The Role of the Lawyer in Matrimonial Cases

Eric D. Turner
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IN MATRIMONIAL CASES

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I. INTRODUCTION

MATRIMONIAL PRACTICE IS UNIQUE among all other areas of law practice. Not only do matrimonial disputes involve a broad spectrum of legal and economic problems, but also, they elicit a maelstrom of extreme and often destructive emotional reactions from the parties.

The age of the parties, the length of their marriage, the nature and extent of the real and personal property they own, their socio-economic status, and the presence or absence of minor children are some of the factors which determine the range of legal and economic problems that may arise. The potential legal problems may include any or all of the following: divorce, spousal and child support, interstate jurisdictional disputes, visitation and custody rights, prop-


1. The terms “divorce lawyer,” “family lawyer,” “marital lawyer,” and “domestic relations lawyer” are synonyms which describe an attorney who represents clients in disputes arising from a matrimonial or quasi-matrimonial relationship. For purposes of consistency, the term “matrimonial lawyer” is used in this article to describe such a practitioner and, thus, the term “matrimonial practice” is used to describe the myriad activities in which he or she is engaged.


property rights and distribution,\textsuperscript{6} protection from threatened or actual physical abuse,\textsuperscript{7} and post-divorce alimony.\textsuperscript{8} Other legal problems which typically arise are the income, estate, and gift tax consequences of support, alimony, and property transfers\textsuperscript{9} as well as the drafting, interpretation and enforcement of written agreements.\textsuperscript{10} The potential economic problems may include the definition and maintenance of the standard of living to which the family unit has become accustomed, the division of assets in a manner appropriate to the relative needs and economic status of the parties, immediate investment and long-range financial planning following property division, and provision for income maintenance or income supplements to the financially dependent spouse.\textsuperscript{11}

Superimposed upon the foregoing potential legal and economic problems are the emotional reactions of the parties in a matrimonial

\begin{itemize}
\item[6.] See generally A. Momjian \& N. Perlberger, supra note 2, \&\& 8.1-6; Foster \& Freed, Marital Property and the Chancellor's Foot (pts. 1-3), 10 Fam. L.Q. 55, 137, 203 (1976); Perlberger, Marital Property Distribution: Legal and Emotional Considerations, Symposium: Recent Developments in Pennsylvania Family Law, 25 Vill. L. Rev. 662 (1980); Gold-Bikin \& Rounick, supra note 2; Comment, New Approaches to Transfer of Appreciated Properties Pursuant to Divorce, 25 Cath. U.L. Rev. 616 (1976).
\item[9.] See generally A. Momjian \& N. Perlberger, supra note 2, \&\& 8.1-6; Foster \& Freed, Marital Property and the Chancellor's Foot (pts. 1-3), 10 Fam. L.Q. 55, 137, 203 (1976); Perlberger, Marital Property Distribution: Legal and Emotional Considerations, Symposium: Recent Developments in Pennsylvania Family Law, 25 Vill. L. Rev. 662 (1980); Gold-Bikin \& Rounick, supra note 2; Comment, New Approaches to Transfer of Appreciated Properties Pursuant to Divorce, 25 Cath. U.L. Rev. 616 (1976).
\item[11.] See generally A. Momjian \& N. Perlberger, supra note 2, \&\& 8.1-6; Foster \& Freed, Economic Effects of Divorce, 7 Fam. L.Q. 275 (1973).
\end{itemize}
dispute.\textsuperscript{12} In this regard, much depends upon the stage of the post-marital relationship during which the disputes arise.\textsuperscript{13}

For each party, there is some "symbolic act"\textsuperscript{14} which heralds the end of the matrimonial or quasi-matrimonial\textsuperscript{15} relationship. Possible "symbolic acts" include the very decision to consult an attorney, the filing of a divorce action, physical separation which may be accompanied by secreting the whereabouts of children, the seizure of jointly-owned assets, or the discovery of infidelity on the part of one spouse. During the period immediately following the "symbolic act," the lawyer must be prepared to encounter intense emotional responses on the part of the client including, but not limited to, feelings of rejection, jealousy, failure, anger, revenge, fear, uncertainty, and selfishness. Moreover, during this initial period, a client's approach to others involved in the dispute—e.g., his or her lawyer, the spouse, the spouse's lawyer—is determined in large part by these emotional reactions rather than by an objective, solution-oriented approach.\textsuperscript{16} Herein lies one of the ironies of matrimonial practice: the lawyer's role is complicated by nonlegal factors as much as, or more than, it is by strictly legal considerations.\textsuperscript{17}

On the other hand, consider the disputes which arise long after the marriage relationship has ended. For example, actions for modification or enforcement of support, alimony, custody, or visitation agreements or court orders often arise months or even years after the


\textsuperscript{13} See Kaslow, \textit{supra} note 2, at 720-51; Perlberger, \textit{supra} note 6, at 663-66.

\textsuperscript{14} Elkins, \textit{supra} note 12, at 229 & n.4.

\textsuperscript{15} A quasi-matrimonial relationship may be defined as a state of unmarried cohabitation in which "two parties live together and have a sexual relationship." Oldham, \textit{The Effect of Unmarried Cohabitation By a Former Spouse Upon His or Her Right to Continue to Receive Alimony}, 17 J. Fam. L. 249, 250 n.9 (1979). Such relationships, although generally falling short of the marital intent requirements for common law marriage, are often characterized by the commingling of assets and financial affairs of the partners. \textit{Id.} at 252-53. The incidence of support, alimony, and property disputes arising out of quasi-matrimonial relationships has risen dramatically due to an enormous increase in the number of unmarried cohabitants. \textit{Id.} at 251. Estimates show a 700% increase in the number of unmarried cohabitants from 1960 to 1970 and a 100% rise from 1970 to 1976. \textit{Id.} Since these relationships are conjugal in nature, the termination of such relationships often gives rise to allegations of \textit{contractual} support, alimony, or property rights. See, e.g., Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Keene v. Keene, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d 761 (1943).

