Responding to the Value Imperative: Learning to Create Value in the Resolution of Disputes

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RESPONDING TO THE VALUE IMPERATIVE: LEARNING TO CREATE VALUE IN THE ATTORNEY-CLIENT RELATIONSHIP

KENNETH R. MARGOLIS

I. INTRODUCTION — WHY IS IT IMPORTANT TO TEACH ABOUT VALUE CREATION IN LAW SCHOOL?

There is widespread agreement that law schools cannot do everything necessary to prepare students for the competent practice of law.\(^1\) Perhaps law schools are best suited to concentrate on basic legal skills and knowledge building a foundation for the more advanced skills and knowledge that every lawyer must possess in order to represent clients effectively.\(^2\)

Even in clinical programs, there are limits to what can be taught to novice practitioners. How to relate to clients, basic factual investigation, fundamental legal research, how to prepare a simple statement to the court, how to plan for a negotiation — let alone the practice necessary to hone those skills to an appropriate level of effectiveness — are all standard fare for the clinical teacher trying to introduce students to the various tasks lawyers perform in their work.

In addition, the demands of clinic cases usually require exploration of more sophisticated lawyering skills, such as strategy formation and implementation, decision making under uncertainty and sensitivity to ethical dilemmas.

This article discusses another topic for clinical teachers to consider adding to their teaching agendas. In this paper, I identify the "value imperative" implicit in the attorney-client relationship and sug-

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1 AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 8 (1992) [hereinafter "THE MACCRATE REPORT"]).

2 Id. at 233, referring to STANDARDS FOR ACCREDITATION which requires instruction in the "core" curriculum, instruction in "skills," "writing experience," and "duties and responsibilities of the legal profession." See also Jonathan Rose, The MacCrate Report's Restatement of Legal Education: The Need for Reflection and Horse Sense, 44 J. LEGAL EDUC. 548, 559-64 (1994).
gest that a perception by the client of high value in the relationship is necessary for its success. Briefly, I describe value in legal services as the client’s perception of the ratio of benefits received from legal representation to the sacrifices necessary to obtain those benefits. The more the ratio favors benefits over sacrifices, the greater the value perceived by the client. I present a model describing value in legal services and suggest how lawyers (and law students) might study what makes legal services valuable to their clients.

Finally, I posit that it is possible (and desirable) to “create” value in the attorney-client relationship. By this is meant that a lawyer can affect her client’s perceptions, and engage in acts which will exceed the client’s expectations of the benefits to be received and sacrifices to be incurred throughout the representation. I conclude that skillful counseling and context-based decision making at pivotal “value points” in a representation can make the difference between a client who perceives her lawyer’s services as valuable and one who does not.

But why should clinicians teach their students about the need to create value for their clients in the legal services they provide? After all, the vast majority of clinics do not charge for their services. Most clinics have many more potential clients than can be served. And since most clinics serve poor or low income populations, there is certainly no shortage of legal need for clinics to meet.

Moreover, even if we should try to teach students to create value, focusing on clients’ perceptions of value may be more difficult for them because, as neophytes, they may not have their own sense of what is a valuable legal service.

The simplest answer to why we should teach students about value in legal services is that clients’ perceptions of value are affected by our actions, whether we know it or not. We engage in value creation (or destruction) in almost everything we do as lawyers. In the process of representing our clients, we discuss the client’s goals and the means for their achievement with them in order to move the case forward. In doing so, we are engaging in value creation or destruction. If we make choices or counsel our clients in ways that enhance the client’s perception of benefit from the representation, we are likely creating value. If we make choices or counsel in ways that are perceived by the client to reduce benefit from the representation, or increase sacrifices incurred by the client we are destroying value.

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3 For example, in our clinical program, it is not uncommon for a waiting list to exist of one year or longer for routine divorce cases.
Every lawyer deals with the decision making process that is at the heart of what it means to create value in every case with every client. We can ignore the question of whether we are creating value for the client if we wish, but nevertheless, the question is always present.5

There are other reasons to teach about value creation. Clinicians have widely embraced the idea that legal representation should be “client-centered.”6 Client-centered representation means we pay close attention to the client’s goals.7 It means we do our best to accomplish those goals, taking into account the legal framework and factual nuances, the financial and time constraints present, and the various alternative means for accomplishing those goals.8 It means we become, primarily, solvers of a client’s problem.9 Sometimes, it means we help clients solve their own problems.10

To solve a client’s problem certainly implies that we have made the client’s situation better in some significant respect. It means we have at least reduced the uncertainty and anxiety of the client’s predicament. To do this, we must fully understand the client’s situation because, as has been recognized, it is the situation, not the legal “case,” that creates the problem.11

Lawyers might argue so long as we “favorably” resolve the case, we have created value for that client. Unfortunately, clients do not necessarily share that view. Certainly clients care about the result, but they also care about how the result was obtained — how long it took,

5 Teaching about value creation also can help lawyers (and law students) to avoid the emotions of anger and resentment that can develop as reactions to the things some clients do — for example, being tardy to appointments or failing to cooperate fully in the preparation of the case. A clear understanding of the contextual factors a client brings to a representation as well as her expectations of benefit and sacrifice provides a basis for important mutual understandings about goals and means to achieve them.

For an interesting discussion about how such emotional reactions by lawyers can cause them to act as “amoral technicians” see Joseph Allegretti, Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship, 27 Creighton L. Rev. 1, 17-23 (1993).


7 Binder et al., supra note 6, at 19-23; Alex J. Hurder, Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration, 44 Buffalo L. Rev. 71, 76-80 (1996).

8 Binder et al., supra note 6.

9 Id. at 268; THE MACCRATE REPORT, supra note 1, at 148-51.

10 See, e.g., Eric Galton, Representing Clients in Mediation 3-4 (1994) in which the author identifies “pure form mediation” as a method by which the mediator “empowers” the parties “to identify constructive options and solutions” and make them “fully responsible” for those options and solutions.

11 Binder et al., supra note 6, at 14-15.
what financial cost was incurred, what inconvenience or emotional toll the experience exacted, and how empowering or demeaning was the experience.\textsuperscript{12}

In the days when there were fewer lawyers and non-lawyer legal service providers, perhaps the issue of value to clients was less predominant. Clients simply had no choice but to rely on the lawyers available to navigate through the unknown waters of their legal troubles. Times have changed. Beginning in the 1960's, the consumer movement increased interest in the law as a profession, yielding more practicing lawyers and non-lawyer providers. Heightened awareness on the part of citizens about their options for obtaining legal help resulted in a kind of competition in the legal market that previously had been unknown\textsuperscript{13}. Increasingly, clients came to expect that they would receive legal services that they perceive as valuable.\textsuperscript{14}

Trends in modern life affect what lawyers will need to know how to do. Greater internationalization and interdependence of world markets and cultures, growing complexity of scientific and technical issues, longevity of life, cultural diversity and the slowing rate of growth of standards of living, all will have an impact on the shape and purpose of legal institutions and lawyers.\textsuperscript{15} These changes suggest that lawyers should strive to insure that their contribution to a particular activity exceeds their cost.\textsuperscript{16} Not only will greater efficiency be necessary, requiring knowledge of the uses of advanced technology, but the legal profession needs to learn to deal with clients' increasing willingness to look to alternatives to lawyers for the resolution of their problems.\textsuperscript{17}

As pointed out by Professors Mixon and Otto, many areas of law currently stress the notion that clients should receive value in the resolution of their legal problems. For example, the alternative dispute resolution movement has at its heart the goal of finding acceptable

\textsuperscript{12} John Mixon & Gordon Otto, Continuous Quality Improvement, Law and Legal Education, 43 Emory L.J. 393, 409 (1994): “Currently, lawyers tend to think that clients are totally result-oriented. This narrow view, however, does not reflect reality. Clients want direct, realistic, and understandable advice; . . . they want to be treated as partners in the endeavor; they want good value for their money.” See also Henry W. Ewalt, Through the Client’s Eyes 38 (1994).

\textsuperscript{13} Despite the growth of the general population, the ratio of general population to the number of lawyers has steadily fallen from 790 to 1 in 1948 to 320 to 1 in 1991. The MacCrAte Report, supra note 1, at 13; see also Gary A. Munneke, Dances with NonLawyers: A New Perspective on Law Firm Diversification, 61 Fordham L. Rev. 559, 560-65 (1992).


\textsuperscript{15} Id. at 633-634.

\textsuperscript{16} Id. at 631.

\textsuperscript{17} Id. See also Ewalt, supra note 12, at 6; Munneke, supra note 13, at 562.
resolution techniques that will result in greater client satisfaction through more involvement of the client in fashioning creative solutions at lower cost. In criminal practice, the fact that the vast majority of cases are settled indicates that lawyers for government as well as defendants are interested in finding resolutions that both sides can tolerate so as to minimize risk and cost. So long as clients are fully involved in the decision making in such situations, the process has the potential to yield greater value in the result. Contract law, antitrust, labor relations, corporate and securities, family law, tort, property, and administrative law all have shown shifts in basic approach so as to provide greater benefit and less cost, often yielding more value. The tendencies toward greater standardization in the processing of all legal matters — use of forms, check lists, instructions and other transactional aids — are aimed at reducing costs, increasing efficiency and potentially providing greater value.

The question of whether client satisfaction is a legitimate aim or function of law or the legal system may be important for theoretical purposes because it forces us to think about how we design systems to deal with various legal problems. In addition, if we view the law as a consumer product, it becomes immediately clear why client satisfaction and value are important goals to achieve.

No consumer product or service will survive if it does not satisfy its users. An important component of customer satisfaction is value. If the customer does not feel a good value has been provided, she will not buy again, she may complain or request her money back, and may attempt to damage the reputation of the producer by telling other consumers of her dissatisfaction.

Aside from what might be academic concerns about the role of law and lawyers in society, legal practitioners have certainly per-

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19 Id. at 418-419.
20 Id. at 419-423.
21 Id. at 423-424.
23 Binder et al., supra note 6, at 260-261; Ewalt, supra note 12, at 95; Earl Naumann, Creating Customer Value: The Path to Sustainable Competitive Advantage 28 (1995); Mixon & Otto, supra note 12, at 435.
25 Naumann, supra note 23, at 120, in which it is noted that "a dissatisfied customer will tell seven or eight other individuals about his or her experiences."
26 See e.g. Mixon & Otto, supra note 12, at 432-35 in which Professors Mixon and Otto provide a brief overview of the work of Professors Harold Lasswell and Myres McDougal from the 1930's to the 1970's, who through their efforts in applying social science methodology to law "identified eight value categories - power, wealth, enlightenment, skill, re-
ceived a change in the nature of the demands and expectations of clients regarding their services.\textsuperscript{27} It appears that law firms must "get closer to the client" in terms of understanding their needs and desires in order to redefine client service.\textsuperscript{28} These attempts are oriented towards providing more value in legal services.\textsuperscript{29}

These dynamics in the legal services industry have been described by Professor F. Leary Davis as "buyer's market" conditions.\textsuperscript{30} Through a comparison of certain employee statistics in the finance, insurance and real estate industries, Professor Davis documents that the legal services industry is experiencing buyers' market conditions much like the situation prior to the 1960's\textsuperscript{31} when the billable hour came into widespread use.\textsuperscript{32} He claims that buyers' market conditions put a renewed emphasis on client relationships and the creation of new frameworks for legal practice.\textsuperscript{33}

The emphasis on client relationships certainly implicates questions of value.\textsuperscript{34} The purpose of a meaningful attorney-client relationship is to maximize the lawyer's understanding of the client's situation and needs, so that the legitimate goals the client considers important have the best chance of attainment.\textsuperscript{35} Relationships are not static. Either they improve or they deteriorate.\textsuperscript{36} Maintaining and improving positive client relationships is a major component of a lawyer's work on a case.\textsuperscript{37}

Since value appears to be important in achieving an effective, sat-

\textsuperscript{27} See e.g. Joseph V. Walker & Barbara L. Ciaramitaro, Total Quality Management in Action, One Firm's Journey Toward Quality and Excellence 3-7 (1994) in which the authors, lawyers with Plunkett & Cooney P.C. of Detroit, Michigan recount the reasons for undertaking a plan based upon total quality management principles to improve their client relations and the overall level of client satisfaction with their services.

\textsuperscript{28} Id. at 16.

\textsuperscript{29} Id. at 4.


\textsuperscript{31} Id. at 149-151.

\textsuperscript{32} Id. at 157-159.

\textsuperscript{33} Id. at 174-178.

\textsuperscript{34} Id. at 186.

\textsuperscript{35} See e.g. Model Code of Professional Responsibility DR 7-101(A) (1980) (hereinafter "Model Code"), in which a lawyer is admonished not to intentionally "(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, . . ." or "(2) Fail to carry out a contract of employment entered into with a client for professional services, . . ." To similar effect, see Model Rules of Professional Conduct (hereinafter "Model Rules"), Rules 1.2(a) and 3.2 (1983).

\textsuperscript{36} See, e.g., Ann W. Schaef, When Society Becomes An Addict 28 (1987).

\textsuperscript{37} Ewalt, supra note 12, at 40.
isfying attorney-client relationship, it would seem useful, even foundational, for students to learn about value creation in the attorney-client relationship as one of the building blocks for successful law practice. Since law school clinics and some extern field placements are the primary places in law school where the changing dynamics of the attorney-client relationship can be observed and studied, clinical programs can effectively expose law students to the principles of value creation throughout the handling of cases.

This article is an attempt to approach the teaching of value creation in a way that can be applied to any attorney-client relationship. My premise is that value in legal services can be objectively defined by legal professionals, subjectively perceived by the client, or both. My purpose in the article is to suggest that for value to be meaningfully achieved, there must be both “actual value,” and value which is “perceived” by the client.

In Section II, I define value in legal services. In Section III, I present a model for creating value in legal services. In Section IV, I define “value points” and suggest that legal representation proceeds from one “value point” to the next until the client arrives at a final assessment of the value received from the attorney-client relationship. Finally, in Section V, I present examples in which I apply the model to three hypothetical disputes that could arise in a law school clinical practice.

38 Although an argument might be made that some aspects of the clinical curriculum might be taught as well in simulation settings, the dynamics of the attorney-client relationship cannot be studied as effectively in a simulation course. This is true largely because of the difficulty in reproducing the many variables present in a relationship that develops over time between two unique individuals.

