family law attorneys in particular, the conflict between the client's interest and the lawyer's pecuniary interest is stark: a perverse incentive exists to contribute to harmful dynamics facing families. If the conflict increases, the lawyers' billable hours increase. For this reason and others, including protecting the legal profession's reputation, private family law attorneys must prophylactically caution clients about the conflict of interest that exists for the lawyer, and that that conflict of interest further militates in favor of a bias towards seeking to achieve the client's objectives through the least damaging means.

Family law attorneys should not be discomforted in a reparative role. Quite the opposite, given the context, family law attorneys should be discomforted by playing a traditional adversarial role that, in most cases, harms the client and the client's family and financially benefits the attorney. The reparative advisory role of the family law attorney contrasts with an attorney who encourages "relationship-destroying, adversarial behavior" or who is indifferent to the non-legal consequences of adversarial family law litigation.[265] When the family law attorney's contextualized role is articulated in comments to the Model Rules and widely adhered to by the family law bar, family law attorneys will be well on their way to their own kind of reparation: an acknowledgment of their past gratuitous contributions to the harms of the adversarial family law system, and a recognition of the efforts that must be made to limit the extent to which family law attorneys contribute to harmful dynamics, all while diligently representing their client and meeting their ethical obligations under the Model Rules. A family law practice fundamentally oriented towards reducing harm, as opposed to a misplaced concept of "winning," would do much to repair the family law attorney's practice.

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261 Fines & Madsen, *supra* note 25, at 980.

262 *Id.*

263 *Id.*

264 *Id.*

265 Huntington, *Repairing Family Law*, *supra* note 10, at 1281.

### *D. Proposed Comments to the Model Rules*

As argued above, the Model Rules, as currently constituted, provide ample basis to support the family law attorney's reparative advisory role, and that reparative role includes providing advice that is holistic in many key senses. A Reparative Model of family law thus does not require abandoning or reconceiving of the Model Rules of Professional Conduct in the family law context. The Rules are and always have been context dependent. Current family law attorneys who do not provide advice on holistic family and other concerns, and who do not explore less-damaging means of achieving their client's goals, abdicate their advisory role under the Model Rules and in fact provide incompetent, unethical representation.

Although many attorneys approach cases (or strive to approach cases) from a reparative-oriented advisory mindset, that advisory mindset's efficacy is stymied by, among other factors, (1) high conflict cases, (2) attorneys who are ill-equipped, burnt out or lack the emotional energy and wherewithal to properly fulfill their advisory reparative role under the Rules, and (3) other attorneys who either do not see a reparative role for themselves under the Rules or are not experienced in the family law context and therefore inappropriately apply their approach from other civil litigation contexts to the family law context.[266] Of course, not all cases will proceed in a reparative fashion, but that does not constitute the reparative role being stymied. Some cases are simply not good candidates for a reparative approach and therefore must proceed in a litigation posture. Nevertheless, a reparative approach is most successful with mutual buy-in by each party and their respective counsel.[267]

Certain comments to the Model Rules should be amended to make clear that family law attorneys have reparative obligations and a presumptively reparative orientation in terms of their advisory role.[268] By explicitly addressing the family law attorney's role in the Comments, the Model Rules will underscore family law attorney's existing, contextualized, ethical obligations. There is ample precedent to single out specific practice areas in comments to the otherwise trans-substantive Model Rules: for example, Rule 1.5, concerning fees, includes language that prohibits contingency fee arrangements in domestic relations cases.[269] The Model Rules, as currently constituted, thus already recognize that family law matters require special treatment and consideration. Additional language in comments should be added to Model Rules of Professional Conduct 1.1, 1.3, and 2.1.

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[266] There are a disproportionate number of lawyers in the family law context who "underestimate the skills and knowledge required for effective family law practice" and incorrectly believe they can simply "pick up a divorce or two" to supplement their other practice. *See* Struffolino, *supra* note 170, at 184–185.

[267] *Cf.* Huntington, *Repairing Family Law*, *supra* note 10, at 1308–1309 (noting that attorneys have a role to play in counseling their clients to move beyond hate and towards the reparative approach, in pursuit of their own interests).

[268] Other comments to the Model Rules make specific reference to certain practice areas. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. [2], 3.6 cmt. [2] (AM. BAR ASS'N 2024).

[269] *Id.* at r. 1.5(d) ("A lawyer shall not enter into an arrangement for . . . any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.").

Model Rule of Professional Conduct 1.1, Comment [8] [Maintaining Competence] should be amended to include language along the lines of the following italicized addition:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[270] *To maintain competence in representation, particularly for lawyers working in highly-charged practice areas, like domestic relations law or criminal law, the lawyer must address transference/counter-transference and secondary trauma's impacts on the lawyer.*

Adding this proposed language to a comment to Rule 1.1 acknowledges the reality of practice for the family law attorney and underscores the family law attorney's ongoing obligation to address the impacts of transference/counter-transference and secondary trauma, given the overall context of the work.