\textsuperscript{16} It has been suggested that the traditional model of "lawyering" which seeks to foster in clients an unemotional and rational state actually hinders the development of a satisfactory attorney-client relationship. Elkins, \textit{supra} note 14, at 232. Instead, it has been contended that the eliciting of a client's emotions is necessary for the psychological health of the client and a working attorney-client relationship. \textit{Id.} at 232-33. See also T. Schafer, \textit{Legal Interviewing and Counseling in a Nutshell} 3-4 (1976).

\textsuperscript{17} See generally Kaslow, \textit{supra} note 2; Perlberger, \textit{supra} note 6, at 662-66.
martrimonial relationship has ended. In many instances, one or both of the spouses has remarried. Naturally, in most cases, the emotional turmoil incident to the initial breakdown of the marriage has subsided at this stage but it is rarely resolved.

All of the foregoing considerations, unique to matrimonial cases, directly affect the lawyer's role in such cases and, as will be developed herein, operate to make that role perhaps more complex than would ordinarily be the role of a lawyer in nonmatrimonial cases. Accordingly, this article will discuss the specifics of a lawyer's role in matrimonial cases. Parts II and III will consider, respectively, the initial decision to accept a matrimonial case and the basic "tools" of matrimonial practice. Part IV will define the lawyer's role, examining client expectations, how the lawyer's role progresses through the various stages of a matrimonial dispute, and the lawyer's special role in negotiations. Part V addresses the special considerations of reconciliation, custody, dual representation, and malpractice claims.

II. The Decision Whether or Not to Handle Matrimonial Cases

A. Ability to Maintain Objectivity

Probably the most important decision for lawyers in matrimonial cases is whether or not to get involved in the first instance. It may be stated as a sound general principle that lawyers must always maintain an objective approach to their cases. This is especially true in matrimonial cases where the lawyer is often the only participant in the controversy who has even a remote chance of bringing some objectivity to bear upon the case. The objectivity problem can also arise in the case of a lawyer who has had unpleasant experiences in his or her own matrimonial situation and who permits this to affect his or her approach to representation of
others. In such a case, the lawyer becomes unable to direct the client toward a fair settlement, often with the consequence of protracted, costly, and acrimonious litigation. Therefore, if the lawyer cannot maintain objectivity, he or she should decline the employment.

All persons, lawyers included, have individual beliefs in the areas of divorce, child rearing, relations with persons of the opposite sex, and other subjects which may be in dispute in a matrimonial case. It is important for the lawyer to be able to refrain from imposing such beliefs upon his or her client. The client has come to the lawyer for legal representation, not for religious or moral counseling. If a lawyer feels that the client's position is incompatible with his or her own personal code of conduct, and that this incompatibility will affect the attorney-client relationship, then the lawyer should disclose that fact to the client and decline employment. Failure to do so will only cause the client confusion during the proceedings and militate against effective representation.

B. Knowledge of the Law

After ability to maintain objectivity, the next important factor for the lawyer to consider in determining whether or not to become involved in matrimonial cases is the knowledge he or she possesses of the law and customs applicable to such cases. The substantive law applicable to matrimonial cases changes regularly and it is axiomatic that any lawyer who undertakes to practice in the field must be aware not only of the changes but also of the prior law and the trends for

20. See Fisher, Matrimonial Turmoil, 7 J. Fam. L. 31 (1967); Kaslow, supra note 2, at 725.
With regard to the lawyer who may be influenced by his or her own marital difficulties, one author has remarked:

A competent [matrimonial lawyer] does not permit his own rages, whims, and angers to govern [the handling of the dispute]. . . . No member of the bar should be a matrimonial lawyer or act in a matrimonial cause unless he understands and has come to some resolution of his own emotional problems and those of his marriage. A hostile, arrogant, or insecure attorney should not handle matrimonial causes. A lawyer should be most careful not to work out his own hostilities in a contested marital suit.
Fisher, supra note 20, at 44.
22. See ABA Code, supra note 21, DR 5-101.
23. At the present time, there is ongoing debate in the legal profession over the desirability of formal specialization within the legal practice. See Petrey, Professional Competence and Legal Competence, 50 St. John's L. Rev. 561 (1976). See also ABA Code, supra note 21, DR 2-105 and EC 2-14.
the future.\textsuperscript{24} Without adequate knowledge of the substantive law, a lawyer in matrimonial practice or otherwise, suffers three major disabilities: 1) an inability to determine the existence of a cause of action or the lack thereof; 2) an inability to guide the behavior of the client in a manner consistent with the law; and 3) an inability to effectively negotiate on behalf of the client.\textsuperscript{25}

### III. The Matrimonial Lawyer's Repertoire

One of the characteristics of a matrimonial practice is that clients depend heavily upon their lawyers for a variety of services both legal and nonlegal. Therefore, the matrimonial lawyer must be knowledgeable in all aspects of matrimonial law. For example, the matrimonial lawyer must familiarize himself or herself with the new no-fault divorce law enacted in Pennsylvania.\textsuperscript{26}

In the area of support, the lawyer must have knowledge of the applicable substantive law as well as an intimate knowledge of accounting and tax concepts.\textsuperscript{27} The latter is especially important when the lawyer is involved in a support case where one of the parties is self-employed, a professional corporation, or a principal shareholder in a closely-held corporation.\textsuperscript{28} These forms of doing business are conducive to the "hiding" of income and assets.\textsuperscript{29} Thus, no lawyer should undertake employment in such a support case unless he or she is able to analyze financial statements, tax returns, and the financial books and records of a business enterprise.\textsuperscript{30}

In the event that issues concerning custody and visitation arise, the lawyer must be familiar with the applicable law, including statu-
tory laws regulating jurisdiction and venue in custody cases. Moreover, a lawyer involved in such cases must be prepared to deal with expert testimony from persons such as psychiatrists, psychologists, clergymen, teachers, and social service professionals.