39 One way our clinical program exposes students to value creation is to teach students time/billing procedures by which we are able to compare results obtained on behalf of a client with the time and effort it took to achieve them. We can thereby consider financial cost/benefit tradeoffs (through the preparation of mock statements for services rendered) as well as the balancing of more intangible benefits and costs of the legal services rendered. We engage in these discussions near the end of the semester, and do not emphasize “efficiency” over learning at any time throughout the term. Like most clinicians, we stress high quality service by students since we believe, especially at this stage of a new lawyer’s career, that it is more important to instill basic values of thoroughness and superior service first. We do believe, however, that it is appropriate to reflect back on ways in which our work could have provided more value, whether by shortening the cycle time of the case, reducing the cost that a similar client would have to pay or providing more non-monetary benefits that were important to the client.

40 See, e.g., The ABA Guide to Legal Marketing 148, 151 (Gary A. Munneke & Susan Raridon eds., 1995).

41 Although I believe that this model is applicable to transactional legal work as well as dispute resolution, this article’s focus is on disputes. I did this for two reasons: 1) generally speaking, it is probably more difficult to create value in dispute resolution because of the “involuntary” nature of the parties’ involvement; i.e. their options are more limited since they usually cannot choose inaction without incurring some loss; and 2) the benefits and
II. WHAT IS VALUE IN LEGAL SERVICES?

A. Consumer Value in General.

Value in the delivery of legal services is an elusive concept for a number of reasons. Notions of value applicable to other consumer purchases do not neatly apply. When we think about value for most purchases, we compare “what we got” with “what we paid.” When we buy a meal at a restaurant, we consider the taste, texture, attractiveness of presentation and quantity of the food, the decor and ambience of the dining room, the skill and attentiveness of the server and other factors against the financial cost incurred and any waiting period endured. After weighing these factors against one another, we evaluate the extent to which we “got our money’s worth.” We know the answer shortly after the decision to purchase the meal was made.

When we buy a new car or a new suit, we generally perceive, even before the purchase is complete, whether we are getting a “good buy.” Whether clients consider legal services to be valuable, however, depends upon a whole series of events and interactions that take an extended period of time to unfold. Unlike the new suit or restaurant meal situations, usually it is not possible for a legal client to form a final conclusion about whether the services have been valuable until long after the initial decision was made to retain the attorney and to involve oneself in the legal process.

As with other consumer purchases, the ultimate value of legal services is not determined until they are completed. But unlike many other consumer purchases, “completion” may not occur for months or even years (in the case of protracted litigation) after the service begins. All of the client’s perceptions of value prior to the conclusion of the case are based upon expectations of what the ultimate value will be. Those expectations can change as the representation progresses. The changes that occur over time will affect the nature of the relationship and its ultimate value.

Sacrifices present in transactional legal work are more readily understood because they are often defined in financial terms. Therefore, I felt that a better use of the paper would be to apply the model to the resolution of disputes.

42 Of course, our perception of whether we got good value from an automobile purchase may change if the car turns out to be a lemon; i.e. our expectations of benefit as compared to the sacrifices needed to obtain that benefit are not fulfilled. In some ways, buying a car might be like purchasing legal services, in that we live with our cars over time, just as we do with our lawyers. However, the benefits derived from owning and driving the car, perhaps, are more tangible in nature. In addition, those benefits do not center around the interaction between two individuals, where, on an ongoing basis, one provides the value, and the other receives it.

43 EWALT, supra note 12, at 53, 63.

44 Id. at 49-53; NAUMANN, supra note 23, at 28, 118; see discussion of value points infra at 139 et seq.
Nevertheless, contemporary consumers of legal services are prone to think about their transactions in terms of the value received. The same concepts applicable to other consumer products and services can be useful in deriving a workable definition of value in legal services. Such a definition should take into account the various functions lawyers perform.

B. Defining Value in the Roles Lawyers Play.

One function served by lawyers is to help their clients manage complex transactions. In this role, a lawyer helps to "minimize the inevitable risks and costs associated with interpersonal dealing." Thus, lawyers use their knowledge of legal rules and procedures to help clients make decisions that will further their clients' goals while attempting to control for both anticipated and unplanned contingencies.

Lawyers have also been referred to as "information brokers." As such, lawyers use their special knowledge and expertise to inform clients how to comply with the law and avert risk, "by resolving disputes and by fighting efforts by others to take [their] resources."

Another view is that lawyers "make and implement plans" for clients who cannot or do not want to do so on their own. Viewed this way, a client does not want to purchase a lawyer's services per se, but instead, wants to pay for a result or for certain events to occur.

One commentator favors the view that lawyers serve their clients best as "interpreter-consultants" rather than "knight-rescuers." This implies that the appropriate function for a lawyer is to engage the client actively in analyzing the client's own problem and assessing potential courses of action. This is in contrast to a model by which a lawyer simply tells her client what is his problem and identifies the


46 Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 YALE L.J. 239, 255 (1984), in which Professor Gilson refers to lawyers as "transaction costs engineers."

47 Morgan, supra note 14, at 627.


49 Id. at 656-58; Morgan, supra note 14, at 627.

50 Davis, supra note 30, at 176.

51 Id. at 175.

52 Donna Beck Weaver, New Model to Deal with Customers, CALIF. BAR J., Jan. 1994, at 25.
appropriate solution without the significant participation of the client. The key attributes of the interpreter-consultant would include respect, demonstrated empathy with the client's emotional state caused by the legal situation, expertise in assisting the client in resolving the problem, ability and willingness to interpret for the client without condescension, and the ability and willingness to help the client evaluate both the legal and non-legal elements and implications of the available options. Alternatively, a lawyer can "unbundle" her services and permit the client to select which parts of a full-service package the client wishes to utilize. At least three less-than-full-service possibilities exist: 1) the lawyer can serve as a counselor to a pro se litigant; 2) the lawyer can provide consultant services to a client who represents herself in mediation; or 3) the lawyer can engage in preventive lawyering techniques by which the lawyer acts as a kind of "legal health" monitor, periodically checking on the client's business or personal situation to identify potential "soft spots" indicating legal problems, and suggesting appropriate action. Any of these methods result in the client taking a greater role in the resolution of the problem, and the lawyer performing only those tasks that the client feels unable to accomplish herself. Each of these descriptions of a lawyer's function suggests a somewhat different definition of value in legal services. The lawyer as transaction manager provides value when she guides the client towards the most effective solution to the structuring of his transaction. The information broker provides value when she provides necessary and timely advice on how to comply with the law. The maker and implementer of plans provides value by balancing the planning resources available to lawyers against the time it takes to achieve the occurrence of the desired event. The interpreter-consultant and unbundler provide value when they explain the mysteries of the law and the legal process and empower their clients to take on as much as

53 Binder et al., supra note 6 at 16-19.
54 Weaver, supra note 52, at 25.
56 Id. at 426-47.
57 Gilson, supra note 46, at 255. "Transaction" is defined in Professor Gilson's article as "the transfer of a capital asset from one party to another." Id. at 249.
58 Cross, supra note 48, at 656.
59 According to Professor Davis, the six planning resources available to lawyers are talent, commitment, case and other consumable assets, facilities and other nonconsumable objects, information and positioning. Davis, supra note 30 at 176-178.
they wish of the problem-solving role.\textsuperscript{60}

Of course, it is possible for a lawyer to act in one or more of these roles at different times in a case. In whatever role or manner the lawyer creates value, however, for the success of the attorney-client relationship, it is important for her to assist her client in perceiving that value.

III. A Model for Creating Value in Legal Services

A. General Principles.

A view of legal service consumer value that synthesizes ideas of consumer value in general with many of the descriptions of what lawyers do, can be developed based upon the general principles described by Earl Naumann.\textsuperscript{61} According to Naumann, value can be defined as “the ratio of benefits” to the consumer of a product or service “to the sacrifice necessary to obtain those benefits.”\textsuperscript{62} The term “product” refers to the central item or service that the consumer is buying,\textsuperscript{63} while “service” consists of the support services that are provided in delivery of the central product.\textsuperscript{64} “Benefits” of purchase are created by both the product delivered as well as the way it is delivered.\textsuperscript{65} Some benefits can be appreciated by a consumer before the product or service is purchased.\textsuperscript{66} Other benefits can be observed only after the customer has experienced the product or service.\textsuperscript{67} Still others are not perceived until the consumer has repeated experience with the product or service.\textsuperscript{68}

According to Naumann, “expected sacrifices” consist of three categories — transaction costs, life-cycle costs, and risk.\textsuperscript{69} “Transaction costs” are those costs incurred at the initial purchase or those ascertainable costs for which the customer becomes committed at the time of purchase. For most products the main transaction cost is the price of the product or service. Other transaction costs might be a delivery charge, if any, or transportation expenses to get to the site of purchase.\textsuperscript{70}

“Life cycle costs” on the other hand, are those costs, not part of

\textsuperscript{60} Mosten, \textit{supra} note 55, at 422-24; Weaver, \textit{supra} note 52, at 25.
\textsuperscript{61} NAUMANN, \textit{supra} note 23, \textit{passim}.
\textsuperscript{62} Id. at 102.
\textsuperscript{63} Id. at 78-81.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 104-106.
\textsuperscript{66} So-called “search attributes.” Id. at 105.
\textsuperscript{67} So-called “experience-based attributes.” Id. at 105.
\textsuperscript{68} So-called “credence-based attributes.” Id. at 105.
\textsuperscript{69} Id. at 106-106.
\textsuperscript{70} Id. at 106-107.
the purchase price, that must be incurred over the useful life of the product. These would include maintenance and repair costs and unexpected additional charges in connection with the purchase.71

“Risk” represents the possibility that the customer will not receive the benefits anticipated when the product was purchased, or that the ratio of benefits to sacrifices will favor sacrifices more than was originally projected.72

What a customer expects will be the benefits and sacrifices of a purchase may be influenced by contextual factors extrinsic to the actual product or service.73 In the case of many consumer products, such intangibles as corporate image, store name or brand name provide “cues” about the product or service. But often past experience or familiarity with the product or service are also important contextual factors.74

Generally speaking, increasing benefits while holding sacrifices constant, increases expected value.75 Decreasing sacrifice while holding benefits constant increases expected value. Increasing benefits faster than sacrifices yields higher expected value. The greater the expected value, the greater the willingness to buy the product or service.76

In evaluating whether to purchase, the consumer will compare the product or service under consideration with available alternatives.77 The differences in the expected benefits of the products are balanced against their respective sacrifices. The consumer will choose the product with the higher expected value.78

71 Id. at 107-108.
72 Id. at 108.
73 Id. at 113-115.
74 Id. For example, having eaten candy bars in the past leads one to expect the next one will be sweet. A person without experience eating candy, however, may have no expectation whatever regarding the taste of his first piece. The fact that the experienced candy eater has come to expect sweetness when he eats candy, is an important contextual factor of that consumer which probably affects his ultimate satisfaction with the next candy product he eats.
75 The term “expected value” is used rather than “value” because the ultimate decision whether or not a product or service has been valuable is made after it has been purchased and used. The customer’s perceptions of value prior to purchase or use, are therefore tentative or “expected.” NAUMANN, supra note 23, at 117-118.
76 Id.
77 Naumann refers to the item under consideration as the “focal product” and the comparison alternatives as “reference products.” A repeat customer often reduces the risk of the purchase by relying on known benefits of the product already used, and is often unwilling to trade off the known benefits for the risk of lesser benefits of the focal product. Id. at 114-117.
78 Id. at 118.
B. The Model Applied to Legal Services.

These ideas can be applied to the delivery of legal services. A model for creating value in legal services, therefore, would require a lawyer to understand, from the client's perspective, three major groups of factors: contextual factors, expected benefits from the relationship and expected sacrifices to be incurred.\(^{79}\)

When clients come to a lawyer's office they come in context — they have preconceived notions of the benefits they hope to receive and the sacrifices they expect to incur.\(^{80}\) As Naumann suggests, in light of their previous experiences, clients probably create and weigh their perceptions of benefits and sacrifices against their alternatives in order to decide whether to proceed with a particular lawyer or follow a particular course of action. Their alternatives may include not only retaining another lawyer, but also proceeding pro se or with the assistance of a friend or relative, or forgoing legal action altogether.


The context brought to a representation by an individual client might include societal images of lawyers and the legal system in general. Alternatively, it might include any image the client may have of the particular lawyer or firm created by advertising or word-of-mouth reputation, or by the office surroundings and the appearance of the lawyers and staff. Another important contextual factor would be the client's previous experiences with the legal system and whether those experiences were satisfying or disappointing.

Moreover, a client's personal or business situation is an important contextual factor.\(^{81}\) For example, regardless of the merits of a case, a client who is emotionally distraught may present different expectations than one who is not. A client operating a successful business...
may have entirely different needs and expectations than another client with a similar “case” who is struggling to survive.

2. Expected Benefits.

As with other consumer products, the expected benefits from legal services can be broken down into product and service attributes. The legal “product” consists of the core legal work to be performed, i.e. the gathering of facts, the legal research, the drafting of pleadings or other papers, conducting the trial and the like. All aspects of the manner in which the core product is delivered can be considered “service.”

Some expected benefits may exist in the mind of the client before seeing her lawyer, from sources extrinsic to the lawyer. These might include such things as the typical total price for the service (particularly where fixed fee representation is common), the estimated time it will take to complete the case, whether the lawyer has done this type of case before and with what frequency, and her overall competence level as gauged by reputation. Theoretically at least, a client may have compared several alternatives to the lawyer under consideration and determined whether there are any advantages or disadvantages to hiring a particular lawyer even before meeting her.

Other aspects of legal services must be experienced before they can be evaluated. These include the type of relationship (i.e. empathetic, friendly, officious, cold) established after representation is undertaken, costs actually incurred as compared to estimates given at the outset, the manner in which the client is treated by the lawyer’s staff, actual performance in various aspects of the case as observed by the client, results obtained along the way as compared to the lawyer’s representations made in advance about what those results will be, and final results achieved compared to the client’s preconceived expectations.

Finally, some expected benefits are created over time following several experiences with the attorney in the same case or in different cases. These might include the quality of the relationship in various situations and under varying degrees of stress, the trustworthiness of

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82 These are the so-called “search attributes” of Naumann’s taxonomy. See note 66 supra.
83 Some of this information can be gained from media advertising or by telephone inquiries to bar association referral agencies. It must be acknowledged, however, that at least with respect to many low income clients, the ability to engage in this type of comparison shopping is limited by such things as cultural barriers and the lack of sophistication and knowledge about the relevant questions to ask.
84 Naumann’s “experience attributes.” See note 67 supra.
85 Naumann’s “credence attributes.” See note 68 supra.
the lawyer and the accuracy of her predictions, and reputation among other clients, other lawyers or court personnel.

3. Expected Sacrifices.

All of the costs associated with purchasing legal services that can be known in advance can be considered transaction costs. These might include any fees or expenses that are paid in advance and the estimated fees and expenses over the life of the case that are known in advance. They might include expected levels of inconvenience and anxiety, as well as opportunity costs incurred through engagement in the legal process. The transaction costs of legal services are a major part of the sacrifices clients must accept when they hire lawyers.

