

COACHING, COUNSELING AND GHOSTWRITING: LAMAZE MEETS THE PRACTICE OF LAW

Outline by M. Sue Talia

How to increase the availability of legal services?

- ? Traditional answer: give them away
- ? Pro Bono
- ? How about a better way?
- ? One that doesn't require the lawyer to underwrite the cost?

The birth of a new legal culture

- ? Increased demand for ADR
- ? Increased demand for control
- ? Shared responsibility

Economic pressures; the lawyer's view

- ? More law school graduates
- ? Dwindling client pool in some areas
- ? Increasingly complex law & procedures drive the cost up
- ? Perceived need to protect ourselves against from the very clients we serve
- ? High accounts receivable
- ? Frustrated lawyers
- ? Unhappy clients

Economic pressures - the client's view

- ? Inability to raise a retainer
- ? Unwillingness to pay the lawyer to jump through procedural hoops
- ? Lack of understanding of lawyer's duty to cover all bases
- ? Frustration with the lawyer's inability to firmly estimate final cost
- ? Conclusion: lawyers are just trying to drive up fees
- ? Frustration with congestion and delay built into the system
- ? Frustration with attorney's perceived sinecure as gatekeeper to the courts

Other Pressures - the self help mentality

- ? Buy a book to tell me how to solve it myself
- ? Unwillingness to pay for services deemed unnecessary
- ? Info should be free; I should be able to get it off the web
- ? It's my life; I should be able to make the decisions myself

Other pressures

- ? Retention of control over the case
- ? Low lawyer public esteem
- ? Less willing to just follow lawyer's advice
- ? Profound suspicion of the system
- ? Frustration with excessive litigiousness
- ? Frustration that the lawyer isn't litigious enough (we know who these are)

The result: Unbundling - Redefining the attorney/client relationship

- ? Team approach to solving legal problems
- ? Gives client greater control
- ? Gives client greater responsibility

Unbundling - Redefining the attorney/client relationship

- ? Increases availability of legal services
- ? Recaptures clients who are currently outside the system
- ? Reduces the high cost of litigation
- ? Make the client the primary force solving her own problems

Unbundling - Watching a new system evolve

- ? Consumer driven
- ? Self help based
- ? Frequently anti-lawyer
- ? Experimental
- ? Fluid

Challenge to the private bar

- ? How to develop new practices which are demanded by the changing system
- ? How to implement office systems to maximize efficiency
- ? How to tailor traditional practices to new demands
- ? How to protect myself while the new guidelines are still fluid
- ? How to provide good service at a fair price

Traditional Bar Association's View

- ? Knee-jerk rejection
- ? Full service is the only way; anything else = malpractice
- ? How do you defend the premise that no legal representation is better than some?
- ? Trend in favor across the country

The reality

- ? You can get advice off the internet by typing in your credit card number
- ? This is happening; it isn't going to go away
- ? The Bar can bless it or not, it is here
- ? If it chooses to reject the concept, the Bar simply ensures that the new system will evolve without its input

My Goal:

- ? Point out the pitfalls and practical solutions
- ? Protect practitioners from excessive risk while the system is evolving
- ? Some day, we'll have a body of practice to guide us
- ? It isn't here yet, so here are some suggestions

Defining the Standard of Care - CCCBA model

- ? Recognizes the need for limited services
- ? Provides training for lawyers
- ? Establishes the standard of care
- ? Educates the public and protects lawyers and clients
- ? Available to anyone on videotape
- ? Creates a referral base

Standard of Care - A floor, not a ceiling

- ? Minimum standard
- ? If you know it and don't do it, you're at risk
- ? There is no "bright line," though there will be

Standard of Care - The reality

- ? I can't assure you you won't be sued

- ? I can't assure you coverage
- ? Good news: there are no rules, so we are free to experiment
- ? Bad news: there are no rules, so some of what we try won't work
- ? Standard of care is not relaxed for the areas you commit to do

Why do it?