Another area of law in which the matrimonial lawyer must be proficient is that of property rights. Specific property issues which may arise are, for example, the wrongful appropriation of joint property, the existence of constructive trusts, actions for accounting of rents and profits from assets, partition of jointly owned property either based upon wrongful appropriation prior to divorce or pursuant to law after divorce, establishment of ownership of nontitled assets, the transfer of ownership of titled assets, receiverships, estate and trust modifications, as well as problems relating to equitable division of marital property.

The matrimonial lawyer must know tax law as it relates to matrimonial settlements, including the determination of filing status and dependency exemptions, as well as the tax treatment of alimony and gain or loss on transfer of assets. Tax concepts can play a key role in support and alimony litigation in the determination of actual earnings and earning capacity.

Because the matrimonial practice is a very litigious one, a matrimonial lawyer must be a skilled litigator. This involves general knowledge of trial tactics and procedure as well as knowledge of the numerous strategic considerations applicable to matrimonial litigation. Furthermore, knowledge of local rules of court is essential since the matrimonial field is characterized by procedural variations from county to county.

Perhaps the most important part of the matrimonial lawyer’s repertoire is his or her skill as a negotiator. Conceptually, negotiation of a matrimonial settlement is similar to the negotiation of the termination of any business relationship. However, clients and many

31. See generally sources cited notes 4 & 5 supra.
33. For a sampling of recent legal discussion of the relationship between marital disputes and property rights, see note 6 supra.
34. Concerning the equitable distribution of marital property in Pennsylvania, see DIVORCE CODE, supra note 8, § 402.
35. For a selection of recent articles discussing tax law as it relates to marital disputes, see note 9 supra.
36. See notes 27-30 and accompanying text supra.
38. See Fain, supra note 32, at 40-44; Walzer, supra note 37, at 215-16.
lawyers lose sight of this fact. A matrimonial lawyer must possess the skill required to negotiate an economic settlement which is fair to both parties and which leaves as little as possible for interpretation and dispute in future years.\(^{39}\)

Having summarized the components of the matrimonial lawyer's repertoire as it pertains to his or her role as a legal representative, it is also important to note the nonlegal elements in the repertoire. A matrimonial lawyer should be aware of the numerous social service agencies, community resources, and professional counselors available to assist his or her client.\(^{40}\) In the case of abused spouses or children, the lawyer should be aware of the shelters or child welfare services which may be available in the community to provide emergency aid to such clients.\(^{41}\) There are numerous marital and family therapy agencies available, either publicly funded or privately endowed, to assist families in dealing with marital disputes, especially where the children are the objects of contention.\(^{42}\) Finally, in cases involving clients who are receiving public assistance or social security, the matrimonial lawyer is often required to assist the clients in matters such as application for maintenance of, or termination of, such benefits.\(^{43}\)

\(^{39}\) For a discussion of the lawyer's role in settlement negotiations, see notes 66-69 and accompanying text infra.

\(^{40}\) See generally Kaslow, supra note 2. A lawyer may find it helpful and necessary to refer his clients to social service agencies and professionals for marital or psychological counseling. In an effective domestic relations practice, the matrimonial "lawyer should be aware that qualified professional helpers are available in the community; he should know when to make a referral; and he should know enough about the professional helpers to be able to advise the client how to select a counselor or therapist." Elkins, supra note 12, at 262. Moreover, the lawyer should be cautioned against diluting his role with "excessive non-legal responsibilities" since "the role of marriage counseling . . . is a corollary service, not the primary one." Callner, Boundaries of the Divorce Lawyer's Role, 10 Fam. L.Q. 389, 393-94 (1977). See also T. Shaffer, supra note 16, at 312-19; Isaac, The Family Lawyer and Extra-Legal Resources, 1 Fam. L.Q., Sept., 1967, at 13; Rutledge, Guidelines in Referring Counseling Cases, 44 Mich. St. B.J. 16 (1965).

\(^{41}\) A wealth of "helping" services provided by nonprofessionals are available to parents and children: "Examples of alternative services provided by non-professionals include: hot lines, rap houses, youth crisis services, sex information and counseling services, and drug counseling." Elkins, supra note 12, at 261 n.166, citing Baldwin, Alternative Services, Professional Practices and Community Mental Health, 45(5) Amer. J. Psych. 734 (1975).

\(^{42}\) For a comprehensive reference work on marriage counselors and schools of therapy, see J. Koch & L. Koch, The Marriage Savers 251-69 app. (1976).