Life cycle costs, on the other hand, include those additional fees or costs which must be incurred but were not anticipated at the outset. These can occur as a result of unforeseen events in the life of the case. These also include financial and emotional costs and inconvenience that must be endured due to the requirements of the case but which were not specifically anticipated.

The final category of sacrifice a client must accept is risk. The risks of using legal services include that the result will not be what the client wants or expects, that the lawyer or system will not treat the client in accordance with the client’s expectations, that the services will cost too much, or take too much time, or that the process will be more of an inconvenience or emotional strain than anticipated.


It is well-recognized that lawyers do not necessarily perceive the benefits and sacrifices from legal services in the same way as their clients. Lawyers often feel that the benefits to be gained from the use of their services are greater than do their clients. Likewise, lawyers do not always appreciate that their clients’ acceptable level of sacrifice may be quite different than their own.

C. Understanding the Client in Context; Determining Expected Benefits and Sacrifices.

The previous discussion suggests that creation of value in the lawyer-client relationship requires the lawyer to understand the client in a way that goes well beyond the facts and circumstances of the particular matter under consideration. In fact, from a value creation perspec-

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86 Binder et al., supra note 6, at 260-65.
87 Id., at 284-85. It is not surprising to find that lawyers and their clients have different priorities. Tolerance for risk, delay, expense and inconvenience as well as the desire for vindication or precedent creation vary from lawyer to lawyer and client to client.
tive, it is as important to understand "where the client has been" as it is to appreciate the facts and circumstances of the current dilemma. Careful client interviewing with these goals in mind will reveal the important determinants of value in the relationship.

1. Determining Client Context.

In order to understand a client fully, an attorney must attempt to ascertain both the client's personal and situational context.

a. Personal Factors.

"Personal factors" include the client's demographic background, socio-economic status, prior experience with the legal system and lawyers, and any preconceived ideas about the legal system, lawyers in general or the particular lawyer involved, based upon word-of-mouth references, advertising or reputation. Other personal factors include more intangible personality traits, such as aversion to risk, ability to take responsibility for, and follow through on, assigned tasks, patience, capacity for compromise, and ability to understand and assist in decision making choices.

Some personal factors can be determined by using a client questionnaire. For example, demographic and socio-economic information concerning age, gender, race, religion, marital status, occupation, annual income, and the like can be provided before the lawyer meets the client. Likewise, initial summary information about prior experience with the legal system and lawyers can be provided on such a client information form.

Other personal factors can be obtained by in-depth interviewing. Questions designed to reveal a client's feelings about her experience with the legal system or lawyers and her reactions to any media images or advertising to which she has been exposed may be particularly helpful in understanding the context the client brings to the representation. A client's timeliness in connection with her initial appointment, as well as her attentiveness, inquisitiveness and appearance at the interview are sometimes revealing factors, because they may suggest the seriousness with which the client may approach the matter and the degree to which she may want to be involved in decision making.

Some personal factors can be determined only after working with the client for a period of time. The degree to which a client wants to be kept abreast of developments, or to take an active role in the management of his case, for example, are arguably such factors. Some of the information obtained through interviewing might lead to reason-
able inferences about such factors.\textsuperscript{88} And, of course, lawyers can explicitly discuss with the client what kind of lawyer-client relationship the client wants.

b. \textit{Situational Factors.}

By \textit{“situational factors,”} I mean circumstances that surround the dispute at issue, whether material to the dispute or not. These make up the \textit{“story behind the story”} in that they place the particular matter in the flow of life events of which it is only one part. Although the legal matter at hand may seem of primary importance to the lawyer, it may only be of passing significance to the client because of other more critical events occurring in his or her life. Alternatively, what seems a \textit{“routine”} legal matter to the lawyer may take on great psychological importance to the client. Also, a legal matter may have great priority in the mind of the client at one point in the case and at other times be relatively unimportant.\textsuperscript{89}

Situational factors can best be obtained by a thorough understanding of the client’s complete profile. An effort should be made to understand not only the facts and circumstances directly relevant to the legal matter, but also the client’s surrounding circumstances. How important is this matter to the client at this time? Why is it important to the client? Is the client’s situation likely to change over time? Will changes in the situation change the importance of the case over time? How emotional is the client about this case? Why are the client’s

\textsuperscript{88} For example, a client who asks a lot of sophisticated questions about the way the matter will proceed, may be someone who wants to be involved and kept aware of the progress of the case. Likewise, a client who has a steady job and earns a respectable income, may be able to accept a greater degree of responsibility in the management of the case. On the other hand, a client who is unable to complete the client information form or seems confused about simple explanations concerning the process, may need a greater degree of input from the lawyer when it comes to making even “small” decisions.

\textsuperscript{89} Situational factors may often drive a decision whether or not to sue or settle a case at a particular time. For example, if the two parties to a divorce case are getting along with respect to the children, property issues may be more easily resolved. On the other hand, if one party is still grieving over the infidelity of the other, no amount of rational discourse may persuade him to resolve what may seem to the lawyer to be relatively insignificant financial issues.

In a business context, if cash flow has been poor over the last few months, it is unlikely that sound cost/benefit analysis and discussion of the poor chances of success at trial will lead the owner to settling now for money he believes he cannot afford to pay.
emotions in such a state? Is there a more effective way to deal with the facts and emotions that are driving the client?

A clear understanding of the client’s context will help create the decision making agenda for the case. Clients will most likely respond “rationally,” and follow a reasonable decision making agenda, if their lawyers show an appreciation for the context in which they find themselves. By addressing the contextual factors known to exist when counseling the client, the client will perceive that the lawyer is suggesting a course of action that is tailored to her needs. This is more likely to create value in the relationship than if the client believes the lawyer is simply providing the “standard” legal remedy for the client’s problem, without taking into account her unique circumstances. 90

2. Determining Expected Benefits.

In order to determine the benefits a client expects to obtain from legal representation, there probably is no substitute for a frank discussion of why the client has sought legal help. The MacCrate Report views this as a fundamental lawyering skill. 91 However, for value creation purposes, it is important to note that benefits of representation can and do include more than just a “favorable” result; good process is important as well. Therefore, lawyers should make it their purpose to determine at least two types of expected benefits: 1) “desired results” from the representation and 2) “process factors” which will lead to the results.

a. Desired results.

Most clients come to their lawyers with some sense — sometimes well-informed, sometimes not — of how they expect their cases to be resolved. It is important for lawyers to understand such expectations so that they can tailor the representation to provide the best chance of fulfilling those desires. It is also important to understand those expectations in order to determine if they are realistic. If they are not, there is little chance that the client will be satisfied at the end of the case. 92

Often, lawyers can help to fashion reasonable expectations about the results obtainable. 93 In such situations, the lawyer must be careful to be realistic himself. As a general rule, it is probably advisable to proceed in stages, talking in general terms early in the representation

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90 See e.g. Binder et al., supra note 6, at 22-23.
91 See e.g. The MacCrate Report, supra note 1, Skill 6.2 at 178-79.
92 This is true unless the client’s expectations are unreasonably low, in which case he may end up delighted when results occur which are better than expected.
93 This can be referred to as “managing” the expectations of the client, and is considered an important determinant of a client’s perception that high quality services have been provided. Zeithaml et al., supra note 81, at 125.
and gradually becoming more specific and concrete about obtainable results as more information is obtained. As the relationship develops and trust grows, the client should be more willing to listen to the lawyer’s attempts to modify the client’s expectations.

Attorneys should resist the temptation to respond with a definite evaluation too early in the case even though that is what some clients want to hear. Such resistance may result in some clients choosing a different lawyer who is willing to be more concrete. Any lawyer who does this, however, does so at the risk of jeopardizing the client’s value perceptions because a client who is “promised” one thing and does not ultimately receive it will rarely be satisfied with the representation.  


Expected benefits pertaining to the process of legal representation include how the client expects to be treated by the lawyer and her staff, e.g. with deference, politeness, warmth or distance; how responsive the lawyer will be to the client; the extent to which the lawyer will “shield” the client from the adversary, his attorney and a hostile legal system; and how much the lawyer will minimize the inconvenience from the case. Such expectations can come from advertising, personal relationships with lawyers, unspoken bottom-line thinking, 

94 Id. at 123. This problem is common in criminal defense practice, where many clients would like to be told initially that they will “get off.” Some clients who do not receive this assurance at the first contact will go to another lawyer. Such an assurance, when made at such an early stage in a criminal case, rarely has any direct relationship to the actual result obtained. A better practice is to explain to the client in as much detail as necessary why it is not possible to provide the assurances the client desires. The lawyer can provide, however, an assurance that she will do everything possible to obtain the client’s desired result, and will advise him promptly when she knows whether the desired result is achievable.

95 For example, a client whose only exposure to the legal system has been television advertising by lawyers who are advertising for personal injury claims, may have an impression of lawyers that bears little resemblance to an actual lawyer he consults regarding a real estate transaction. Such a client may expect that all lawyers work according to a contingent fee structure. If this is the client’s expectation, he may be shocked to learn that he will be charged a fee according to an hourly rate and time spent on his case.

96 A client who has relatives who are lawyers and has talked with them about the legal process and the lawyer-client relationship, may expect as a benefit of the representation, a willingness on the part of the lawyer to carefully and thoroughly explain all aspects of the case. Of course, this presumes that the lawyer relatives are client-centered lawyers. If they are more traditional in their approach, the client may in fact expect to have little input in decision making. If that client is met with a more client-centered approach, he may feel 1) deprived of the benefit of being told what to do by a knowledgeable professional, i.e. isn’t that what the lawyer is being paid for? or 2) pleasantly surprised at the degree to which his opinions and feelings are being considered, i.e. receiving the benefit of empowerment. Which reaction he experiences will be determined by whether he sees lawyer control as a benefit or a sacrifice.

97 Consider a business client who retains a lawyer to handle a piece of commercial
or other experiences or circumstances that cause the client to expect certain attitudes or actions from his lawyer. If these expectations are discussed and evaluated with the client, an important and realistic understanding about the nature of the relationship can be reached between the lawyer and client. Such an understanding will assist greatly in creating value as the matter proceeds.

3. Determining Expected Sacrifices.

As stated earlier,36 the three broad categories of sacrifice in legal representation can be described as transaction costs, life cycle costs and risk.

a. Transaction Costs.

A client will usually be able to discuss his expectations concerning transaction costs once his attorney describes the various known costs associated with commencing his case. Obviously, this discussion should take place as early as possible. The client's view of the proper balance between benefits and sacrifices must be the determining factor in whether to proceed. Thus, the client should be able to weigh the attorneys' fees, discovery costs, document preparation fees, inconvenience, effect of the passage of time, lost opportunity costs and all other costs which can be anticipated, against different reasonably foreseeable scenarios of benefit, in order to arrive at an expected value in proceeding in one way or another.

b. Life Cycle Costs.

Life cycle costs are the type of sacrifice that pose the greatest threat to achieving high value in legal representation.37 Where life cy-

litigation. In the scope of her business, this litigation is of no major consequence even though it may be interesting and financially worth trial. The executive might, however, expect the lawyer to completely take care of it without taking her away from the daily operation of her firm. This benefit of "no inconvenience," however, might hinge upon an unspoken bottom-line expectation that the case can be resolved within certain defined financial limits. Once the client learns that the payout may exceed those limits, "no inconvenience" may be a less important benefit than keeping the amount paid within acceptable limits.

36 See text supra at 127-28, 131.

37 In fact, most efforts at reform in pricing for legal services have been aimed at reducing or at least accurately predicting and controlling life cycle costs. The movement requiring careful budgeting on the part of outside counsel by in-house corporate counsel reflects this concern. Other examples of innovative billing methods which are aimed at reducing life cycle costs include: "task-based billing" (by which lawyers charge flat fees for specific tasks such as drafting the complaint, filing a particular motion, conducting discovery or trial, etc.); "value billing" (fees are dependent upon the actual result obtained, usually with a minimum charged to cover basic costs coupled with a bonus for a particularly favorable result and a discount for a less than expected result); "fixed fee" (one flat fee for an entire
cle costs are destined to be a significant portion of the overall sacrifices incurred, (as in most litigation) the best the attorney can do, in many cases, is to give rough estimates of their nature and extent. It can be very difficult to predict life cycle costs accurately in advance when the variables that determine them are unknown. For example, until the attorney has a good idea of the extent of discovery that will be necessary in litigation, she cannot tell the client what the total deposition costs will be. Moreover, throughout a representation, circumstances often change in unanticipated ways which may result in an increase or decrease in life cycle costs. An aggressive adversary or attorney, a particularly demanding judge, difficulties in obtaining information, legal precedent that is in flux — these are examples of circumstances that can increase life cycle costs.

To compound the problem, clients typically do not have a useful frame of reference by which they can understand the nature of life cycle costs in legal services. There are few other endeavors that require as continuous, extended and unanticipated an expenditure of resources, time and emotional commitment as legal proceedings. Thus, for clients confronted with long-term legal proceedings, the nature and extent of the life cycle costs often are a new experience. In a sense, they present a mine field of possible disappointments and unmet expectations. Inexperienced clients, in particular, rarely come to their lawyers with realistic expectations regarding the life cycle costs they may incur.

In order for a client to have accurate information pertaining to life cycle costs and maintain her perception of value, it is very important for the attorney to prepare the client for them as accurately as possible, and to update the client regularly as to the effect on such costs of unanticipated events. The client should be able to make new choices based upon that new information, even to the point of radically changing a course of action previously determined.100

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matter); and "contingent fee" billing (fees are a pre-determined percentage of the amount recovered, or the amount saved from an agreed payout figure, after the case is concluded). Expenses of litigation, lost opportunity costs, the time value of money and the emotional strain of ongoing legal proceedings are also important life cycle costs which can reduce the value of a representation. See generally Richard Reed, Billing Innovations New Win-Win Ways to End Hourly Billing 133-58 (1996).

100 See THE MACCRAE REPORT, supra note 1, Skill 1.5 at 147-148 which identifies as fundamental, the skill of being open to new information and the ability to change earlier decisions when necessary. In this context, the attorney might describe other situations she has experienced in similar cases, and describe unexpected events which caused life cycle costs to increase. The goal is to provide the client with a broad enough perspective about the uncertainties of litigation so that surprises are not such a shock.
c. **Risk.**

The client's acceptable level of risk is perhaps the most difficult expected sacrifice to determine. "Risk" for value creation purposes refers to the chance that the expected benefits will not be obtained. Therefore, it is necessary to ascertain the client's attitudes about risk in the event that the desired results and process are not achieved. These attitudes may change throughout the course of the representation. Moreover, the client may anticipate tolerance of certain less desirable results, but when those results actually occur, the client may be less tolerant than expected. Thus, lawyers should discuss with clients specific less desirable results and process factors so that they will understand, as accurately as possible, the specific consequences of proceeding in a particular way.

