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YOU WANT TO CHANGE BEHAVIOR? USE THE DRUG COURT FORMAT

by The Honorable Robert E. Gaston
Eighth Judicial District Court, Nevada

A startling innovation hit our courts about ten years ago that has had unprecedented success in the battle to stop drug addiction. Although this concept was new to the court system, it has been around for years in our educational systems. The Drug Court format is simply taking the psychological techniques of behavior modification and adapting them to the court. Studies show that behavior can change if the appropriate model is in place. Of course, the judicial officer must buy into the philosophy and be willing to change his/her courtroom procedure accordingly for this model to be successful.

This technique can be applied to other issues facing the court. In the Eighth Judicial District

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Drug Court cont.

Court, the Juvenile Drug Court Format was successfully applied to a Dependency Drug Court, an Adoption and Safe Families Act Pilot Program, and a delinquency Parole Intervention Program. With imagination and effort this model can be applied to other juvenile and family related issues if behavioral change is the goal.

HISTORICAL PERSPECTIVE

Although judicial attempts at addressing drug addiction have been tried for years, the first Drug Court under the behavior modification model began in Dade County, Florida in 1989.[1] As of June 1999, Drug Courts had been implemented in some 361 jurisdictions, and an additional 220 were in various stages of planning.[2]

The federal government has been instrumental in providing financial assistance to expand this Drug Court model throughout the nation. Between 1995 and 1997, the U.S. Department of Justice, through its Drug Courts Program Office, provided a total of $56 million in funding Drug Courts, and an additional $40 million in fiscal years 1999.[3]

Why has the federal government been willing to financially support this Drug Court model over the past several years? Simply because it works. Reports from the GOA (The General Accounting Office) have found that, "Drug use rates (as measured by urine test results) and criminal activities (as measured by re arrests) are reduced while participants are in the program. In those evaluations that included a comparison group, post-program re arrest rates for graduates are lower than for comparison sample offenders, and lower than for those who drop out or are terminated from the program. Overall, comparing all drug court clients with comparison offenders, most studies found lower post-program re arrest rates for drug court participants."[4] To sum it up, this model works to change behavior. If it is effective for those who are seriously addicted to drugs it can be adapted to help others who need to change their behavior.

DRUG COURT MODEL

Steven Belenko described the Drug Court Model as follows:

"The drug court model usually entails:

1. judicial supervision of structured community-based treatment;

2. timely identification of defendants in need of treatment and referral to treatment as soon as possible after arrest;

3. regular status hearings before the judicial officer to monitor treatment progress and program compliance;

4. increasing defendant accountability through a series of graduated sanctions and rewards;

5. mandatory periodic drug testing."

"The drug court model incorporates a more proactive role for the judge, who in addition to presiding over the legal and procedural issues of the case, functions as a reinforcer of positive client behavior. Although the judge is the central player in the program, most drug courts seek to function as a team in which prosecutors, defense attorneys and counselors work together to help offenders overcome their drug problems and resolve other issues relating to work, finances and family.

Defendants who complete the drug court program either have their charges dismissed (in a diversion or pre-sentence model) or their probation sentences reduced (in a post-sentence model)"[5]

The Role of the Judicial Officer

One of the key elements in the Drug Court model is played by the judicial officer. Under this model, the judge must step out of his traditional role as society's agent for retribution. Instead, the judge under this model, would monitor a team of service providers who would examine the underlying socioeconomic, psychological, and educational issues that result in the antisocial behavior and recommend a course of treatment.[6]

The judge's role, under this model, is to be the one that provides positive reinforcement for good behavior and "natural consequences" for inappropriate behavior. As opposed to traditional methods of adjudication, the judge in the Drug Court setting maintains an active, supervisory relationship with the Drug Court Participants. In the Drug Court, for example, the judge would be the one who rewards the defendant for accomplishing an objective. If the de-

fendant has had perfect compliance as to all of the goals for that period of time, the judge would give the defendant a reward. For example, a defendant who tests negative on all his U.A.'s (urinalysis), and attended all of his treatment groups would be congratulated by the judge who, with the others present in the Drug Court, would applaud his performance. As this individual advances to different phases in the program he would be recognized with a certificate. The judge would praise this person in front of the treatment providers and his peers. Tangible rewards like a certificate of advancement from one phase to another, a gift certificate for a free coke, or a gift certificate for a music C.D. have been very effective, especially dealing with teenagers. Demonstrative rewards like applause, hand shakes and even hugs can be very meaningful to the participants regardless of age.

On the other hand, if this person did not do well in his treatment program, the judge would be responsible to impose "consequences" or sanctions.

The judge also has the responsibility of monitoring and supervising the treatment team. He should make sure that they stay on track with appropriate treatment and assist the team in finding resources that might assist the participants.

This Drug Court format works well because the court intervenes frequently. In a typical Drug Court format, the court would see the defendant every week. This makes the defendant accountable to the court on a frequent basis and it reinforces to the defendant that the court is truly interested in seeing him succeed.