\(^{43}\) At present, there is no constitutional right to counsel for indigents involved in matrimonial actions; however, most courts will exercise discretion and appoint counsel for indigents under state "in forma pauperis" statutes. See Comment, The Indigents Right to Counsel in Civil Cases, 76 Yale L.J. 345 (1967); Note, Justice for the Poor? A Look at the Right to Counsel for Indigents in Divorce Litigation, 22 N.Y.L.S.L. Rev. 87, 96 (1976). For a discussion of suggested guidelines for cooperation between lawyers and social workers concerning indigents, see Rights of Public Assistance Recipients, ABA Policy Statement (1966), reprinted in 1 Fam. L.Q., Mar., 1967, at 72, 77-81.
IV. DEFINITION OF THE LAWYER'S ROLE

A. Dealing With Clients' Expectations

In most matrimonial cases, there is a great disparity between the client's expectations of the lawyer's role and the proper scope of that role. The following is a partial list, not intended to be frivolous, of the roles which some clients expect their attorneys to assume: psychiatrist, friend, gladiator, spiritual advisor, financial consultant, marriage counselor, law enforcement officer, arbitrator, avenging angel, private detective, father, mother, co-conspirator, political-influence peddler, lending institution, business manager, guardian ad litem, internal revenue investigator, judge, and jury. The most important thing for the matrimonial lawyer to realize is that he or she probably lacks the learning and training necessary to deal on a professional level with matters other than the legal issues at hand. Nonetheless, some commentators have observed that the role of the matrimonial lawyer must, of necessity, be an expanded one, not just limited to dispensing legal advice or representation in litigation. Rather, the social, economic, and psychological problems of the clients will also face the lawyer. The solution for the practical lawyer lies in the recognition that he or she lacks the ability to give thorough guidance in areas other than legal matters and that the client must be made to understand that fact. Then the lawyer may refer the client to those social services included in the lawyer's repertoire.

In any matrimonial case, it is of utmost importance that the lawyer establish certain ground rules with the client. From the outset, the client should know what to expect from the lawyer and what the client is expected to contribute to the case. The lawyer must explain the way he or she conducts practice in terms of returning telephone calls and billing fees. Most importantly, the lawyer should apprise the client of what the client should reasonably expect in terms of an overall resolution.

On the matter of fees, the importance of clarity from the beginning cannot be overemphasized. The client has the right to know
in advance how much the lawyer will charge, how the charges will be calculated (e.g., hourly basis, job basis, etc.), what retainer, if any, is required, how often bills will be sent, and what other costs will be involved. If the attorney charges on a time basis, he or she should tell the client whether or not telephone calls are included. If other lawyers or paralegal personnel will be involved, the client should know what the fee for their services will be.

If disputes arise over fees, the lawyer who failed to obtain a clear fee arrangement with the client may be limited to a quantum meruit remedy. It is important to note that in many jurisdictions a lawyer is not permitted to withdraw from a matrimonial case on the ground that the fee is inadequate or that the initial retainer is exhausted where the effect of such a withdrawal would be prejudicial.

It is also wise for the lawyer to give the client certain “homework.” The client should be instructed to maintain a diary with notations of significant events or conversations so that the client will be able to recall them when it is time to prepare for litigation. In support matters, clients should be required to gather certain financial data including expense statements. Clients should also be given the job of obtaining the names and addresses of certain witnesses in cases involving custody, visitation, abuse, or support.

The client should also be given a realistic evaluation of his or her chances of achieving whatever goals he or she has established. The lawyer must inform the client at the outset whether the client’s demands or expectations are too high or too low in terms of what the lawyer knows, by custom and experience, to be fair and reasonable. In this way, the lawyer will assist the client in establishing realistic

As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent.

Id. See Fain, supra note 32, at 37-38.

48. Contingent fees in matrimonial cases are not illegal per se, but are subject to rigid scrutiny. Krause v. Naumberg, 13 Bucks L.R. 547, 554, 36 Pa. D. & C.2d 746, 756 (1964). Contingent fee agreements in marital cases will be void if they are such that the interest of the lawyer becomes one of preventing reconciliation. Id. at 552, 36 Pa. D. & C.2d at 753. For example, in one Pennsylvania case, a contingent fee agreement was held unenforceable where the marital partners had reconciled, thereby preventing the creation of a fund from which to pay the lawyer’s contingent fee. Polis v. Briggs, 68 Pa. D. & C.2d 593, 598-99 (1974).


51. Concerning the types of records which a client should keep and supplement, see Barrett, The Initial Interview With A Divorce Client, 23 FRAC. LAW. 75, 76-86 (1977).
settlement parameters so that the client can decide whether to accept a proposed settlement or to proceed with litigation.  

Another very important aspect of establishing ground rules with your client is what is sometimes called “control over the client.” The concept which the phrase is ordinarily intended to represent is not as oblivious to notions of client autonomy as it appears to be at first glance. “Controlling the client” means nothing more than the ability of the lawyer to persuade the client to do something which the client may not want to do, but which the lawyer knows by custom and experience is the proper thing to do. Throughout the course of a matrimonial case, the lawyer may often have to prevail upon the client to do, or refrain from doing, some act or acts. Certain requests may be made of your client by the other spouse, the court, or the other spouse’s lawyer. If the request is appropriate, then the lawyer should be able to obtain the client’s compliance. For example, in representing the custodial parent, the lawyer may have to prevail upon the client to afford reasonable visitation privileges with the children to the other parent. On the other hand, the lawyer representing the noncustodial parent may have to prevail upon the client to honor whatever visitation schedule has been established or to continue payment of child support even if visitation has been denied.

B. How the Laywer’s Role Varies With the Stages

The most significant variable which will affect the scope of the lawyer’s role in a matrimonial case is the stage at which the lawyer becomes involved. Many clients seek a lawyer’s advice prior to the ultimate marital split. These clients are usually people who have some ongoing marital problems and who may seek a lawyer’s advice in advance as to what their rights and obligations would be in the event of a separation. In this situation, the scope of a lawyer’s role is limited to advising the client of the legal consequences of separation, of his or her rights and obligations in the areas of support, custody, and visitation, of issues which may arise with respect to prop-

52. While the matrimonial lawyer plays a crucial role in fashioning the resolution of the marital dispute, “[t]he Code of Professional Responsibility implies the philosophy of client self-determination by mandating that decision-making is the province of the client. The ultimate decisions [as to the resolution of the dispute] are to be those of the client and not the attorney.” Callner, supra note 40, at 391, citing ABA CODE, supra note 21, EC 7-7.