An important relationship exists between risk and the extent to which a client's expectations of benefit and sacrifice are realistic. Generally speaking, the more realistic a client's expectations, the lower the risk that they will not be met. A lawyer can play an important role in value creation by minimizing the risk inherent in representation. By helping the client to develop and maintain realistic

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101 See note 72 supra and accompanying text, and text supra at 131. This definition should be contrasted with a definition of risk that more broadly refers to the chance that certain anticipated negative outcomes may occur. It is possible for high levels of risk to exist in this more general sense, while low levels of risk are present from a value creation point of view. For example, consider an accused murderer who faces the death penalty if convicted at trial. The state offers him a plea to a lesser offense which carries a mandatory sentence of life in prison. The defendant's attorney assesses his chances of acquittal at trial at no better than 50%. Therefore, the risk of a guilty verdict resulting in the death penalty (an anticipated negative outcome), seems high if the case is taken to trial. However, if spending his life in prison is perceived by the accused as a greater sacrifice than death, trial presents a lower risk alternative from a value creation point of view. This is because there is only a 50% chance that he will be convicted and sentenced to death (the lesser sacrifice) if he goes to trial, as opposed to a 100% chance that he will be given a life sentence (the greater sacrifice) if he accepts the state's offer.

102 For example, a client who expects the benefit of minimal intrusion into his personal affairs but who is inclined to proceed to trial may reconsider the trial option once he is informed about the invasive manner in which he may be cross-examined. Likewise, a client who is inclined to accept an unreasonably low settlement offer in order to conclude the matter quickly, may reconsider once the long term costs of the injury suffered are made known to him. In the first example, the risk of losing the benefit of non-intrusion might be great enough to dissuade the client from proceeding with the trial option. In the second example, the risk of less than complete compensation for the injury suffered may move the client towards holding out for a better offer.

In such cases, the risk involved may require the client to choose between two conflicting benefits. The first example pits the benefit of non-intrusion against the benefits to be obtained by going to trial, i.e. perhaps acquittal. The second example creates tension between the benefit of speedy resolution and the benefit of adequate compensation. The client will have to decide which benefit takes priority and make a decision accordingly. For techniques that can be used to help a client make decisions in such situations, see Binder et al., supra note 6, at 347-56.
expectations, the attorney minimizes risk thereby reducing expected sacrifices, and enhancing value.103

IV. VALUE POINTS IN THE DELIVERY OF LEGAL SERVICES

The lawyer-client relationship can suffer when a lawyer does not understand her client's expectations of benefit and sacrifice.104 These are subjects concerning which there should be an early meeting of the minds. Then, after such an understanding exists, it must be tested and refined, challenged and recreated at various points during the course of the representation. These challenging moments can be referred to as "value points." At these times, the client evaluates (often subconsciously) whether she is getting sufficient value from the legal services to justify continuing with the present course of conduct, or with the representation itself.

A value point can be described as a point in time during the course of a legal representation when the client "recomputes" (figuratively in most non-monetary cases) the expected value from the representation. If sacrifices have now exceeded benefits, the client may perceive little or no value in continuing the representation. This does not necessarily mean, of course, that the client will withdraw. Often that option is not available.105 Even in such a case, however, a client can react to low value. He may simply write off the case and either refuse to cooperate altogether, or not pay much attention to his lawyer or the proceedings. He may insist that it be settled at all costs in order to end the matter. In any event, the dissatisfied client will probably not return to this lawyer again, and may very well spread negative information about him and the legal system so as to damage his reputation and the image of the profession in the community.106

Fortunately for lawyers, there may be a relatively wide "zone of indifference" or "acceptability" in the delivery of at least non-routine legal services.107 Especially early in a representation, clients will prob-

103 See ZEITHAML ET AL., supra note 81, at 20.
104 Id. at 51 et seq., in which the authors discuss their model of service quality. They describe five "gaps" between the producer and a consumer of a service which lead to customer dissatisfaction. Gap one, known as the "research" gap, describes the situation where the producer does not understand the customer's wants, needs and desires and therefore has difficulty fulfilling them. See also NAUMANN, supra note 23, at 94-96.
105 For example, an indigent criminal defendant who is not happy with how his case is proceeding probably has little choice but to continue with his appointed lawyer. And many low and middle income clients who retain counsel may have insufficient resources to start all over again with new counsel if dissatisfied.
106 EWALT, supra note 12, at 116; NAUMANN, supra note 23, at 129.
107 NAUMANN, supra note 23, at 111-12; "Around a perceived reference point, customers often have a pricing zone of indifference. Within this zone, buyers are indifferent to both price increases or price decreases." Customers also have a "zone of acceptability, ...
ably tolerate some unexpected sacrifices before they perceive lower value and feel dissatisfied. This is probably due to the difficulties most clients have in comparing what they are experiencing with what they might be experiencing if they hired another lawyer or pursued some other alternative.\textsuperscript{108}

Value points can occur at many points during the course of a representation. It is probably safe to say that they occur in every lawyer-client interaction, every time a client comes in contact with a staff member in the office, perhaps in every telephone contact, certainly every time the client appears in court or at a formal meeting in the case, when the client receives a bill for services, when interlocutory victories or losses occur, and when the final result is realized. The significance of the particular value point may vary from having a minor effect on the client's overall perceptions of value (as in the case of telephone contact with the receptionist) to having potentially great impact on the client's sense of value (as in the case of the final judgment or settlement in the litigated case.)

A lawyer can affect the client's perception of value when it changes due to unexpected occurrences in the case. By being aware of the effect of various interactions and events on the value perceptions of the client, the lawyer has the opportunity to engage the client in a new assessment of reasonably obtainable benefits and means to achieve them. By doing this, the client's expectations of benefit and sacrifice from continuing the representation can be modified by the lawyer's assessment of the case. Necessary changes to the representation can be made, and the lawyer can thereby create value for the client.\textsuperscript{109}

V. Application of the Model

The following examples are hypothetical amalgamations of actual cases and do not completely recount the events of any single case. I which is wider than the zone of indifference." This zone "has a lower price threshold, below which demand will not increase, and an upper threshold, above which there will be no demand." Zones of acceptability narrow "as products become more standardized." As applied to the delivery of legal services, zones of indifference and acceptability should be dependent upon all sacrifices involved in legal representation, not just financial cost. In addition, for routine legal matters, one would expect these zones to be narrower than in complex cases. See description of William Cobb's "value curve" in Reed, \textit{supra} note 99, at 133-135.

\textsuperscript{108} NAUMANN, \textit{supra} note 23, at 112.

\textsuperscript{109} See note 93 \textit{supra}; see also Milton W. Zwicker, \textit{How to Create Client Value}, Law Practice Management, September 1996, at 48-51 in which the author's discussion of "Client Contact Points" is a useful guide for the points at which value can be created as a result of administrative or non-substantive contacts as opposed to the more substantive value points discussed herein.
have attempted to make the examples as realistic as possible while choosing situations that illustrate the concepts of the model. In each example, I have described the overall case scenario and described a set of client expectations. I have highlighted the important contextual facts and the significant benefits and sacrifices anticipated by the client, which lead to an expected value from the representation.

Following the discussion of the facts in each scenario, I provide what I hope are a plausible series of hypothetical value points. After analyzing each situation, I provide some suggestions to either maintain or create additional expected value. Of course, there could be a variety of different value points in each case.

The first example presents a client who has realistic expectations about what is obtainable through the legal system but has no experience with it. The second example illustrates a client who, also without experience, perceives no benefit from the use of a lawyer in his case. The last example presents a client with significant experience with the legal system but unrealistically high expectations.\[1]

A. Example 1: A Simple Divorce Case

A new divorce client came to the law school clinic. This was her first experience with a lawyer. It was her first marriage, and hence first divorce. She had a decent job and had no children. Her husband worked, but she had not seen nor heard from him in over a year. That was sufficiently long to obtain a "no fault" divorce. There were no assets or debts to divide. She had entered into a new relationship and would become engaged to marry as soon as her divorce was finalized.

The client knew nothing about the clinic other than it was free. She was told about the clinic from a friend who got a divorce with the help of a clinic student. The client’s friend was satisfied with the result, but was a little frustrated by the student lawyer who handled her case because he required several interviews to go over things that the client did not feel were very important. In addition, the student often repeated the same types of questions. Otherwise, the student found the

\[1\] These examples can be used by clinical teachers to raise and discuss issues of value with their students.

Students can be asked to analyze each set of facts for contextual factors, expected benefits and sacrifices, and to evaluate whether the client’s expectations are realistic. Discussion of the value points raised will cause students to appreciate the dynamics of the attorney-client relationship and to confront many complex counseling issues. Instructors can either provide the analyses and suggestions or ask the students to devise their own.

A fourth example, illustrating a client with experience with the legal system and realistic expectations about what can be accomplished, has been omitted for space considerations. The example involves a client who wishes to stop the unauthorized use of intellectual property by a former business partner. Interested readers may contact the author for copies of this example.
clinic staff to be helpful and considerate as well as concerned about her well-being. The friend's case was a simple default divorce, with no property, no children and no spousal support. It took about three months to complete.

The new client investigated what lawyers charge for simple divorces. She found that she could hire a private lawyer for about $250 plus court costs for an uncontested divorce. She also checked with Legal Aid, but she was not eligible for their services. She was told by several attorneys that an uncontested divorce should take about three months to complete. She had not consulted with any other lawyers, but came to the clinic considering that she might do so if she was not happy with the clinic's services.

CONTEXTUAL FACTORS:

Personal:
- no experience with an attorney
- first experience with the legal system
- clinic image was of a caring place, but perhaps a little inexperienced
- no particular preconceived notions of lawyers or the legal system
- believed she had a simple case that should be even quicker than her friend's case

Situational:
- entered new relationship, desired to remarry

EXPECTED BENEFITS:

Process Factors:
- no cost versus $250 fee plus costs
- case should be over in three months or less
- would be represented by a committed student supervised by an attorney
- would be treated well and would feel that people cared about her

Desired results:
- to get divorce without any trouble within three months, since she had not seen her husband in over one year

EXPECTED SACRIFICES:

Transaction Costs:
- would have to pay only court costs, parking and transportation costs to the lawyer and court
Life Cycle Costs:
- parking and transportation costs
- may be inconvenienced from time to time

Risk:
- she might be inconvenienced by an inexperienced student lawyer more than she expected
- the divorce would not be easily obtained
- it would take longer than three months

INITIAL EXPECTED VALUE: In this client's view, the benefits of obtaining the divorce through the clinic exceeded the minimal sacrifices so that expected value from using the clinic was likely to be high.

Value Point #1:

Situation:
At the first interview, the student intern appeared competent and efficient in asking questions and obtaining information. The student confirmed the "normal" time table, but suggested to the client that obtaining the divorce might not be as easy as the client expected because her husband could decide to contest it.

Analysis:
The expected benefits increased because this student seemed experienced. However, the expected sacrifices also may have increased because of the client's perception that there was an increase in the risk that the divorce might be more difficult to obtain. If that was a justified perception, it actually raised the risk and lowered the expected value from the representation. If it was not a justified perception, however, the student may have lowered the expected value of his services unnecessarily. This happened because the assertion that the divorce might be contested by the husband conflicted with the contextual fact that the client believed the divorce would be easily obtained.

Suggestions:
Although it was possible that the husband might contest the case, it did not seem likely since the client had neither seen nor heard from him in over a year. It was probably not necessary at that point in the case to emphasize that possibility. Raising unjustified concerns about the husband contesting the case increased the risk that the client's expectation of easily obtaining the divorce would not be fulfilled. To maintain, and because of the student's apparent competence, even increase expected value it may have been better not to raise those
Another, more productive way to have raised the possibility that the case might become contested would have been in the context of discussing the time it would take to complete. The intern might have made explicit the assumptions upon which the time estimate was based, including that the case would not be contested.112

Value Point #2:

SITUATION:

On the way out of the office, the receptionist warmly bid the client a good day.

ANALYSIS:

This probably did not increase expected value, because the client's context included this expectation. If the receptionist had been rude, however, it would have had a negative impact on the expected value because the client believed the firm would be friendly.

SUGGESTIONS:

It was important to understand the client's preconceived notions of how she would be treated in the office. This could have been ascertained in the initial meeting by asking the client what she had heard about the service provided at the clinic. Even if she had heard nothing, however, she was likely to have had expectations about how she would be treated. Some explanation about the roles of office staff, whom the client might talk to for information, and how staff were expected to treat clinic clients would provide a basis for discussion which would enable the intern to ascertain the client's expectations. Every effort should have been made to meet or exceed those expectations.113

111 BINDER ET AL., supra note 6, at 317 in which it is pointed out that a client need only be counseled as to those alternatives that are "pivotal or pertinent," as opposed to all possible alternatives. In addition, the authors note that depending on the situation, it is not necessary to counsel clients concerning "extreme possibilities" where "the chances of their occurring are remote." Id. at 339-40.

112 A time line is helpful in delineating the lawyer's responsibilities and establishing accountability for both lawyer and client. EwALT, supra note 12, at 41.

113 Receptionists and secretaries play an important role in a client's perception of the seriousness with which her case is taken and in the quality of service of the office in general. Id. at 145-48.
Value Point #3:

**Situation:**

After the first attempt, a problem in service of process occurred because the address given for the husband was not correct. The intern relied on the client's account of the address. Three weeks were lost due to the delay by the court in notifying the clinic of the problem. The intern needed to contact the client and inform her of the problem. A new address had to be ascertained and the delay explained. The intern called the client and informed her of the problem. The client claimed to have no other knowledge of the address. The intern indicated that without a better address, service could be performed by publication but that would delay the case another eight weeks. The client was unhappy about that prospect.

**Analysis:**

Two things happened that most likely reduced expected value. First, the intern did not anticipate the service problem in the initial interview so as to get the best possible address. Second, the intern did not seem to have a satisfactory solution for the problem since the only suggestion made was one that would delay the process by eight weeks. Given the client's contextual belief that the process would be sure, short and simple, the client probably questioned her initial view that the intern was competent. She wondered if she made the right choice in hiring the clinic.

The intern understandably felt it was not his fault the client did not provide a good address. He saw the problem as one beyond his control and felt he was doing the best he could given the facts presented.

**Suggestions:**

The challenge presented was to reduce the perception of increased sacrifice on the part of the client. If the intern had made explicit the assumptions upon which the original time estimate was based, he could have reminded the client of this fact and perhaps the increased sacrifice due to the delay would have been offset by the increased confidence the client would have gained because the student anticipated this problem in the beginning and was consistent in his handling of the issue when it arose.