Model Rule of Professional Conduct 1.3, Comment [1] should be amended to include language along the lines of the following italicized addition:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.[271] *In domestic relations law matters, for example, a lawyer should generally avoid adopting a "win-lose" approach to the representation, given the interrelated nature of family relationships.* The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.[272]

This added language makes clear that family law is not a matter of winning and losing, and that a different orientation is required in this context. It communicates the critical message that zealous advocacy in the family law context does not necessarily mean striving to 'win' in any traditional sense.

Model Rule of Professional Conduct 2.1, Comment [2] should be amended to include language regarding scope of advice in family law cases along the lines of the following italicized addition:

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.[273] *In domestic relations law matters, for example, it is appropriate to advise the client on litigation's costs (monetary and non-monetary) and potential harmful effects on children and family relationships.* It is proper for a lawyer to refer to relevant moral

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[270] *Id.* at r. 1.1 cmt. [8].

[271] *Id.* at r. 1.3 cmt. [1].

[272] *Id.*

[273] *Id.* at r. 2.1 cmt. [2].

> and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.[274]

The addition of this language to Comment [2] makes clear the Rule's obvious implication in the family law context—that children and family relationships bear substantially on the client's interests, that family cases belie traditional analysis focused on an *individual*'s interests.

Model Rule of Professional Conduct 2.1, Comment [5], concerning Advice, should be amended to include text along the lines of the following italicized language regarding providing advice in family law cases:

> In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.[275] *In domestic relations matters, a lawyer has a presumptive obligation to explore with their client the possibility of pursuing goals via means less detrimental than adversarial litigation and advise the client regarding contested litigation's harmful costs (monetary and non-monetary) on children and families.*

The addition of this italicized language presumptively requires the family law attorney to explore settlement of the case outside of court, and further explore other, non-legal approaches that may ameliorate the client's situation. It further requires, in the case of private practice attorneys, a robust obligation to prophylactically underscore the economic and social costs of family law litigation. Particularly because private practice family law attorneys are the principal beneficiaries of contested litigation, at the expense of their clients and their clients' families, and because of the professional power they hold in the attorney-client dynamic, they must be upfront with the client about the financial considerations to avoid any later suggestion that they mislead the client. The reparative presumption can, and often will, be overridden, but the context and unique challenges of family law practice demand such a presumptive orientation, to protect the client and vulnerable third parties (*e.g.,* children), as well as the legal profession's reputation in the public's eye. This amended Comment [5] in Rule 2.1 provides a concrete advisory heuristic for family law attorneys, a guiding principle that limits their ability to gratuitously contribute to the harms facing clients. Absent a presumptively reparative advisory role, family law attorneys are at undue risk of perpetrating additional "psychological or economic violence upon clients . . . ."[276]

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274 *Id.*

275 *Id.* at r. 2.1 cmt. [5].

276 Fines & Madsen, *supra* note 25, at 966 (citing Schact, *supra* note 93, at 570).

A natural question that arises about the archetypal reparative advisory role articulated in this Article: does it apply to cases that do not involve children—*e.g.*, a divorce case with no custody components? Yes, it does. A presumptive reparative orientation is needed in all family cases, to limit the extent to which the attorney may contribute needlessly to the parties' damaging dynamics. The stakes are not as high, however, when children are not involved. The parties need not work together moving forward. But if the parties are fighting over a limited pot of resources, the client's potential for self-harm, to the attorney's great benefit, remains. The presumption in favor of a reparative approach may be more easily overcome in cases not involving children, but the baseline approach of a family law attorney should still be reparative-oriented.

Comments to the Model Rules are necessary to encourage a practice norm shift that supports other reparative reforms, thereby protecting the public and the legal profession's reputation. Aspirational documents like *The Bounds of Advocacy* have thus far been insufficient. Absent widespread acceptance of, and adherence to, a reparative advisory role, the reparative role's effectiveness is too limited. Although the Model Rules currently imply a reparative advisory role for the family law attorney, there remains inadequate articulation of the family law attorney's reparative role and inadequate adherence to that role amongst the family law bar.[277] The inclusion of simple language to the Model Rules, as proposed above, would do much to clarify the family law attorney's role and encourage a practice norm-shift.

## CONCLUSION

As family law continues to move in a reparative direction, family law attorneys require further clarification on their role. Cases like the Kassenoff family litigation underscore the extraordinarily damaging, pyrrhic nature of contested family law cases. Family law attorneys must recognize the specialized nature of their practice area—that traditional adversarialism is inappropriate and harmful. Considering the unique family law context, family law attorneys are ethically obliged to avoid the pitfalls of a traditional adversarial mindset. It is time for family law attorneys to embrace their reparative role: comments addressing the reparative advisory role should be added to the Model Rules to demystify family law attorneys' ethical obligations in representing clients. A declaration that family law attorneys have a presumptively reparative mindset would certainly not prevent all or even most of the needless conflict witnessed day-in and day-out in family court, but it could prevent some of that conflict—the conflict produced by attorneys' gratuitous contributions. Family law attorneys need to recognize the limits of their role and wash their own hands in this adversarial process, making their own kind of reparation for past contributions to the dynamics harming clients and families.

277 *Id.* at 969.