53. For in-depth discussion of the stages of the divorce process, see Kaslow, supra note 2; Perlberger, supra note 6, at 663-66.

54. For a good outline of the type of information which clients should receive in initial consultations, see Loucks, Explaining Divorce Proceedings to a Client, 20 PRAC. LAW. 83 (1974).
erty rights—including the legal implications of seizure of joint assets—and of the fees the lawyer charges for his or her services. Clients at this early stage may never return to the lawyer. They may decide that the path of least resistance would be to attempt to straighten out the marital problems. Also, clients at this early stage may be “interviewing” several lawyers in order to select one with whom they feel comfortable. This is appropriate and prudent. Both lawyer and client should give careful consideration to any ideological or personal clashes which reveal themselves during the initial contact and which would hinder the development of the lawyer-client relationship further down the road.

It is also possible that client contact may be initiated sometime after the initial marital breakdown, or even after litigation and/or settlement has been concluded. In the latter situation, clients are often seeking assistance with some problem which has arisen in the areas of support or custody. Although it is desirable in arriving at an initial settlement to eliminate, as much as possible, the potential for future disputes, no one can predict the onset of circumstances which may require a modification of previously settled rights and obligations. In such a situation, the scope of the matrimonial lawyer’s role is strictly limited to the narrow issue at hand, whether it be an increase or decrease in support payments, a modification of custody or visitation rights, or enforcement of previous agreements or court orders.

The most difficult stage in terms of defining the scope of the lawyer’s role occurs in the period immediately following the marital breakup. Regardless of which spouse the lawyer represents, the lawyer’s basic tasks occur in three stages: 1) problem definition; 2) stabilization; and 3) resolution.

1. First Stage—Problem Definition

Consider the situation of a client whose domestic situation has recently deteriorated. In most cases, the day-to-day lifestyle of the entire family is radically altered by the resulting emotional, economic, and legal bedlam. In situations such as this, the lawyer

55. See id.
56. See Elkins, supra note 12, at 252-54; note 22 and accompanying text supra. A client will rarely manifest any hostility which he or she may feel towards the lawyer in the initial contact; unfortunately, this is more likely to occur at a later stage in the attorney-client relationship when withdrawing would possibly inflict hardships on the client. See Elkins, supra, at 252-54; ABA Code, supra note 21, DR 2-110.
57. For in-depth discussions concerning such problems, see authorities cited notes 3-5 supra.
must first elicit facts and complete a "checklist" of legal problems. The lawyer must define any problems which may exist as to the support and maintenance of dependent spouses and children. Another distinct problem is the custody and visitation situation with respect to minor children. The lawyer must also identify any problems in connection with the use or appropriation of joint assets. It is generally in this problem definition stage that the lawyer seeks to outline in practical terms the different areas of legal dispute and to assign priorities.

2. Second Stage—Stabilization

Once the lawyer has defined the legal problems, he or she must next proceed to establish stability in the marital dispute. Initially, the lawyer must deal with any crises. During this stage, the lawyer must defuse threats made by the other spouse such as: "If you date, I'll get custody of the children" or "If you consult a lawyer, I'll cut off all of the credit cards and stop paying the household bills." In sum, clients must be given guidance as to how they should conduct themselves in matters such as socializing, dealing with child visitation, and dealing with joint property—including the exclusion of a spouse from the marital residence, payment of household expenses, use of credit cards, or whether or not to execute joint tax returns.

This stage is also the time when a lawyer will typically make contact with the other spouse or his or her attorney in order to stabilize the situation and move it toward a resolution. Litigation may have to be commenced or defended in order to stabilize some matters (such as support, custody, visitation, abuse, or property rights). In short, the lawyer during this stage must seek to achieve interim solutions, whether by agreement or litigation, to the more pressing problems identified during the "problem definition" stage.

3. Third Stage—Resolution

Once the problems have been defined and once the legal and economic situation of the client has been stabilized, the lawyer must

58. The most important factual determination to be made is the cause of the marital conflict. The matrimonial lawyer should interview the client and all others with relevant knowledge of the dispute in order to obtain an objective view of the facts. See Fain, supra note 32, at 40-41. The interviewing attorney should be cautious as to the reliability of the facts related by the client. Often a client will consciously or unconsciously distort the facts due to "strong feelings and emotions [which] can only intensify partisan presentation of facts." Elkins, supra note 12, at 240-41.

59. Frequent causes of crises in marital disputes are a lack of support, waste or misappropriation of assets, abuse, and "child snatching." For a discussion of abuse, see note 7 supra. For a discussion of the problem of "child snatching," see notes 78-83 and accompanying text infra.
work toward an overall resolution of the matter. This is generally accomplished by continuing the dialogue opened during the "stabilization" stage. It is here that the lawyer takes on the role of negotiator or litigator, seeking to resolve the areas of dispute and to define the rights and obligations of the parties. 

In directing client conduct during this phase, the lawyers should refrain from "stoking the fires." Lawyers in matrimonial cases are often blamed for exacerbating the disputes between the parties. Unfortunately, this is often true. Even more unfortunate is the fact that lawyers often purposefully make matters worse. In the ideal situation, the involvement of competent attorneys on both sides should have the effect of easing the situation and making the disputes more manageable. If nothing else, lawyers who are able to cooperate with one another and who have a good understanding of their respective client's goals can eliminate the need to resort to litigation to resolve disputes in many cases.