As the defendant progresses through the program, the judge can see him less frequently, with the understanding that if he relapses, one of the consequences can be to place him back a phase and require him to attend court more frequently.

It is essential that the participants appear before the same judge throughout the Drug Court experience. "Only one court with one judge adjudicates and monitors all the cases screened and all the offenders admitted to the treatment program."[7] Otherwise the program will lack consistency for the participants and individual progress may begin to unravel.

The Treatment Team

The Treatment Team is made up of the judge, the public defender, the district attorney and all of those individuals who have an interest from a service or treatment prospective. A member of the drug treatment staff, a drug counselor, the Drug Court probation officer, an education liaison person as well as a vocational trainer should all be part of this team.

The team meets every week, just before court, and discusses each individual's performance for the preceding week. The team collaboratively determines what action should be taken in court that day, with the final decision resting with the judge. The team also actively participates in evaluating an appropriate program for each individual and determines if there are other services that might assist the participant in reaching his objectives.

"Under this model, as members of the drug treatment team (including the judge, the public defender and the district attorney) remain constant, they develop a familiarity with each participant in the program and a unique awareness of all of the factors impacting the lives of each of these young people. This intimate knowledge of each situation allows the team to effectively hold the juvenile participant accountable for his or her actions, and reinforces them in ways that will keep them in treatment, if appropriate."[8]

APPLICATION OF THE DRUG COURT FORMAT TO OTHER AREAS

It is the opinion of this writer that the Drug Court format can be used successfully in other areas where the goal is to change behavior. This format, as was previously mentioned, is a legal application of behavior modification used for many years in educational and psychological settings. From Pavlov to Skinner in the psychological and behavioral sciences, to Glasser and others in the educational arena, the stimulus response technique, or rewarding positive behavior technique, has proven to be an effective way to achieve certain desired behavior.

If the subject is given a reward every time the subject achieves the desired behavior, the appropriate behavior is likely to become established. It is essential that the intervention of rewards occurs frequently in order for success to be achieved. The subject can also respond to sanc-

tions. If the subject receives a sanction for every inappropriate behavior and that sanction occurs frequently and consistently, the subject is likely to avoid the behavior that is undesirable.

As the reader can see, by applying these basic behavioral modification concepts, a subject's behavior can be positively affected in many areas of law: delinquency prevention, parenting skills, abusive drinking, abusive gambling, etc. The application is as broad as the imagination.

These concepts were applied to court programs in Clark County with very exciting results. These programs and how the Drug Court format was applied will be briefly discussed in an attempt to give the reader an idea as to how the format can be applicable to a wide variety of programs where the objective is to change behavior.

Dependency Court

A dependency Drug Court was started in Clark County in January, 1999. Those participants in this program were, for the most part, referred by Child Protective Services (CPS), as parents who had been identified as having a drug problem. The children had either already been removed from their custody, or it was an ongoing concern due to the parents use of drugs.

The format of the dependency Drug Court was very similar to that of the juvenile Drug Court. There were four different phases and the program lasted for about one year for most of the participants.

This program monitored parents who had been addicted to drugs for years. These parents showed significant progress in drug rehabilitation during the course of the program. An evaluation of the program showed that there was a success rate of 97%. This means that 97 out of 100 parents who graduated from the program were not reported for subsequent drug use, either criminally or by CPS.

Drug free parents were united with their children with a plan of permanency.

A.S.F.A. Pilot Program

The Adoption and Safe Families Act (A.S.F.A.) is a federal act that was, for the most part, adopted by the state of Nevada. This Act requires, among other things, that children who are in foster care be ordered into a plan of permanency within twelve months of removing them from their home. In 1998 the average stay for a child in foster care in Nevada was 3.2 years, with a great many children staying in multiple foster homes for 8 to 10 years. Historically, the court would review these cases every six months.

A pilot program was established incorporating many of the ideas and techniques established in other jurisdictions which had successful programs. In order to implement these ideas and techniques, the Drug Court format was adopted.

Using this format, perma-

nency was established with 85 per cent of the families involved within the first nine months. The case plans for the remaining 15 per cent of the cases anticipated permanent placement within the targeted time of 12 months. The factors that made this program successful were:

1. frequent court intervention,

2. team work of the service providers, case workers and attorneys,

3. assignment of attorneys for the parents and children at the onset of the case, and the ability to have 30 to 40 minutes for each hearing to thoroughly discuss the issues, so that everyone had a clear understanding of the goals and objectives.

Parole Pilot Program

For years, there has been a very high rate of recidivism for youth who have been sent to state operated youth camps for delinquent behavior. Recidivism nationwide is reported as being at 85 per cent. This program was established in order to reduce the number of youth paroled from the youth camp and Spring Mountain.