- ? Thousands of lawyers are trying to make the system better
- ? Willing to strike out and try new things
- ? Even if the official bar doesn't bless it

Analogy to Mediation

- ? 20 years ago, nay sayers were in charge
- ? Carriers didn't approve
- ? Experience: higher client satisfaction and fewer claims
- ? Result: mediators have lower E & O rates

Types of Unbundling: the continuum - "Pure" coaching

- ? Advice only
- ? No drafting
- ? No ghostwriting
- ? Only as requested by the client

Types of Unbundling: the continuum - The vast middle ground

- ? Drafting pleadings
- ? Coaching on strategy
- ? Ghostwriting
- ? Role playing
- ? Researching law
- ? Writing briefs and declarations
- ? Negotiating
- ? Preparing exhibits
- ? Organizing discovery
- ? Drafting agreements
- ? Preparing orders

Types of Unbundling: the continuum - Horizontal

- ? Of record for some aspect of the case
- ? Highest risk
- ? Different retainer agreement requirements
- ? Different file protection requirements
- ? Interface with the courts
- ? Relations with opposing counsel/party
- ? Need to get out of the case at some point
- ? Some judges simply won't allow

Types of Unbundling: the continuum - The phantom "special appearance"

- ? "This is a special appearance; it will be easier if I speak for her"
- ? NOT!
- ? It is a general appearance for limited purposes

Types of Unbundling: the continuum - The variables

- ? Success depends on the right mix of factors -The right client - The right issue(s) - The right judge
- ? Critical that the agreement, file and all interactions consistently reinforce the apportionment of

tasks

Attorney litmus test - Why are you doing it?

- ? Sincere desire to demystify the process
- ? Assist people in taking more responsibility
- ? Innovative and willing to try a new solution
- ? Willingness to document the file completely and differently than in full service cases
- ? Get clients in the door and hand them off to a paralegal
- ? Unauthorized practice of law
- ? Guaranteed to get you into trouble
- ? You still have a duty to supervise
- ? Requires hand-on work
- ? Defeats the purpose if you have to write endless confirming letters to cover yourself
- ? Check your comfort level
- ? Remember, there's no bright line; you have to define it for yourself, case by case

Attorney litmus test - Personality and expertise

- ? Do you have the patience; it's easier to do it yourself
- ? The discipline?
- ? Willing to remain personally involved?

Ethics and Malpractice - Your duty

- ? See that client understands the options for limited representation
- ? Knowingly assumes the risk of reduced services
- ? Advise on collateral issues, even if not asked
- ? Responsible for the quality of advice you do give
- ? Do sufficient factual investigation to spot collateral issues
- ? All this must be documented in the file
- ? How to do this and still make a profit?

Ethics and Malpractice - Your duty

- ? Conflicts screening essential
- ? These folks tend to be "hit and run"
- ? Limitation on representation does not equal limitation on liability

Ethics and Malpractice - Your duty

- ? Most malpractice claims come from failure to advise on an issue about which you weren't asked
- ? Secondary cause; client gets a bad result and takes you to arbitration
- ? Either way, file must be documented (more later on this)

Attorney/client relationship? Yes, but....

- ? Some argue the term is inconsistent with limited representation
- ? In fact, we're redefining what it means

Client Screening - Your ticket to a good night's sleep

- ? Is the client intellectually able to undertake his/her representation?
- ? Emotionally?
- ? Able to understand and knowingly accept the risks of limited representation?
- ? If he refuses to listen, won't accept that he can't win the unwinnable, DON'T take him
- ? He'll just sue you when he loses

Client Screening - The unbundled client from hell

- ? Passive

- ? Unreasonable
- ? Litigation Lifers
- ? Rigidly insisting on what the law “should” be
- ? Unrealistic expectations
- ? Victims/whiners

Client Screening - Poster Child for unbundling

- ? Resourceful
- ? Self-help oriented
- ? Educated about finances
- ? Technical backgrounds
- ? Can gather and organize information

Client Screening - Poster Child for unbundling

- ? Research on his own
- ? Willing to pretend it’s a business transaction, not an emotional crusade
- ? Able to make decisions and accept the consequences
- ? May or may not be educated or sophisticated
- ? Look at the prepaid legal services model

Issue Screening - Some issues can’t be safely delegated

- ? QDRO
- ? Stock Options
- ? Tax
- ? Review a will drafted by the client
- ? Complex litigation