Unhappily, however, some lawyers in matrimonial cases advise their clients to take disruptive actions such as denying visitation, ceasing support, going on a spending spree to run up bills, cleaning out joint bank accounts, snatching children, or locking a spouse out of the marital residence. None of these actions promotes settlement. On the contrary, such activity always increases the hostility between spouses, causes needless litigation, and may involve adverse legal consequences.

On the other hand, it is often unwise for a lawyer to rely upon the good faith and fairness of the other spouse or his or her lawyer. There are certain cases where the use of self-help is imperative and where resort to litigation is unavoidable. These methods, however, should be the last resort. The first resort should always be the bargaining table. However, if one of the parties refuses to come to the bargaining table, or if having come does not negotiate in good faith, or if good faith negotiations stalemate, then resort to the courts can and should be the next step.

60. See notes 38-39 and accompanying text supra; notes 66-69 and accompanying text infra.
61. See note 37 and accompanying text supra.
62. For a list of factors which should be considered or contained in the resolution agreement, see note 69 infra.
63. See Kaslow, supra note 2, at 723-26.
64. For a discussion of the role of the lawyer in directing self-help, see Cassola, First Step in Divorce—Initial Client Contact, Litigation Financing, Investigation and Self-Help, 3 Fam. L. Rep. 4019 (1977).
65. See notes 66-69 and accompanying text infra.
C. The Lawyer’s Role in Settlement Negotiations

Matrimonial lawyers should always be settlement-minded and should encourage and even insist that their clients be likewise settlement-minded. This is not to say that all matrimonial cases can be settled; however, all matrimonial cases have settlement potential which should always be vigorously pursued.

The benefits of settlement are numerous. From the courts’ standpoint, a case settled is a case removed from the already crowded docket. From the point of view of the parties, settlement defines specifically, and with greater control on their part, their respective rights and duties, financial and otherwise, to one another and to any minor children. This permits the parties to move forward with their separate lives without the burden of ongoing disputes. Settlement also keeps the parties out of court, thereby avoiding substantial legal fees and time commitments. From the point of view of the lawyers, settlement is beneficial since it prevents or reduces the tremendous expenditure of time involved in litigation which is often disproportionate to even the most successfully litigated result. Finally, settlement benefits the minor children involved since it is they who are the victims of the continuing warfare between their parents which is so characteristic of matrimonial cases prior to final settlement.

Before approaching settlement negotiations with the opposing side, the matrimonial lawyer must first “settle” with the client. The lawyer must explore with the client his or her settlement expectations. This is not an easy task and the lawyer will often encounter client responses such as “I won’t give her anything” or “I want to take him for all he’s worth.” It is incumbent upon the lawyer, therefore, to explain to the client initially the general benefits of settlement and the possible adverse consequences of failure to reach agreement. In the opinion of this author, a “good” matrimonial lawyer will decline employment by someone who clearly refuses to consider reasonable settlement possibilities.

Many clients will seek the lawyer’s advice as to what would constitute a reasonable settlement. Clients who would be primarily on the “giving” side of a settlement will probably want to know what his or her exposure would be in court absent a settlement. The lawyer

66. Such statements are outward manifestations of client hostility which the matrimonial lawyer must defuse. See Elkins, supra note 12, at 249-52; note 59 and accompanying text supra.

67. See ABA CODE, supra note 21, EC 2-30. Ethical Consideration 2-30 provides that “[e]mployment should not be accepted by a lawyer . . . when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another.” Id.
must be able to evaluate the risk, if any, involved in litigation and to assist the client in deciding whether or not certain legal or economic trade-offs are preferable.

Clients who would be primarily on the "receiving" side of a settlement will look to the lawyer's evaluation of the minimum, if anything, the client could reasonably hope to obtain in litigation absent a settlement. The client will also want to know what "premiums" he or she may reasonably demand as inducement to settle.

In order to assist clients in the foregoing settlement analyses, and in order to advise clients whether or not their settlement expectations are realistic, certain financial and other data must be available to the lawyer. Unfortunately, this data is often unavailable except as incident to litigation. Ideally, the attorneys on each side should cooperate with one another to exchange such relevant data in the possession of their respective clients which would enable each lawyer to effectively guide his or her client in the formulation of a settlement position. Especially in the financial aspects of settlement, most of the data needed to formulate or respond to a settlement proposal would be disclosed if the matter went to litigation. Therefore, exchange of financial data in advance of litigation for the purpose of settlement discussion generally does not prejudice either party.

Having "settled" with the client in terms of defining the range of settlement options, the lawyer must now define the scope of the negotiations. Since one of the primary advantages of a settlement is keeping the clients out of court, the scope of settlement discussions should be as broad as possible so as to include present and potential areas of dispute.

68. The type of data which is necessary to determine the scope of a settlement can usually be supplied by the client in his own words or on forms provided by the lawyer. See Barrett, supra note 51, at 76-86. In particular, joint income tax returns, bank statements, and credit reports may provide valuable information to the practitioner.