Next, the intern should have explored other possible means of obtaining a better address, before raising the client's stress by discussing service by publication. The client may not have considered such sources as friends, relatives or work acquaintances. The intern might
have obtained such information beforehand, or pursued any such known leads before contacting the client about the service problem once it arose.

Finally, if appropriate, the intern should have taken some responsibility for not anticipating the problem at the initial interview so as to reduce the cycle time for the case. If practicable, the intern could have suggested ways in which the case might be shortened later so as to make up the time lost waiting for service to be perfected.114

Value Point #4:

Situation:

Service was properly accomplished and the husband did not respond. The case was scheduled to proceed in a default posture. When the client came to the office to prepare for the hearing, she told the intern that her husband called her and wanted to know if he should come to court. She told him that she would ask her lawyer. The intern told his client that her husband did not need to come to court, but he could do so if he desired. The client reviewed the papers, signed the necessary documents and left the office.

At the hearing, the husband appeared without counsel. He had not seen the papers submitted to the court. When the case was called, the husband requested a continuance to get a lawyer. The continuance was granted for thirty days. The client was unhappy about the continuance.

Analysis:

The client wanted to know how this could happen when her husband previously had not appeared in the case. Her confidence in the intern was shaken because he was not able to prevent the continuance. She was worried about what would happen to the case when her husband got a lawyer. Building on the earlier service problem, this could have become a crisis point in the representation. Unless the intern rehabilitated the client's falling perception of value, this client might have sought representation elsewhere since the delays may have caused the sacrifices perceived by the client to fall outside the "zone of acceptability."115

114 By reviewing the process and procedure with the client at this point, it might have been possible to find ways to shorten the original time line. See id. at 49-50. Extra effort to insure service of process was correctly accomplished would be important to exceed the client's expectations about the intern's competence based on this problem. Since the intern did not "do it right" the first time, it is essential to do it "very right the second time." ZEITHAML ET AL., supra note 31, at 31.

115 See discussion of "zones of acceptability" and "zones of indifference," supra note
SUGGESTIONS:

Ideally, the intern should have contacted the husband and shown him the papers as soon as he found out he had contacted his client. That may have prevented the need for the continuance since the husband would have had some time to consider what he wanted and the wisdom of letting the matter proceed with the papers already prepared. Since that was not done, however, the intern’s efforts should have been directed towards minimizing any further delay.

Unless the husband was clear about wanting to hire a lawyer, the intern should have spoken to the husband immediately after the hearing to ascertain his concerns. They may have been minor, and some modifications to the papers may have eliminated the need for a lengthy continuance. Although the husband clearly had the right to consult an attorney, early contact with him might have reduced his anxiety about the process.  

The intern should have had a detailed conference with his client immediately to explain the significance of the continuance and describe the alternative directions the case could have taken. If the husband’s concerns were minor, delays probably would be minimal. On the other hand, if the issues raised seemed significant, the client’s entire set of initial expectations would be in jeopardy. The student would need to understand this and respect the process the client would need to go through to reassess her decision to use him as her lawyer. If the student showed proper concern for the shock to the client’s expectations by this turn of events, the level of trust in the relationship actually could have been strengthened by it.

107 and accompanying text.

116 In a jurisdiction which has adopted the Model Rules, the intern could have acted as intermediary since in this case there appeared to be little subject to dispute. See Rule 2.2. In any event, the intern must be careful not to make false statements of law or fact (Rule 4.1) or to suggest that he is disinterested in the case. Rule 4.3. Under the Model Code, DR 5-105 prevents a lawyer from representing both husband and wife unless it is “obvious” that she can represent the interests of both and they both consent. Some jurisdictions take the position that in essence, it is never obvious that a lawyer can represent the interests of husband and wife in a divorce. Under DR 7-102(A)(5) it is a violation for a lawyer to “knowingly make a false statement of law or fact.” Finally, under DR 7-104(A)(2), a lawyer may not give advice to an unrepresented party except to obtain a lawyer, if that party’s interests “are or have a reasonable possibility of being in conflict with the interests of his client.”

None of these rules would prevent the intern from discussing the husband’s concerns so long as it was clear that the intern was acting on behalf of the wife, he made no false statements to the husband, and did not provide legal advice to the husband.

117 STANLEY CLAWAR, YOU & YOUR CLIENTS 10 (1985); NOELLE C. NELSON, CONNECTING WITH YOUR CLIENT 60-61 (1996) in which it is suggested that problems be discussed as soon as they occur and that the lawyer be realistic about the nature of the problem and his ability to solve it.
Value Point #5:

Situation:

After a one week delay, the husband called the intern and told him the papers looked fine and he would not be retaining a lawyer. If the case could have been set earlier, he would have liked to complete it as soon as possible. The intern called the court scheduler who told him the case could be set the following week so long as the husband appeared, waived his right to an attorney and indicated he had no objection to the case proceeding in a default posture. The husband's appearance, waiver and acquiescence could be done in writing.

Analysis:

This presented an interesting dilemma for the student. If the case were reset and went forward, there would have been a significant increase in expected value on the client's part because having assisted her in adjusting her expectations in light of the continuance, the intern was now able to exceed those expectations by completing the case sooner than currently anticipated. On the other hand, if the student advanced the hearing and the husband either changed his mind or failed to appear at the advanced hearing, the student would run the risk of worsening the value perception of the client (not to mention the perception of his competence in the eyes of the judge) because of the wasted appearance.

Suggestions:

The intern probably should have explained the courses of action available to the client and asked her to help decide how to proceed. To guard against the husband's change of mind or failure to appear, one option would have been to ask the husband to come to the office and indicate his approval of the papers by signing them along with a waiver of counsel.\footnote{See references to the Model Rules and the Model Code, supra note 116, at 931. Whether the intern could ethically suggest that the husband sign a waiver of counsel would hinge upon whether this would require the giving of legal advice. If the intern was not acting as intermediary, he should not have given such advice unless the husband's interests were not, and did not present a reasonable possibility of being in conflict with the wife's interest. He must also take care not to make false statements pertaining to the legal effect of the waiver. If the parties were proceeding by agreement and their interests coincided, the waiver would likely be proper.} In that event, he probably still should have asked the husband to appear in court to verify to the judge that he was agreeable. If, nonetheless, the husband failed to appear at the hearing, the papers alone might have sufficed.

Alternatively, if the student was not comfortable having the hus-
band sign the papers or if the husband would not do so, it would have been more prudent to advise the client to proceed with the hearing as scheduled. This would have best preserved and met the client's current expectations and most likely would have led to successful completion of the case without further unanticipated events. The disadvantage of the latter approach, of course, would have been that an opportunity to create value by accelerating the process would have been lost. On balance, however, the latter approach was probably more prudent because it posed less potential damage to the client's already reduced perceptions of value.

Value Point #6:

SITUATION:

The case proceeded on the rescheduled date and the divorce was granted uneventfully. The whole process took four months.

ANALYSIS:

At the end of the case, the client made her final assessment of the value she received from the clinic. As long as the student reminded the client that the delays were due to the faulty address and the unexpected appearance of her husband, and that these delays were managed successfully, one would expect this client to perceive that the clinic's services were valuable.

SUGGESTIONS:

In a closing interview or letter, the intern could have reviewed the course of the case emphasizing how the case progressed as originally anticipated, pointing out the ways the process was not significantly hampered by unanticipated life cycle events. The basic result was achieved as expected by the client — only minor delays occurred.

B. A Domestic Violence Criminal Case

The local municipal court assigned a domestic violence case to

\[119\] See James C. Freund, Lawyering, A Realistic Approach to Legal Practice 263-68 (1979) in which the author's discussion of deferring decision making where possible suggests an approach that minimizes the risks that future events might shed new light on the matter under consideration and lead to a different decision.

\[120\] Some commentators suggest that a meeting is the best way to review and consolidate the benefits received from the representation. This may be preferable to a letter because the client can interact with the lawyer. Whatever the method, the lawyer should review the client's goals and results obtained and should concentrate on the benefits of the representation. Ewalt, supra note 12, at 51-56.
The client was the defendant, charged with slapping his wife in the midst of an argument. The argument centered around the defendant not earning enough money for the family to make ends meet. As he was yelling at his wife, she pushed him away and he reflexively struck out at her. The slap caused some temporary redness in the victim's face which faded after about an hour. Photographs taken by the police at the scene did not show any obvious injury.

The money trouble had been a source of discord for several months, since the wife quit her job to raise the couple's small child. Although the couple had argued regularly about this subject, this was the first instance of physical violence. The defendant felt responsible for the family's money trouble, and was very remorseful for what happened. He wanted to plead guilty and conclude the matter. He did not believe the court would be very severe in its sentence because it was his first offense. The court wanted to make sure he was fully informed of the effects of a guilty plea. Therefore, the judge assigned the clinic to advise him before accepting his plea.

The city prosecutor has a strict no-drop, no-reduction policy in domestic violence cases. Although there are varying degrees of seriousness in domestic violence cases, the defendant was charged with the most serious variety, so that a plea of guilty exposed him to six months in jail and a $1000 fine. The court tends to treat defendants convicted of domestic violence harshly and occasionally imposes up to ten days in jail for a first offense involving a minor injury. Most such cases, however, result in a period of probation, a fine, and an order that the defendant engage in counseling directed at controlling anger. After a defendant has been convicted once of domestic violence, a second incident involving any variety of domestic violence (regardless of severity), can be charged as a felony.

In a hearing at the beginning of the case, at which the defendant was present but not represented, a temporary protection order ("TPO") was obtained under which the defendant was ordered to vacate the marital dwelling and to refrain from contacting his wife. The defendant had been staying with his parents. It had been ten days since the issuance of the TPO and both the defendant and the victim wanted him to come home.

The defendant was a hard-working automobile mechanic with a high school education. He had no prior involvements with the law.

The student intern assigned to the case was scheduled to appear at the arraignment. There had not been time to meet the client for an interview prior to the hearing.

When the client heard the clinic was assigned, he was concerned because he believed any attorney might complicate the case and cause
the judge and prosecutor to be harder on him. In addition, he worried that a student lawyer would treat his case as an “educational project,” in which he would be more interested in receiving a good grade than the client’s welfare.

**CONTEXTUAL FACTORS:**

**Personal:**
- first experience with criminal justice system
- relatively unsophisticated, did not appreciate the potential seriousness of the case
- felt guilty about the family’s money problems
- did not want to resist prosecution, felt he should take responsibility for his actions, was remorseful for the events
- wanted to go back home
- wanted to put this incident behind him
- did not think a lawyer was necessary, and feared that a lawyer might make matters worse

**Situational:**
- arose out of chronic money trouble
- the city follows a no-drop, no-reduction policy
- the court often treats perpetrators of domestic violence harshly

**EXPECTED BENEFITS:**

**Desired results:**
- prompt resolution of the case
- client thought he would be better off without a lawyer
- imagined little benefit from legal representation
- wanted to return home as quickly as possible

**Process Factors:**
- knew nothing about lawyers or what to expect, but imagined the process would be explained to him so he could enter a plea of guilty at the next hearing

**EXPECTED SACRIFICES:**

**Transaction costs:**
- minimal financial costs expected
- would have to experience some delay while intern became familiar with the case and prepared to represent him

**Life cycle costs:**
- hopefully none, case would be concluded at next hearing
Risks:
- the client would be a "guinea pig" for the student lawyer causing the experience to be a greater benefit to the student than the client
- the student lawyer would actually make things worse for the client
- getting a lawyer would increase the time necessary to conclude the case

INITIAL EXPECTED VALUE: This client wanted to plead guilty but the judge required him to consult a lawyer so that he would fully understand the ramifications of pleading guilty. If it were up to the client, he would not have retained counsel. He expected little value in having a lawyer on his case, let alone a student intern.

Value Point #1:

Situation:

The client made no attempt to call the clinic after the assignment of his case by the court. The intern assigned to the case did not have a chance to meet or talk to the client prior to the arraignment. At the arraignment, the client and the intern met and discussed the case very superficially.

The intern wanted to enter a plea of not guilty, set the case for a pretrial hearing, arrange an in-depth interview with the client, conduct discovery with the prosecutor and then decide how to proceed at the pretrial hearing. The intern learned of the TPO and suggested to the client that a motion be made to dissolve it so he could return home. He said he could have the motion filed within three days.

The client preferred to plead guilty at the arraignment. The intern indicated that he could not represent the defendant in good conscience if he wanted to plead guilty before the intern had an adequate chance to develop the case. The intern offered to withdraw from the case and let the court appoint another lawyer.121 At that prospect, fearing even further delay, the client agreed to follow the plan recommended by the intern.

Analysis:

The problem here was that the client did not perceive how he

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121 Withdrawal may have been required under the Model Rules: Rule 1.1 (lawyer shall provide competent representation) and Rule 1.16 (lawyer shall withdraw if continued representation would result in violation of the rules of professional conduct.) This also may be mandated under the corresponding sections of the Model Code: DR 6-101(A)(1) and (A)(2); DR 2-110(B)(2).
could benefit from the representation. Ironically, this case presented an opportunity for substantial value creation because the client had such low expectations of benefit. Almost any benefit conferred would exceed those expectations. The primary goal of the client at the arraignment was to conclude the matter. Everything the intern suggested ran counter to that goal. Moreover, some of the sacrifices anticipated by the client came about — since he did not perceive any benefit from the representation, he probably felt like a guinea pig for the intern, he was about to experience further delay, and he feared the intern would make matters worse by pleading not guilty.

**SUGGESTIONS:**

The dilemma presented was largely due to the fact that the intern and the client did not have a chance to discuss the case and the client's situation prior to making a decision at the arraignment. The client did not perceive any benefit from the representation because he was not aware of the potential seriousness, in both the short and long terms, of a plea to the first degree misdemeanor. His perception that nothing serious would happen at sentencing should have been acknowledged but he needed to know that if another incident were to occur, it could be very serious indeed. One way to have accomplished this would have been to remind the client that chronic money trouble led to this incident and since it was still a problem, another incident could occur.

The focus in the first meeting at the court house should not have been on a detailed understanding of the facts of the case, although the client should have been given the opportunity to say enough about the facts to feel the intern was concerned. The intern should have explained the process and reassured the client that pleading not guilty at that point would not make the situation worse. Since both the cli-
cut and his wife wanted him to come home, some effort should have been made to raise that issue with the judge at that time, even if the court's policy was not to reexamine a TPO at such an early stage. At least the client would have felt that the intern was doing everything possible to accomplish the client's goal of concluding the case quickly.