Retainer Letters Overview - Key Elements

- ? Client’s informed consent
- ? Clear delineation of apportionment of tasks
- ? Client’s understanding of the risks of limited representation
- ? Willingness to assume responsibility for part of the case (even if it goes bad)
- ? Clear documentation of any changes to any of these

Retainer Letters Overview - Biggest pitfall

- ? Instructions change; you don’t revise your agreement
- ? How to get around this?
- ? Revise agreements each time the instructions change
- ? Use checklists (in materials) liberally

Retainer Letters Overview - Key elements

- ? Agreements must be tailored to the specific issues and tasks
- ? Different agreements for pure coaching, limited representation behind the scenes and going of record
- ? Samples of each in materials
- ? Tailor them; don’t just copy and fill in the blanks
- ? Must be easily understandable
- ? Boilerplate full service agreement can’t be successfully doctored

Conflicts Management

- ? Easier to mess up when contact is sporadic and limited
- ? No excuses
- ? Any decent contact management software will do the trick

? USE IT

File Management - The key to making it work

- ? For now (until the world catches up with us) file must be BETTER documented than full service
- ? Client does things you won't know about
- ? You have to coordinate apportioned tasks with them
- ? Easier for something to slip through the cracks

File Management - How NOT to do it

- ? Endless CYA letters at client's expense
- ? Endless CYA letters you don't charge for
- ? Off the cuff answers not documented in the file

File Management

- ? Remember, these people will forget some of what you tell them
- ? Especially when it turns out to be harder than they expected

File Management - How to paper your file without going bankrupt

- ? Memos are good
- ? Checklists are better
- ? Fill them out while the client is there (and you're charging for your time)
- ? Make a copy and give one to the client
- ? Now each of you has a record of who's going to do what
- ? Reduces later phone calls and miscommunication

File Management - Papering your File

- ? If you're not willing to take the time to document your file, DON'T unbundle
- ? You're doing it to assist the client and protect yourself

File Management - Questions your file needs to answer

- ? Did I advise client of options for limited legal services?
- ? Of the risks of limited representation?
- ? Did client knowingly waive full service?
- ? Did I advise of relevant deadlines?
- ? Advise of related issues, even if not asked?
- ? Does my file clearly demonstrate all of that?

Client Education - Key risks aren't hard to state:

- ? You may be confronted with things you don't understand
- ? May be unable to get evidence in if you don't know the rules
- ? May fail to understand ramifications of orders and stipulations
- ? Will not be as effective as someone who is familiar with all of the above

Client Education

- ? Do you want to do it anyway?
- ? Note: many of these problems won't even arise until later, when you're in court and I'm not there
- ? It is impossible for me to predict and warn against all of them
- ? Are you willing to take that risk?

Client Education - Alaska ethics opinion

- ? "Disclosure should include a warning that the litigant may be confronted with matters he will not understand, which is the trade-off which is inherent in unbundled legal services"

Client Education - The bottom line

- ? They are assuming the risk in exchange for lower fees and more control
- ? Do they understand the risk and knowingly consent?
- ? State the trade-offs
- ? Does my file clearly demonstrate that
- ? It doesn't have to be beaten to death with a stick, but it does need to be there

Client Relations

- ? Different mind set than full service
- ? Different vocabulary
- ? Team approach, with more equal power balance
- ? More time consumed in conferences and explanations, frequently repeated
- ? Remember, you need to be sure they understand
- ? No transference
- ? Constantly reinforce client's right and responsibility to make judgment calls
- ? Frequently anti-lawyer
- ? Remember, this is consumer driven; they're buying information

Client Relations - Initial Contact

- ? No specific advice over the phone
- ? Your file won't demonstrate it
- ? Do client screening yourself; don't delegate it
- ? Advise of limited services options available
- ? They're more likely to be informed when they sign up

Client Relations - Initial Contact

- ? See interview checklist
- ? Tailor it to your practice
- ? Identify issues presented by the case
- ? Describe risks and benefits of unbundling
- ? Determine if this is a good client/issue to unbundle and decide how far you're willing to go with it

Client Relations - Initial Interview

- ? Note on the checklist what materials you gave them and when
- ? Let them go away and think about it
- ? Most people simply unable to assimilate this much info in one conference
- ? Give them the proposed agreement and checklist