69. The list of topics in settlement discussions should always include, where appropriate, the following: the amount, frequency, and duration of payments for support of spouse and minor children; the disposition of real estate and other titled assets including vehicles, securities, and bank accounts; separate treatment of support-related items in addition to weekly or monthly payments including items such as medical insurance, health care expenses, educational expenses, religious training and membership expenses, summer camp expenses, transportation expenses in connection with education and/or summer camp; disposition or division of nontitled personally such as appliances, furniture, furnishings, and household equipment; payment of outstanding obligations to various creditors; tax matters including responsibility for taxes arising in connection with alimony payments and/or sale or other disposition of assets, joint tax returns, tax refunds, and dependency exemptions; custody and visitation; life insurance; security for obligations undertaken in the settlement; provisions to facilitate enforcement; allowance for modification of support due to changes in cost of living; cash payments; the mechanics for implementing the terms of the agreement including matters such as the formal transfer of title to assets, any escrow arrangements that are deemed appropriate, the terms of sale of any assets and the disposition of proceeds; and the disposition or division of any business interests. The
Having determined the client’s position as to settlement and having
defined the scope of the matters to be negotiated, the lawyer
then commences negotiations with the other attorney who normally
also has some idea of his or her client’s position with respect to the
topics of negotiation. The lawyers will generally exchange proposals
and counterproposals in an effort to narrow the gaps which exist be-
tween their respective positions on each major topic of discussion.
During this process of give and take, the attorney’s role becomes
similar to the role played by persons negotiating labor contracts or
business agreements. The lawyer must be able to utilize whatever
bargaining power is inherent in his or her client’s position in order to
obtain concessions from the other side. The lawyer must be able to
differentiate between his or her client’s negotiable and nonnegotiable
demands. By doing so, the lawyer can give concessions on negotiable
items in return for obtaining concessions on nonnegotiable items.

During each step of the negotiation process, the lawyer should
carefully review each proposal with the client and be absolutely cer-
tain that the client understands all potential consequences of agreeing
or not agreeing to each individual proposal. By doing so, there can be
no dispute between the lawyer and the client as to whether or not
the lawyer was exceeding his or her negotiating authority.

In the event that settlement discussions are productive and con-
clude with an agreement in principle as to the major areas of dispute,
the lawyer must then proceed to draft a written document which will
memorialize the agreement of the parties. A significant aspect of the
lawyer’s role is to ensure that the final written agreement expresses
the actual intent of the parties in unambiguous terms in order to
facilitate future enforcement or interpretation of the agreement.

V. SOME SPECIAL CONSIDERATIONS

A. Marriage Counseling and Reconciliation

Some commentators argue that a “good” matrimonial lawyer al-
ways explores the possibility of marriage counseling leading toward a
reconciliation, whereas others caution that lawyers should not meddle
in affairs beyond the scope of their professional training and expert-
tise. Regardless of whether or not one believes that it is the job of
the lawyer to seek a reconciliation, it is certainly a good idea to ascer-
tain whether or not the parties have considered it so that the lawyer

foregoing list is not all inclusive: individual cases will undoubtedly present areas of potential
dispute unique to the parties which should be provided for in an overall settlement.

70. See note 45 and accompanying text supra.
can be certain that his or her full-scale involvement is not premature. On the other hand, even if counseling is in progress, the lawyer may still have a limited role in establishing temporary arrangements for support, custody, or visitation during the pendency of the counseling. In any event, a lawyer should be aware that under Pennsylvania's new Divorce Code, counseling may be mandated where either party requests it if a divorce is sought on indignities or no-fault grounds.

Thus, in this controversial area, this author takes a "middle of the road" position, recognizing that reasonable matrimonial lawyers and other knowledgeable professionals may disagree. My position is simply this: the matrimonial lawyer should neither encourage nor discourage reconciliation per se. Reconciliation efforts should usually be considered desirable and the lawyer should always inquire as to whether outside counseling has been considered in the event that such counseling simply never occurred to the parties. During the pendency of reconciliation efforts, the lawyer should be supportive of these efforts and should not advise the client to take any action which would irretrievably alienate the parties.

B. Custody and Visitation Disputes

Of all of the potential areas of dispute in a matrimonial case, custody and visitation are perhaps the most troublesome because of the direct involvement of minor children. Even the most intelligent and sophisticated parents find it difficult to shield their children from the fallout of their matrimonial war. As a result, disputes often arise as to which parent should have custody and what visitation rights should be arranged with the noncustodial parent.

In the typical private custody dispute in Pennsylvania, where issues of deprivation or neglect are not involved, separate counsel is not provided for the children. Therefore, it is incumbent upon the

71. See Walzer, supra note 37, at 214.
72. See DIVORCE CODE, supra note 8, § 202.
73. See note 45 and accompanying text supra.
74. For a discussion of custody litigation, see Bertin & Anthony, supra note 5.

There has been considerable debate over whether a child has the right to counsel in divorce custody adjudications. See, e.g., Gender, Separate Legal Representation of Children: Protecting the Rights and Interests of Minors in Judicial Proceedings, 11 HARV. C.R.-C.L.L. REV. 565 (1976); Inker & Peretta, A Child's Right to Counsel in Custody Cases, 5 Fam. L.Q. 108 (1971); Note, A Child's Due Process Right to Counsel in Divorce Custody Proceedings, 27 HASTINGS L.J. 917 (1976); Note, Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce, 87 YALE L.J. 1126 (1978).
lawyer in such cases to give utmost consideration to the interests of the children.\textsuperscript{76} Although the lawyer cannot and should not function as a judge, the client interview will usually reveal whether or not the motives of the client in seeking custody are proper. Also, by interviewing the client, the lawyer is usually able to gain some impression of whether the children would, indeed, be better off with the client. Clients will often seek to initiate a custody case either as a negotiating tactic or as a means by which to harass the other parent. In such cases, this author submits that lawyers must give primary consideration to the interests of the children and protect them from involvement in spurious custody litigation. In other words, lawyers must discourage the use of children as pawns in the matrimonial war.\textsuperscript{77}

Another important consideration for lawyers in custody cases is the problem of "child snatching."\textsuperscript{78} Lawyers must discourage the violation of court orders or agreements as to custody and visitation. Lawyers must also discourage the use of self-help or unilateral alterations of the custodial status quo as a means of gaining jurisdictional or other tactical advantages in custody cases.\textsuperscript{79} Uniform legislation\textsuperscript{80} which has been adopted in a majority of states,\textsuperscript{81} clearly defines the public policy against such conduct.\textsuperscript{82} In some jurisdictions, lawyers have even been directed by the courts to disclose the whereabouts of their child-snatching clients despite claims of attorney-client privilege.\textsuperscript{83}

C. Dual Representation and Unrepresented Parties

The lawyer is often asked in a matrimonial case to "represent" both parties for the limited purpose of working out a settlement

\textsuperscript{76} See Fain, \textit{supra} note 32, at 41-42.