Finally, the possibility of a finding of not guilty or pleading guilty to a lesser charge might have been raised. The intern could have pointed out that the reflexive action of slapping his wife in response to her shove might not have risen to the level of domestic violence. If not, the client might be found not guilty. Alternatively, the prosecutor, in considering the nature of the act, might have offered a lesser charge to dispose of the case. However, given the prosecutor's and court's inflexibility, and the fine distinctions inherent in such a defense, those possibilities were not very likely to occur. Therefore, in discussing them, they should not have been overemphasized.

**Value Point #2:**

**SITUATION:**

The in-depth interview took place at the clinic. The client explained the facts of the incident. He reiterated his desire to plead guilty and conclude the matter. He had heard from others that the prosecutor would not agree to lesser charges and he did not want to antagonize him by asking. He listened patiently as the intern explained his rights, the various types of domestic violence charges, the fact that a second offense can be charged as a felony, the elements of self-defense, and how provocation might play a role in his defense. The client asked a few questions for clarification, thanked the intern for the comprehensive explanation, and then reaffirmed his desire to plead guilty as charged and conclude the matter as quickly as possible.

**ANALYSIS:**

The client still saw little benefit from permitting the intern to carry the process further. He received some information which he probably appreciated. He gained a better perspective on the situation and deeper understanding of the seriousness of the predicament. He

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125 Clearly, the intern should not make frivolous motions or arguments, but pursuing this request probably did not fall into that category. Even though the intern may have believed the judge would deny the request, he could have made it if he believed, in good faith, that there were grounds to support it. See Comment to Rule 3.1 of the Model Rules. See also DR 7-102(A)(1) and (A)(2) of the Model Code.

126 The alternative of a lesser plea probably is not "pivotal" or "pertinent" because it is so unlikely. In such circumstances, it should not receive emphasis. BINDER ET AL., supra note 6, at 317.
probably considered these to be benefits of the representation.127 He did not change his overall position, however. He did not want to mount a defense to the charge.

SUGGESTIONS:

At that point, the intern should have acceded to his client’s wishes. Although the intern had not talked with the victim, the client took full responsibility for the incident. Since the intern carefully explained all ramifications of pleading guilty, the client was entitled to direct the course of the representation.128

The intern could have shifted to a discussion of the sentencing phase. By discussing the mitigation statement that could be made on behalf of the client, the intern would have provided the client with an unexpected benefit, i.e. the client would have an advocate explaining his side of the story to the judge, not for the purpose of escaping responsibility, but to minimize the sentence.

The client would have left the office feeling informed, that he was heard and understood, and that he would be guided through the rest of the case by a sympathetic and understanding advocate.129

Value Point #3:

SITUATION:

At the pretrial hearing, the intern and the prosecutor discussed the case. After some exploration of possible resolutions, the prosecutor reiterated his no-drop, no-reduction policy and stated that if necessary, he would subpoena the victim to the trial if she refused to appear voluntarily. The intern indicated to the prosecutor that the client wished to change his plea to guilty.

The plea was entered after which the prosecutor made representations about the facts of the case. When asked whether he wished to respond, the intern made a mitigation statement on behalf of the client. The intern focused on the recurring money problems, the stress created by the additional responsibilities of having a child, and the reflexive manner in which the client struck his wife. The intern also pointed out the client’s work history and that he had never had any previous trouble with the law. Finally the intern emphasized that there had been no other incidents of this kind.

127 Generally speaking, reducing a client’s uncertainty will be seen as a benefit of the representation. EWALT, supra note 12, at 107-14.
128 BINDER ET AL., supra note 6, at 356-61; FREUND, supra note 119, at 268-78.
129 See NELSON, supra note 117, at 43-48, 83-84, describing techniques to deal with insecure clients and suggesting that high value can be created for such a client from a thorough explanation of the process the case will take.
The client told the judge he was sorry for what happened and promised it would not happen again. The judge referred the case to the probation office for a presentence investigation. Afterwards, the client told the intern he was glad he was there because he was very nervous when the judge recited the rights he was giving up by pleading guilty and the potential maximum sentence.130

**ANALYSIS:**

The client did not anticipate that he would need an interpreter or guide through the plea process. He was grateful for the intern’s presence because he provided knowledgeable support and the feeling that someone was on his side. The relationship began to improve from that point forward. The client received benefits from the intern’s help that he did not expect.131

**SUGGESTIONS:**

Since the client experienced an unexpected benefit from the representation, he may have been more receptive to any suggestions the intern might have made as well as the intern’s perspective on the case during the sentencing phase. Advice regarding how to handle the probation interview may have been well-received. Other ideas for ways to favorably impress the court also may have been appreciated, e.g. the suggestion to obtain character references from persons who know the defendant or the couple. Finally, the defendant might have acted upon the intern’s suggestion that he start the anger counseling before the sentencing date.132

**Value Point #4:**

**SITUATION:**

At the sentencing hearing, the intern made a moving mitigation statement, presented some letters from persons who were supportive of the defendant, asked the victim to make a short supportive statement, and informed the court of the defendant’s progress in anger counseling. At the intern’s suggestion, the defendant also reiterated his apologies to the court and his wife for the incident. The court

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130 When a judge recites the rights a client gives up by pleading guilty and the maximum possible sentence, often great anxiety is created for many clients. If they previously did not believe they needed lawyers, they often change their minds at this point. Putting these warnings in perspective, reduces the uncertainty created by the judge’s stern admonitions and can be a point of significant value creation. Id. at 83-84.

131 Expected value increases when benefits unexpectedly increase. Naumann, supra note 23, at 117-18.

132 These are examples of “proactive customer contact” which will always increase perceived value. Id. at 167 et seq.
imposed a minimal sentence, not unlike the usual sentence given first time pro se defendants who had not caused significant harm to their victims.

**Analysis:**

Although the intern did not obtain an uncharacteristically favorable result for the client, the help given coupled with the result obtained probably were perceived as substantial benefits of the representation. Because it could not be known what the result would have been if the intern had not been present, the natural tendency of the client probably would have been to ascribe at least some of the result to the intern's work. Just as importantly, he was likely to appreciate the process itself — the professional, caring job done by his student representative.133

Conversely, if the court had been more harsh than expected by the client, the client would probably still have felt he received valuable representation because of the extent of the help given and the concern shown by the intern.134

**Suggestions:**

A closing letter or interview outlining the efforts made and actions performed by the intern, and the process value received by the client may have served to solidify in the mind of the client the intern's contribution to the favorable result.135

**C. A Contested Child Support/Visitation Case**

The clinic received a telephone call from the father of a fourteen year old girl. The client sought assistance in having more contact with his daughter. The parties had been divorced ten years earlier. At that time, allegations were made that the mother had been abusive towards the other family members and was alcoholic. She accused the father, on the other hand, of being mentally unstable. Initially, custody was awarded to the father with visitation to the mother. The

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133 It is the client's perception of the lawyer's ability to help that is important in solidifying a lasting and favorable client relationship. EWALT, supra note 12, at 137.

134 It is also possible, however, that this client would have felt that a more harsh result was due to the intern's presence. This would have been consistent with the client's initial fear that the student might make matters worse. It this had occurred, the intern would have needed to discuss the causes for the result with the client and put the sentence in perspective in order for the client to have believed that the representation was valuable.

135 It is important to review the results of the representation with the client to insure that the client perceives the benefits achieved and the ways in which sacrifices were minimized. See note 120 supra. An example of such a letter is attached as an appendix to this article.
mother's income was not steady so she did not pay support on a reliable basis. The father was skilled as a legal assistant but had a history of leaving or being terminated from his jobs.

Three incidents occurred which eventually led to a change of custody and restriction of the father's visitation rights. The first involved an allegation that the father left the child alone at age five, wandering around a shopping mall. The mother filed a temporary custody motion on the basis that the child had been abandoned. The father claimed that the child had wandered off and that the mother had failed to meet them as previously agreed. After a brief court episode, the mother dismissed her motion for permanent custody.

The second incident involved an allegation of child abuse against the father by the child's school teacher. Apparently the teacher observed bruises which the child could not adequately explain. When examined and interviewed by a doctor, the child stated that her father had inflicted the bruises. This led to a court proceeding and a referral to the courts' child custody investigative unit. Following the investigation, a recommendation was made for a change of custody to the mother. After a contested hearing, the court awarded custody to the mother, with liberal visitation to the father.

The third incident occurred during the pendency of the custody case, when the father moved to New York. After the court's ruling, visitation was arranged by which the daughter flew to New York to spend two weeks with her father. After the two week visitation period was over, the father did not return the child. The father made this decision based upon his (as was later determined, unfounded) belief that the child was in danger from her mother because she was abusive and alcoholic. The father took the child to another state. After a couple of weeks, the father was located. The police took the child into custody and the mother flew to their location to bring the child home.

Following a contested hearing on this incident, the father was restricted to four hours visitation every other week, under the supervision of mental health professionals. He was required to pay the costs of that supervision. He was also required to undergo counseling which the judge hoped would help him accept the authority of the court.

The last order referred to was made five years earlier, and was the latest outstanding order. In that period, the client had not seen his daughter regularly. For months at a time he had no personal visits. He had, however, maintained frequent contact with his daughter by telephone. At the time he called the clinic, his daughter had told him that she wanted to see him more often. In light of her age and her stated desires, he thought he should be able to regain custody. How-
ever, he had not engaged in counseling as required by the last order. The client had not had good experiences with lawyers or judges. In fact, he was so unhappy with one prior lawyer and the therapist to whom he was referred that he sued them both. In addition, he tried to have the guardian ad litem removed from the case and thought the trial judge was biased against him. He knew that any further court proceedings would come before that judge due to the fact that judges in domestic relations cases retain continuing jurisdiction.

The client knew that the legal standard governing his case required the court to make orders that were in the best interests of the child. However, he also knew that the judge, the mother and her attorney relied heavily on his daughter's preferences and the guardian ad litem's opinions in deciding how to resolve the custody/visitation issues.

Approximately eighteen months prior to the call to the clinic, the client filed a pro se motion to modify his visitation. The mother countered with a motion for child support (there had never been an order that the father pay support) and for reimbursement of the expenses she incurred in bringing her daughter back from the earlier abduction. There had been one evidentiary hearing at which the father's testimony was taken regarding his work history. This was a hostile and uncomfortable experience for the client. The hearing was continued and the client sought the clinic's help, claiming he had no money to hire a lawyer. He had been on the clinic's waiting list for over six months.

The client knew that the clinic was staffed by law students supervised by law professors. This appealed to him since he saw himself as a victim of an unfair system. He believed the student and law teacher would be more idealistic and willing to put forth more effort on his behalf. He also believed that regardless of the outcome of his custody/visitation struggle (which he believed he would win), he would not be ordered to pay support since he had no income.

CONTEXTUAL FACTORS:

Personal:
- significant experience with the legal system and lawyers
- believed he was not treated fairly
- did not trust lawyers, judges, mental health workers, employers or anyone else in a position of authority
- resisted the assertion of authority over him by others
- believed he should be able to regain custody because his daughter said she wanted to have more contact with him
- did not know much about the clinic, but knew it was free
and was staffed by students supervised by law professors
- incorrectly believed his ex-wife was abusive and alcoholic
- had a great deal of anger about previous events

Situational:
- despite the legal standard applicable, the guardian ad litem's opinion and the child's preferences were very influential in determining what happened with respect to visitation
- did not fully exercise his previous visitation rights
- did not comply with the order requiring counseling
- waited over six months to get help from the clinic

EXPECTED BENEFITS:

Process factors:
- no cost versus prohibitive costs for representation by a private attorney
- knew a student would represent him who would not have much experience, but liked the fact that a law professor would supervise the student—thought both would have a more idealistic outlook than private practitioners and would be willing to fight for the "underdog"
- expected to have a lawyer who really cared about his case
- expected to have a lawyer who would fight as hard as necessary to achieve his goals
- would be protected from the GAL, opposing counsel and judge and their demonstrated bias against him

Desired results:
- regardless of who represented him, he expected to win custody or at least more visitation
- regardless of who represented him, he believed he would not have to pay support because of his relatively poor financial condition

EXPECTED SACRIFICES:

Transaction costs:
- transportation to clinic or court, no fees payable
- would need to pay court costs

Life cycle costs:
- none other than transportation and minimal court costs
- some inconvenience as case proceeded

Risks:
- his student lawyer would not be adversarial enough to
compete with the hostile lawyers and judge involved
- his student lawyer would not understand him well enough
to be able to advocate his position
- his student lawyer would be intimidated into siding with
the mother and the GAL
- he would have to engage in counseling, an activity he
found useless and degrading when forced upon him

INITIAL EXPECTED VALUE: Although he had apprehensions
about using an inexperienced student attorney, he believed that the
justice of his case was obvious. He could not afford to hire a private
lawyer, but regardless, he did not trust private lawyers enough to re­
tain one again. He fully expected to win his case, regardless of the
student's inexperience, and thought he could "teach" a student lawyer
how to win if necessary. He expected high value from the clinic's
representation.

Value Point #1:

Situation:

At the initial interview, the client brought in all his papers and
expected to go over the entire case with his intern. The intern was
sympathetic and listened to him carefully but was totally overwhelmed
by his case and his personality. The client spoke quickly and jumped
from topic to topic. The intern had trouble keeping him on track and
could not think fast enough to ask him necessary follow-up questions.
After one hour, the intern excused himself and sought help from his
supervisor, who happened to be available. The intern was in a panic
because he could not control the interview. He worried that he was
not competent to handle this client or his case. He did not know how
to proceed.

Analysis:

Although the intern believed he was in serious trouble, from the
point of view of value creation, he was not. For the most part, the
situation met the client's expectations. He knew he would be repre­
sented by an inexperienced student lawyer who would need a lot of
help handling the case. He believed his student representative would
listen to him and the student met this expectation. He knew there
would be supervision and the student left the room to obtain it.

The client's expectations about risk were also validated. He was
concerned about this student's ability to compete with the other law­
yers but he knew from experience that a case develops over time and
thought that the intern would be able to handle it.
Overall, he probably was pleased that he was able to dominate the conversation for an hour. In the past, lawyers always cut him off and tried to direct the conversation.\textsuperscript{136}

**SUGGESTIONS:**

It probably would have been a mistake to draw any conclusions or give any advice to the client at that point. He expected the intern to have a learning curve and would feel gratified to know that the student took the time to understand his case. It would not have been productive to extend this interview much longer.