Client Relations - Initial Interview

- ? Include clear info on billing requirements
- ? Must be tailored to specific level of services agreed upon
- ? Deposit in trust? Pay as you go? What about phone conferences?
- ? Use an arbitration provision
- ? Educate them on use of your staff, if any

Client Relations - Later contacts

- ? Use a follow up form (in materials)
- ? Memorialize contacts
- ? Consider speech recognition software to reduce need for staff time
- ? No legal advice by staff
- ? No exceptions; it's far too easy to slip up
- ? Besides, there's no record

Services which lend themselves

- ? Calculating support guidelines
- ? Advice on court procedures and deadlines
- ? Directing to local rules; explaining them
- ? Drafting/reviewing legal paperwork, discovery, motions, etc.

Services which lend themselves

- ? Advising how to obtain relevant info
- ? Packaging relevant info
- ? Preparation of exhibits
- ? Referring to outside services: evaluators, actuaries, appraisers, etc.

Services which lend themselves

- ? Coaching on self representation
- ? Role playing
- ? Preparing orders after hearing
- ? Coaching on how to prepare for a custody evaluation
- ? Directing to outside sources

Services to be Avoided

- ? Anything which makes you uncomfortable
- ? Any area so technical that client is unlikely to understand and apply the instruction you're providing
- ? Highly subjective analysis
- ? Life's too short to lose sleep over this one
- ? When in doubt, don't go there

Horizontal Unbundling

- ? Most people think of this when they think of unbundling
- ? Actually a small percentage of limited service arrangements
- ? Issue based
- ? Almost always involves going of record
- ? Danger of being sucked in for the entire case

Horizontal Unbundling - Some judges will try to dragoon you

- ? If you have one of those judges, don't do it
- ? You'll have a large A/R and an unhappy client

Horizontal Unbundling - What to do if a judge dragoons you

- ? Educate them on how your limited involvement is better for them than none at all
- ? Makes calendars run more smoothly
- ? Educated *pro se* more realistic than ignorant one
- ? Appeal to their self interest

Horizontal Unbundling - Acceptance of service

- ? Tag: you're it
- ? Contract with client not binding on opposing counsel if of record
- ? Don't let clients hide behind this one
- ? If client isn't handling "his" assignments, get out
- ? Unbundling requires good faith teamwork

Client Libraries - How to make it work

- ? Computer support calculations (wipe all data files)
- ? Client related books

- ? Keep it current
- ? Not your old, out of date research set
- ? Do it right or not at all

Billing - NO accounts receivable

- ? Pay as you go; no exceptions
- ? Deposit to trust where you're doing work outside the client's presence
- ? Replenish when exhausted if work is ongoing
- ? Make them bring a checkbook to every meeting

Billing - Different rate for pure coaching?

- ? If rate is lower for unbundled, say so in the agreement
- ? Underscores client's responsibility
- ? "You didn't do anything; I represented myself!"

Billing - If they don't want to pay as you go

- ? Reject them; if they won't pay now, they won't pay later
- ? Automatic failure of the sniff test
- ? Weeds out trouble clients
- ? No transference, no sense of joint crusade against the enemy
- ? If you're not getting paid, why take the risk?

Retainer agreements - Three samples in materials

- ? Take the time to tailor them or don't bother
- ? Combine parts of several to suit your needs
- ? Use checklists and attachments as appropriate

Checklists - Checklists are your friend

- ? Make them understandable
- ? Tailor them to your practice/this case
- ? Both sign off on them
- ? Give client a copy
- ? Revise after each change in assignment; no exceptions

Changing the Rules - What happens when the scope changes?

- ? It will
- ? Frequently results in full service representation
- ? Get a new agreement
- ? Redo the checklists

Changing the Rules - What happens when the scope changes?

- ? A confirming letter to the client won't cut it
- ? When it doesn't work, they'll tell you they didn't understand the consequences

Conclusions

- ? Look to the mediation and prepaid models for guidance
- ? Team approach results in higher client satisfaction
- ? Evolutionary; this is still developing
- ? Create your own systems
- ? Standard of care = a floor, not a ceiling
- ? Pass everyone through the sniff test