\textsuperscript{77} See Kaslow, \textit{supra} note 2, at 731-32.

\textsuperscript{78} See generally Frank, \textit{supra} note 4. "Child snatching" may be defined as "the 'seize-run-sue' syndrome that frequently prompts unsuccessful litigants to flee with a child to another forum to seek a more favorable custody adjudication." Brosky & Alford, \textit{supra} note 5, at 695.

\textsuperscript{79} Parents who "child snatch" are aided by the fact that the principle of res judicata is inapplicable to awards of child custody, and by the fact that, under full faith and credit, a sister state is required to give an adjudication no more effect than it would be given by the rendering forum. Brosky & Alford, \textit{supra} note 5, at 697. See generally Frank, \textit{supra} note 4.


\textsuperscript{82} See Frank, \textit{supra} note 4, at 796-803.

agreement. Or, if the parties have already reached an overall agreement, they may ask the lawyer to function as a draftsman and to prepare a contract incorporating the agreement of the parties. The attorney who agrees to become involved in either of these situations is embarking upon a dangerous course involving myriad ethical problems.84

Representation of parties with differing interests by the same lawyer is roundly criticized by the Code of Professional Responsibility.85 Several state bar association ethics committees have confirmed this admonition,86 even with respect to cases which are purely "uncontested."87 Moreover, even if the lawyer's role is limited to negotiating an agreement between the parties, such an agreement may be voidable by one of the parties who subsequently asserts that he or she was not represented by independent counsel and did not understand the consequences of the agreement.88

Some jurisdictions have determined that a lawyer may represent one party to a matrimonial dispute and actually prepare a separation agreement if 1) the other party is made fully aware that the lawyer does not represent him or her; 2) the other party is given full opportunity to evaluate his or her need for representation; and 3) both parties consent in writing to the lawyer so proceeding.89 A related issue arises as to whether or not a lawyer can function as a "mediator" between parties although falling short of actual representation. At least one jurisdiction has observed that there is nothing in the Code of Professional Responsibility which prevents the lawyer from functioning as a mediator as long as the lawyer does not represent either party in any proceedings, past, present, or future, and as long as each party is advised in advance of the desirability of obtaining independent legal advice.90 However, a lawyer who func-

84. See Crystal, supra note 18.
85. See ABA Code, supra note 21, EC 5-15. Ethical Consideration 5-15 provides, in pertinent part, that "[a] lawyer should never represent in litigation multiple clients with differing interests. . . ." Id.
87. See, e.g., CONN. BAR ETHICS COMM., FORMAL OPINION 27, supra note 86. But cf. Klemm v. Superior Court, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977) (dual representation permissible where divorce was uncontested and the parties knowingly and intelligently consented).
89. See, e.g., CONN. BAR ETHICS COMM., FORMAL OPINION 27, supra note 86; OHIO BAR ETHICS COMM., FORMAL OPINION 30, supra note 86.
90. See BOSTON BAR ASSOC. COMM. ON PROFESSIONAL RESPONSIBILITY, OPINION 78-1, supra note 86.
tions as a mediator runs the risk of subsequently being charged with bias or with failure to explain all consequences.

D. Legal Malpractice

It has been previously stated that knowledge of the applicable law is essential for a lawyer who is involved in a matrimonial case. This is important not only from the obvious standpoint of basic professional responsibility, but also from the standpoint of potential legal malpractice claims.

Matrimonial practice, unlike other traditional specialized fields such as antitrust, securities, or taxation, has long been considered an area open to any practicing lawyer. Many general practitioners who would never undertake to represent a client in a complicated antitrust matter would not hesitate to represent a client in a complicated matrimonial case. However, doing so involves a serious risk of subsequent malpractice claims.

For example, in the area of financial settlements, failure to advise as to the potential tax consequences of periodic payments and/or transfers of assets can lead to serious and unintended tax liability for the client. Such liability may not be discovered by the client until long after the conclusion of the matrimonial case. The important point for the matrimonial lawyer to keep in mind is that tax or estate specialists should be consulted if there is any doubt as to the tax consequences, intended or unintended, of a financial settlement.

VI. CONCLUSION

The lawyer's role in matrimonial cases is unique and vastly different from the role of the lawyer in other areas of legal practice. The broad range of problems facing the client in matrimonial cases includes economic and emotional problems as well as the traditional legal issues. The effectiveness of the lawyer in matrimonial cases will depend in great part upon his or her familiarity with, and understanding of, the complex emotional and economic decisions which will define the scope of the legal representation to be provided. The attorney must guide the client through the anguish which traditionally

91. See notes 23-25 and accompanying text supra.
92. California has been in the forefront of legal malpractice cases in the matrimonial area. See, e.g., Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Gorman v. Gorman, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (1979) (malpractice cases where lawyers allegedly failed to define properly the assets to be included in a community property claim).
accompanies a marital separation and secure for the client the necessary economic protection. The lawyer's ultimate goal should always be that of achieving an overall settlement which is fair and practical under all of the circumstances. To accomplish that goal, the lawyer must be able to negotiate with the client, as well as with the other party, and must ultimately guide the behavior of the client so as to facilitate the final economic and legal resolution of the marital dispute.