The client’s expected value was not seriously reduced by these events, even though the student experienced a crisis in confidence. The student probably should have been honest about not being able to digest all of the client’s information in one interview. It was not necessary that he admit his panic, but he could have explained to the client that he needed time to review his interview notes and the client’s documents. He should have scheduled a follow-up appointment as soon as possible. The client would have appreciated his honesty, his willingness to be thorough and his desire to fully understand the case. He would also appreciate having a follow-up interview after only a brief delay.\textsuperscript{137}

The student probably should have written a file memo to organize his thinking about what he learned in the meeting and to decide how best to conduct the follow-up interview.\textsuperscript{138}

**Value Point #2:**

**SITUATION:**

During the second interview, the intern showed the client that he had absorbed the information and material the client left and was able to ask many clarifying questions. In an effort to understand the child support issue, the intern spent a lot of time talking about the child support rules and pointed out that a new statute had been enacted

\textsuperscript{136} Although it may be frustrating to lawyers for a client to dominate the conversation with seemingly irrelevant information, it does permit the client to feel that he is being given the opportunity to tell his whole story and to develop trust in the lawyer. For this client, this probably was seen as a benefit. See, Binder et al., supra note 6, at 246-48; Nelson, supra note 117, at 2.

\textsuperscript{137} Clients often want to know their lawyers as people rather than just professionals. It can be helpful for the lawyer to share his feelings with the client. Erwalt, supra note 12, at 172. However, the degree to which the student lawyer openly admits his insecurity raises difficult and interesting questions, since some clients may become alarmed and quite insecure themselves, if they believe their lawyer cannot handle their situation.

It is also advisable to specify what will be the next steps in the information gathering phase. Binder et al., supra note 6, at 225-25.

\textsuperscript{138} Binder et al., supra note 6, at 105.
which required a minimum child support order in the amount of $50 per month regardless of an obligor’s income. The client became agitated because: 1) he felt that insufficient time was spent on his claim for increased visitation or custody; and, 2) too much time was spent on the child support motion brought by his ex-wife. He reminded the intern that the ex-wife did not comply with the earlier child support order. He believed he should not have to pay support, since she earned more than enough money to support the child, while he was in financial straits. The intern was frustrated by the client’s apparent unwillingness to acknowledge his obligation to pay even a small amount of support to the mother as long as she had custody.

**Analysis:**

The intern permitted himself to be drawn into a power struggle with this client who reacted very negatively to authority. The client’s worst fear had surfaced, i.e. that the clinic lawyers would be just like the private lawyers he experienced and would side with the wife on the case. His expected benefit of having idealistic, “go to the wall” lawyers at the clinic was jeopardized. The risk of having an uncaring, non-adversarial intern increased and expected value fell.

**Suggestions:**

The intern should have helped the client see that they were in the phase of assessing strengths and weaknesses of the case in order to develop an overall strategy to resolve it. Tactics regarding individual components would be devised later. Above all, this client needed to feel that the intern was going to advocate his position. If the client wanted to concentrate on the custody/visitation problem as opposed to the support obligation, there was no harm in following that agenda. There would be time later to discuss the parts of the case that were less favorable. At the moment, the intern should have concentrated on ascertaining the positive facts and law that would lead to a result the client favored. In order to gain the client’s trust, the student needed to demonstrate his loyalty. When the inevitable discussions would occur about the negative aspects of the case, the client would have been better able to deal with them constructively.

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139 This actualizes client-centeredness through acknowledging the client’s “greater need.” Bender et al., supra note 6, at 39-40, and demonstrates to the client that his is not “just another case.” Nelson, supra note 117, at 27.

140 In order for trust to develop, it is important to establish “common ground” with the client. Concentrating on the client’s high priority issues can help to do so. Nelson, supra note 117, at 2, 15.
Value Point #3:

SITUATION:

The court set hearings for the case. The earlier date was for the mother’s motions for support and reimbursement. The later date was for the client’s visitation motion. They were set about one month apart and the first hearing was in three weeks. The intern wrote the client a letter advising him of the court dates. The client called the office, irate because the continued support hearing was set first while the visitation motion had yet to be heard at all.

ANALYSIS:

The client was worried that he was not being protected against the court and the other lawyers. He feared that the intern would not be able to control the proceedings. He began to feel that the intern was too inexperienced or not aggressive enough to represent his interests adequately.

From the court’s point of view, the visitation motion was separate from the support motion. Since the support motion had been heard partially, it made sense to complete that hearing before the visitation matter was taken up. But if the client’s custody claim was to be pursued, it had to be decided before the support issues were resolved. No custody motion had been filed yet. If a custody motion had been filed in response to the hearing notices, however, it probably would have appeared as solely a tactic to raise the stakes so that the mother would voluntarily dismiss her support claim. This was especially true since, from the facts of the case, the likelihood of success on a motion for change of custody was negligible.

SUGGESTIONS:

The client needed to be reassured that his motion would be heard and that steps could be taken to protect him in the support hearing. One way this situation could have been handled was to move to consolidate the hearings on the ground that they involved common questions of fact. In addition, since support matters were relatively routine in light of the child support guidelines in effect in the jurisdiction, it was possible that the support issues could have been settled once the custody/visitation matter was resolved.

If the motions could have been resolved together, the greatest chance for a settlement of all issues would have occurred, the possibil-

141 For guidelines on dealing with anxious or insecure clients, see id. at 83-84 in which thorough preparation for upcoming events and realistic reassurance are recommended.
ity of which may have heightened the client's expected benefits from the process.

Value Point #4:

Situation:

A meeting was held between the intern and the guardian ad litem on the case. The focus of concern for the GAL was that the father had not engaged in any counseling as required by the court. The GAL acknowledged that the child was five years older and wanted to have more of a relationship with her father. The child understood that her father was not permitted to take her out of the jurisdiction and could probably prevent it from happening if the father attempted to do so. From the GAL's point of view, counseling was a therapeutic need of the client. In addition, compliance with the counseling requirement was necessary because it was symbolic of the client's acceptance of the court's authority.

The intern seized upon the opportunity presented to obtain some unsupervised visits. The intern suggested that if the client got some unsupervised visitation, he would see that there was something for him to gain from the process and perhaps the client would be more amenable to counseling. The GAL saw this as plausible and agreed to arrange some limited unsupervised visits.

Analysis:

The extent to which the client would be satisfied with just unsupervised visits was unclear at that time. However, it was safe to assume that any improvement in the current visitation arrangement would be appreciated by the client. Since he had not had this opportunity for five years, he would see this as progress and a substantial benefit of the representation. The challenge was to discuss the counseling issue in a way that did not immediately cause the client to lose sight of the visitation benefit obtained.142

142 This illustrates the sensitive and dynamic nature of value creation. NAIDMANN, supra note 23, at 117-18. It also shows the importance of “managing” the client’s perceptions of events. See note 93 supra and accompanying text. It might be said that such perception management constitutes manipulation by the lawyer, and perhaps, to some degree, it does. However, it also can be viewed as focusing the client on certain positive aspects of events and de-emphasizing other less positive aspects. For clients who are very emotionally engaged in their legal struggles, helping them to see the proverbial glass as “half full” rather than “half empty” can be a valuable benefit of the lawyer’s involvement. Good client-centered lawyering should not require the lawyer to abdicate a positive perspective on events because some negative aspects arguably are present as well.
SUGGESTIONS:

In the first discussion with the client after the meeting with the GAL, the focus should have been on the benefit obtained, unsupervised visits. Since the intern was careful not to guarantee that the client would engage in counseling, or condition the visitation on counseling, it was not necessary to insist, at that time, that the client engage in it. That issue would need to be approached gently and through a series of conversations. In fact, before discussing it at any length, it might have been helpful to have located a potential counselor for the client, after screening him for suitability in light of the client’s previous bad experiences and reluctance to engage in counseling.143

Focusing on the positive aspects of unsupervised visits—such as the freedom to develop a closer relationship with his daughter without being under the watchful eye of a supervisor, the ability to go places other than the site where supervision can occur, the elimination of the artificiality of supervised visitation, and avoidance of the costs of supervision—probably would have eased the client’s perception of risk that his goals may not be obtained. This should have increased his perceptions of value from the representation.144

Value Point #5:

SITUATION:

The client had a few unsupervised visits with his daughter which

143 Because he was ordered to engage in it, the client probably would need to discuss the issue of psychological counseling eventually. It certainly was an issue in the case. His refusal to abide by the order probably was a valid decision, so long as he was aware of the potential consequences of violating the order. Bender et al., supra note 6, at 359. It seemed clear that one basis for the client’s resistance to therapy was his previous bad experience. Therefore, it might reduce his anxiety about counseling to have a compatible therapist in mind when the suggestion is made. Ewalt, supra note 12, at 113. It must be acknowledged, however, that this client’s tendency to react badly to authority might cause him to resent the naming of a particular therapist before he had agreed to engage in counseling—be might see it as presumptuous and paternalistic. Perhaps when raising the issue, the intern might inquire about the nature of the client’s problems with his previous therapist, and if appropriate, point out that counseling with other therapists, such as the one the intern has in mind, would have been less likely to result in these negative experiences.

144 If the GAL had been more tentative in agreeing to unsupervised visitation, or if he had conditioned it upon the client obtaining counseling, a different approach would have been required. To focus on the benefit obtained (unsupervised visitation) without the sacrifice necessary (counseling) would have artificially raised the client’s value perception, only to be undermined later when he found out about the counseling requirement. Handling it in that fashion would have done more harm to the value perception than if the sacrifice were introduced at the outset. This is true because of the damage the later “surprise” would have done to the client’s trust in the lawyer. See Ewalt, supra note 12, at 65; Freund, supra note 119, at 153; Nelson, supra note 117, at 59.
went well. Although the court did not consolidate the support and visitation hearings, the intern obtained a continuance of the support hearing so that it was scheduled after the visitation hearing. The first visitation hearing was considered a pretrial, at which the parties agreed that unsupervised visits would continue for the time being. The GAL and the mother were still interested in the father obtaining counseling, but did not make it a condition of continued unsupervised visits. The unsupervised visits had not yet increased in frequency and were still only one afternoon every other weekend. The counseling problem probably would have become more immediate if the client wanted more frequent visits. He allowed his daughter to determine at what point more visits would occur. He maintained his resistance to obtaining counseling.

**ANALYSIS:**

The client probably could have obtained a more liberal visitation schedule if he had engaged in some minimal counseling. He was highly resistant to it, however, and there seemed little reason to force it on him (even if that were possible) as long as he was satisfied with the current arrangement. It appeared that “winning” the counseling battle with the court and the other parties may have been as important a benefit to the client as getting more visitation. On the other hand, except for having paid lip service to the existence of the counseling order, neither the court nor the other party insisted on compliance.

If the counseling issue had been forced, the client may have been able to resist because visitation had been going well without it and the courts normally would recognize that even parents who need counseling should be allowed to see their children, as long as there is no likelihood of harm to the child.

**Suggestions:**

A discussion with the client about his options would have been appropriate at this time. He would need to decide what was more important to him — more extensive visitation or avoidance of counseling. If he were approached with these options in a non-judgmental way, so that he did not feel that the intern was simply siding with his former wife and the GAL, he may have been able to make a rational choice. Since, in the client’s view, the daughter’s wishes were

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145 See Binder et al., *supra* note 6, at 260-65.
146 See generally John De Witt Gregory, Peter N. Swisher & Sheryl L. Scheible, *Understanding Family Law* § 10.05, at 390 (1993), and cases cited therein.
147 See Ewalt, *supra* note 12, at 49.
the most significant factors, if she wished to keep the visits as they were, the client could accept that and most likely would continue to decline the counseling. If the child wanted more contact, counseling or a lack of it may not have been the controlling factor in any event.

From a client value perspective, there seemed little reason to stress the need for counseling at the time, despite the court order and the requests by the parties. Since it was clear that the client did not wish to do it, he perceived heightened value from the representation because he got unsupervised visits and avoided the counseling requirement.\footnote{This is because increasing benefits while keeping sacrifices the same increases value. NAUMANN, supra note 23, at 117-18. The question remains whether it was ethically appropriate for the lawyer \textit{not} to urge his client to comply with the outstanding order that he engage in counseling, or at least advise him of the risks of not doing so. Might the lawyer's silence be construed as encouragement to ignore (i.e. violate) the order? Should the lawyer have advised his client to pursue a change in the counseling requirement if he was not going to urge compliance?}

\textit{Value Point #6:}

\textbf{Situation:}

The hearing date approached on the mother's support motion. In preparation for the hearing, the client stressed that the mother had not paid all the support she owed when the client had custody of the child. Upon reviewing the child support enforcement agency records, it was not clear whether all previously due support was paid. On the other hand, it was certain that a minimal child support order would be entered against the client. The statute required it, and the client earned enough to be required to pay a small amount. The client claimed that he could not afford any support and the mother earned more than enough to support the child on her own. He did not feel it would be fair for him to pay any support.

\textbf{Analysis:}

The client had unrealistic expectations with respect to the support issue. Because of the client's resistance to authority, he resisted paying support. He remembered that the mother did not pay all she was ordered to pay and used that as justification for why he should not be compelled to pay support. In his mind, the fair result was that he should not be subject to any order for support. If the intern could not obtain that result, the value perceived from the representation would diminish.
SUGGESTIONS:

The intern would need to explain in detail the rules by which both parents are required to pay child support, regardless of a disparity in their incomes. The client may need to be shown the child support schedules and perhaps the statute requiring a $50 per month minimum order so that he would believe that the requirement really exists. As soon as possible, specific support figures should have been stated so that the client would not labor under the fear of an inordinately high amount. He could have been reminded that he had resisted payment of support for many years when under the law, an order probably should have been made. Further, the intern could have advised him that a motion to collect the back support due from the mother could and should still be filed. Once the support obligation was placed in its legal context and he was reminded of his luck in fending it off this long, he would hopefully attain a more realistic perspective on the issue.

Certainly the client should have been told that any legally sufficient arguments he wished to make to keep the support as low as possible would be made. Moreover, the offsetting motion for previous unpaid support would have provided him with a sense of equitable parity.

Value Point #7:

SITUATION:

The parties appeared at the hearing on the mother’s support motion. The mother’s attorney was not anxious to conduct an evidentiary hearing. Initial discussions regarding settlement of the entire case looked promising. The mother and GAL were willing to permit unsupervised visitation to continue, and to permit the frequency of the visits to be determined primarily by the child.

As to the financial aspects, the mother was willing to offset her

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149 Providing reliable information is an effective way to deal with unrealistic or suspicious clients. BINDER ET AL., supra note 6, at 281-82; EWALT, supra note 12, at 65; NELSON, supra note 117, at 76-78.

150 Describing how the client previously had attained his goal of avoiding a child support obligation, may create value because it helps the client see beyond a simple “win/lose” view of the current case and helps him to “focus on interests, not positions.” In other words, the client achieved a longer term interest in avoiding child support for several years, even though at the present time, he may “lose” the battle over the prospective minimal child support order. See CLAWAR, supra note 117, at 29; See generally, ROGER FISHER & WILLIAM URY, GETTING TO YES, 40-55 (2d ed. 1991). Of course, this may be a double-edged sword since the reminder that the client avoided an order that probably should have been made, may fortify him in his belief that he can avoid it now, as in the past.

151 See, e.g., FREUND, supra note 119, at 144.
claims for transportation expenses and attorneys fees against the client's claim for support arrearage. From an objective point of view, this seemed advantageous since the records did not clearly support the claim that an arrearage was owed to the client. The mother claimed she did not owe it and, if pushed to hearing, she might have prevailed. Conversely, the claims against the client for transportation expenses stemming from his abduction of the child and the mother's request for attorneys fees in connection with earlier actions by the client seemed very strong.

In addition, the mother was willing to settle for the minimum child support order ($50 per month) and to begin the order as of the date of the hearing rather than make it retroactive to the date of filing of the motion, almost two years earlier. Such retroactive application would have been probable if the case had been decided following a full evidentiary hearing.

When the student discussed this possible settlement with the client, however, he rejected the financial aspects. He insisted that the mother owed him support from prior to the final judgment in the case and that this was not being taken into account. The intern explained that the support records failed to bear him out, but even if they had, under local law the temporary support was merged into the final judgment. Since the final judgment did not contain an arrearage finding, any arrearage was deemed waived.

Further, the client maintained that he could not pay $50 per month (despite the fact that he was working part-time and probably could be working full-time), and, in any event, the mother did not need the money. He claimed he was willing to go to jail rather than pay any child support. He said that although he would not agree to pay the support directly to the mother, he might agree to pay $50 per month if the court required her to put it into a separate bank account in the child's name. The court was unlikely to enter such an order absent agreement of the parties.

At the end of the session, the parties and counsel were exasperated. The case was continued for a full evidentiary hearing.

Analysis:

It is hard to imagine a result more favorable to the client than the one offered by the mother. Following an adversarial hearing, the client could reasonably have been expected to do no better, and possibly quite worse.

This situation presented a stark example of perception disparity
regarding the value of the services being provided. From a reasonable lawyer's point of view, the settlement proposal obtained by the intern was highly beneficial to the client. The client, on the other hand, obviously did not see it that way. The client wanted nothing short of no support obligation and he wanted the mother to pay him money she probably did not owe. He also refused to acknowledge his obligation for the transportation expenses stemming from his abduction of the child. From the point of view of an objective lawyer, high value was provided. From the client's perspective, however, the proposed settlement provided little or no value. It appeared the only thing that would satisfy the client (assuming the mother would not accede to his demands) was an evidentiary hearing at which he could have advanced fully his unreasonable position.

This situation presented an ethical dilemma for the student because it created a conflict between the demands of the system and providing value to the client. The student lawyer was not permitted to continue representation if, by trying to create value for the client, he was compelled to interpose frivolous claims or defenses. It would have been permissible (and perhaps required) to withdraw from the representation of this client based upon his position. It is possible that the mother might have agreed to set the small support payment aside in a separate account. If she believed that this would avoid the need for, and expense of, a full evidentiary hearing, sufficiently high value may have been present for her to forgo her

Suggestions:

It is possible that the mother might have agreed to set the small support payment aside in a separate account. If she believed that this would avoid the need for, and expense of, a full evidentiary hearing, sufficiently high value may have been present for her to forgo her

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152 See Section III.B.1 supra.
153 This may be in part because the client actually "benefited" from the continuation of the problem. Clawar, supra note 117, at 9. Apparently, some divorce litigants find it rewarding to carry on their interpersonal struggles with their former spouses through cases such as these. See e.g. Forrest S. Mosten, The Complete Guide to Mediation, 174-75 (1997). Depending upon the receptiveness of the client, the intern might have been able to create value for the client by introducing him to the psychological dimensions of this tendency through the available literature. It is doubtful, however, that the client would have been receptive to this in the heat of the litigation.
154 Defending against the statutory minimum child support order, and pursuing the claimed arrearsage from the temporary support order, might be considered frivolous because they appear to be "unwarranted under existing law" and would not seem to constitute a "good faith argument for an extension, modification, or reversal of existing law." See e.g. Model Code, DR 7-102; Model Rule 3.1.
155 As to the rules regarding withdrawal from the case, see e.g. Model Code DR 2-110(B)(2) and Model Rule 1.16(a)(1) requiring withdrawal if continued representation "will result in violation of a Disciplinary Rule." See also e.g. Model Code DR 2-110(C)(1)(a), (d) and (2) and Model Rule 1.16(b) which permit (but do not require) withdrawal under applicable circumstances.
need to force the father to be responsible for his share of the current support. The client resisted paying support because he believed he had not received all the support he was entitled to when he had custody of the child. If she had agreed to the separate account, the client might have felt assured that the child, rather than his ex-wife, would benefit from the money. This may have caused the client to feel he had gotten enough of what he wanted to accept the settlement. At least, the intern should have explored this possibility with opposing counsel and advised the client he had done so. If they rejected the proposal, however, the explanation to the client should not have been oriented towards casting the mother and her attorney as unreasonable, but rather should have emphasized her clear right to receive the support and the court’s tendency to enforce that right.

It also was possible that the client’s unwillingness to accept the proposal was more a reflection of his anxiety and anger at his ex-wife, and may or may not have been an intractable position.\textsuperscript{156} If that were so, a patient consultation in the office, in which all the factors suggesting the wisdom of the settlement proposal were set forth for the client, might have caused him to follow the intern’s advice and accept the proposal.\textsuperscript{157} The intern would need to place emphasis upon the benefits of the settlement rather than the sacrifices of not settling. This is because the client made it clear already (by indicating his willingness to go to jail) that the risks and costs of going through a full evidentiary hearing were acceptable to him. The intern might have shown him authority for why his temporary support claim, if it ever existed, was barred by the merger doctrine.\textsuperscript{158} The intern also might have shown him the statute requiring a minimum child support order of $50 per month. Although this would not likely have dispelled all of the client’s fears (because of his contextual perceptions that lawyers cannot be trusted), at least he would have seen that the intern had not invented his statements of the law, and hopefully would have been more willing to agree to the proposed settlement.\textsuperscript{159}

At the next consultation, the intern would need to decide whether to advise the client that he would withdraw if the client did not change his position. From one perspective, this might have provided an incentive for the client to accept the proposal. Conversely, he may have felt threatened by that advice and simply turned his an-

\textsuperscript{156} For guidelines in dealing with angry or explosive clients, see Binder et al., supra note 6, at 248-50; Clavar, supra note 117, at 15-16; Nelson, supra note 117, at 69-72.

\textsuperscript{157} Nelson, supra note 117, at 76-78.

\textsuperscript{158} Of course, a form of authority that would be understandable to the client must be used. Opinions from courts might not have been suitable. Perhaps textual material from a practice handbook would have been appropriate for this purpose.

\textsuperscript{159} Nelson, supra note 117, at 76-78.
Unfortunately, if the client still refused to agree to the terms of the proposal, withdrawal may have become the only viable option. The lawyer's ethical obligations must take priority over the creation of value for the client.

Value Point #8:

Situation:
The consultation referred to in the previous discussion occurred. The client was still apprehensive about the settlement. He inquired as to why the intern was not willing to fight harder for what he wanted. The intern patiently explained the legal and practical reasons for the settlement and showed the client the authority for the minimum support order and the merger of his temporary support claim. The client looked superficially at the authority offered, but seemed to accept as true what the intern told him. The intern chose not to tell the client that he would move to withdraw from the case if the client did not change his position, but did inform him of a lawyer's duty to refrain from filing claims that are not warranted under the law. After considering the alternatives, the client agreed to accept the settlement proposal, with or without the requirement that the support go into the separate account for the child. He left the office feeling somewhat deflated but acquiescent.

Analysis:
The situation was still volatile. The client easily could have continued to reject the settlement. From the point of view of value creation, the client may have begun to perceive the benefits of the representation in the form of an objective assessment of the client's chances and of the best results obtainable, although his fears and anger at his former wife could have taken control again.

Suggestions:

It would have been important for follow-up to occur, summarizing the reasons why the client should accept the proposal. This would have helped to reinforce the client's decision to do so. It also would have been important for the settlement documents to be prepared and

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160 BINDER ET AL., supra note 6, at 285-86; CLAWAR, supra note 117, at 42.
161 See note 155 supra, for references to the Model Rules and the Model Code.
162 This is an example of the client experiencing “conflicted feelings” about the wisdom of the settlement. BINDER ET AL., supra note 6, at 351. It is important not to manipulate the client in this situation and to make sure the client makes the decision on his own. FREUND, supra note 119, at 278-79.
signed as soon as possible, consistent with allowing adequate time for the client to evaluate his decision to settle. 163 Creating specific language for the client to consider may, in effect, have changed the "go/no go" decision of whether or not to settle, into the less emotionally charged "way to go" decision, which is to say that the client would have had further input into the manner in which the settlement would be documented, and would have been more likely to feel satisfied with it. 164

Alternatively, it could be argued that substantial time deliberately should have been permitted to pass before the client was asked to sign settlement documents. This would have provided time to make certain he was satisfied with the settlement. A long delay, however, may have resulted in the client losing sight of the persuasive reasons for the settlement and once again, he may have succumbed to the emotional pressures that earlier caused him to resist.

Value Point #9:

SITUATION:

After a few days, the documents were prepared and submitted to the client for signature, along with a letter explaining the reasons supporting the settlement. Although apprehensive at first, after being reminded again of the sound reasons for accepting these terms, the client agreed to accept the settlement as proposed. The case was concluded.

ANALYSIS:

As a prerequisite to settling, the client needed to feel that he got enough of what he wanted and, more importantly, that he was being well-treated by his attorney. In the long run, he probably would have felt well-served, since the settlement was objectively favorable to him. 165 On the other hand, if his main goal was to perpetuate the hostility with his former spouse, he would likely not be satisfied with the representation.

SUGGESTIONS:

As in the prior examples, a closing letter or meeting reminding the client of his initial desires in the case and the results obtained would have helped to solidify the client's perception that he received

163 Binder et al., supra note 6, at 274.
164 Id. at 399-406; Freund, supra note 119, at 268-78.
165 This has the greatest chance of occurring if the client feels the decision was his. Binder et al., supra note 6, at 284-85; Clawar, supra note 117, at 29.
high value in the representation. Because this client was reluctant to settle on the terms proposed, however, it would have been necessary to acknowledge some understandable ambivalence on his part about the result. Finally, the lawyer could have pointed out that the settlement was modifiable if the client later feels it must be changed.  

VI. CONCLUSION

This paper discusses the creation of value in the attorney-client relationship—specifically in the resolution of disputes. It is important to teach new lawyers how to create value for their clients because in practice, they will be called upon to provide it.

The article describes value as the ratio of the benefits received to the sacrifices (i.e. costs of all varieties) incurred by a client from the legal process. As with other consumer purchases, if the balance, in a client’s mind, favors the benefits, high value will be perceived. This will lead to client satisfaction with the representation and repeated use of the attorney's services. If the balance favors sacrifices, low value is perceived, yielding client dissatisfaction.

Often, lawyers and clients do not agree about what makes a representation valuable in a particular case. Whether high value can be provided often depends as much upon the context the client brings to the relationship as on the “quality” (as traditionally defined by lawyers) of the legal services. Every client brings different needs and expectations to the relationship. As with other aspects of client-centered lawyering, lawyers should learn to perceive value from the client’s point of view, and work hard to understand the unique determinants of value for each client.

Clients’ perceptions of value can and do change throughout a legal representation. The examples of various “value points” in the paper illustrate how perceptions of value can be affected by the events in a case. The examples also suggest how the attorney can and should attempt to affect (i.e. create) perceived value.

For law school clinicians, the paper leaves many unanswered questions. To what extent should law school clinical programs attempt to teach the subject of value creation? Does the emphasis on efficiency, inherent in value creation, conflict with the educational goals of most clinical programs? Should teaching value creation be the responsibility of the practicing bar? But if so, can students get a thorough and organized introduction to the topic that does not promote efficiency as the only goal—at the expense of other important considerations? How can lawyers find out more about what clients value?

166 See notes 120, 135 supra and accompanying text.
in the process they receive?

Finally, is it always possible, or even desirable, to create value for a client? If it is highly unlikely that clients' goals will be achieved, should lawyers decline to represent them due to ethical constraints or because ultimately they are destined to be dissatisfied? How does this comport with the ideal that every client should be entitled to legal assistance? How can clinicians teach students to balance the ethical demands of lawyering against the need to provide value for their clients? To the extent that creating value requires manipulating clients' perceptions, is this consistent with our shared ideals of client-centeredness?

The discussion in this paper touches upon some of these questions, but is meant only to provide an introduction and a paradigm for further study. Certainly, it seems true that whether value is present in legal representation depends upon the perceptions of the client — and, at times, such perceptions may be difficult for lawyers to ascertain. Nevertheless, issues of value are present in every case and with every client, whether or not we acknowledge, or are aware of them. By focusing our students on these issues, we seize an important opportunity to improve our clients' levels of satisfaction with our work. Moreover, we advance the view that the legal profession does not exist for its own sake, but rather, to provide benefits to clients which exceed the sacrifices necessary to obtain them.
Appendix — Sample Client Closing Letter

Dear Client,

We write to confirm the results of your domestic violence case. After pleading guilty as charged, you were given no jail time and received a fine of ______. You were also placed on one year’s inactive probation. This means you need not report to the probation officer. The only requirements to comply with your probation are that you pay the fine and court costs and that no further incidents of domestic violence occur.

As you know, you were charged with first degree domestic violence for which the possible penalty is a maximum of six months in jail and a $1000 fine, or both. In addition, in this state, a second incident involving domestic violence (after having been convicted of domestic violence previously) can be charged as a felony. In light of these serious consequences, initially our concern was to make sure we explored all possible defenses before entering a plea of guilty. You were concerned about antagonizing the court by entering a plea of not guilty, but agreed to allow us to investigate the case completely. After we explored the facts fully, we agreed with you that you probably had no legal defense to the charges, but that there were sympathetic facts in your situation that should be brought to the attention of the court in order to minimize your sentence. We worked hard with you to put together supporting information and a statement to the court that fully described these facts. We think this had an impact on the judge and contributed to the favorable sentence you received. We hope you agree.

Finally, we know that you accepted our representation distrustful of lawyers, and worried that our involvement would make matters worse for you. Hopefully, we have been able to help you better accomplish your own goals, on your terms, in a manner you found helpful.

Thank you for allowing us to represent you in this case. We certainly wish you the best of luck in working out the stresses that led to this incident. If we can be of any further assistance to you, please let us know.

Sincerely,

Legal Intern & Supervising Attorney