The treatment team included the judge, the district attorney, the public defender, the parole officers, therapeutic intervention coordinator, Aspen coordinator, Boys and Girls Clubs coordinator, Parenting Training personnel, and vocational counselor. This team would meet every week prior to the weekly court hearing and discuss how each youth did that week. Recommendations would be made regarding additional services a youth might need, as well as rewards or consequences for the youth in his court appearance.

Although the program existed for about five months, the results appeared to be very encouraging. During those five months only one of the approximately fifteen boys was sent back to Spring Mountain Youth Camp. The cessation of the program had nothing to do with the quality or success of the program, but simply a change in the judicial officer.

The Drug Court format was utilized and the court met with these boys and their parents every week. The parents were required to remain in court and participate in parenting classes while the boys had group meetings with their parole officers. A Family Intervention therapist met with each family, each week to assist that family with relationship problems that were present in the home. Every boy was involved in school, or working full time, and was involved in their local Boys and Girls Clubs after school.

The program was successful because of the teamwork concept, the consistency of the parole officers and the frequent court intervention that reinforced the parole officers and service providers and rewarded the boys for their compliance.

THE LEARNING PROCESS

The judicial system has remained relatively unchanged over the centuries, notwithstanding research findings that may challenge the process. The judicial system has been primarily punitive. Although such a system may be needed in criminal or civil proceedings, it appears to be least effective with juvenile or family law matters.

Neurologists tell us that the brain is composed of over 10 billion neurons. Learning occurs when some of these neurons become linked in patterns. Associations are formed when events occur together in time.[9] Pavlov and Bechterev studied the relation of learning to the closeness of events in time. They found that if an animal completes a desired task and at the time is rewarded, that animal forms associations so that he is more likely to complete the desired task again.[10]

B. F. Skinner of Harvard University developed the learning principle he called, "operate conditioning," wherein he described how learning takes place through positive reinforcement.[11] According to Skinner's principle, when an individual completes a desired act and he is rewarded, learning takes place. This reward stimulates the "pleasure centers" in the brain. In a learning environment it may simply be a smile or a pat on the back for a child. In a classroom, a teacher's smile or frown is intended to stand for any of the stimuli that produce pleasure or punishment connections as experienced by the child. A child must have a number of similar experiences in order to learn.

Although punishment leads to a learned reaction of avoidance of the activity, it must be followed by positive reinforcement of appropriate activities for long term learning to occur. Obviously, if an individual is reinforced for what society believes

is negative or inappropriate behavior, that too is learned.

Applying positive reinforcement techniques in a structured program entitled, "Reality Therapy," Dr. William Glasser had an 80 per cent success rate with delinquent girls in a California youth camp. These girls had been in institutional settings for years for crimes ranging from "incorrigibility" to first-degree murder. Out of a total population of 370 girls only 43 were returnees.[12]

Dr. Glasser found that one common characteristic the girls shared was a lack of a deep feeling for themselves or anyone else.[13] The continuous positive reinforcement in a structured, secure setting had amazing results, considering the fact that the previous rate of recidivism for this institution was 90 per cent. This represented on a 10 per cent success rate.

What these experts tell us through these many years of research is that behavior can be changed. By applying these theories of learning to programs involving children and families, the court can make a positive impact on the underlying problems.

CONCLUSION

The creation of the Family Court is a recent phenomena in the United States. It makes sense to provide a forum where a judge can hear and understand strictly family and children issues. However, we cannot assume that we will be able to effectively meet the needs of these families and children by conducting business as usual. We need to be constantly looking outside the proverbial envelope for new ideas and techniques to more effectively serve these families.

The Drug Court is an innovation in our court system that has provided us with a new understanding as to how we can change behavior. We need to take advantage of these innovations and look for ways we can apply them to these troubled families. Parenting skills, communication skills, disciplinary techniques, and extended family matters are but a few of the issues we could look at in starting innovative programs in the family court.

Only by trying new programs and new techniques in an attempt to be more effective for the Family Court clientele can we be assured that the families are best served by our court system.

ENDNOTES

[1] Belenko, Steven, Ph.D., "Research on Drug Courts: A Critical Review," *National Drug Court Institute Review*, Vol. 1, Issue 1, Alexandria, Virginia, Summer 1998, p.3.

[2] Belenko, Steven, Ph.D., "Research on Drug Courts: A Critical Review, 1999 Update," *National Drug Court Institute Review*, Vol. II, Issue 2, Alexandria, Virginia, Winter, 1999, p.1.

[3] *Ibid,* at p.3.

[4] *Ibid,* at p. 4.

[5] Belenko, Steven, "Research on Drug Courts: A Critical Review", Vol. I, Issue 1, *op. cit.* at 5.

[6] Babb, Barbara A., "An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective," *72 Ind.L.J.* 775, 779 (1997).

[7] Hora, Peggy Fulton and Schma, William G., "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America." *74 Notre Dame L. Rev.* 438,449 (1999).

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[9] Thorndike, E. L., *Educational Psychology*, vol. 2., New York: Teacher's College, 1913.

[10] Pavlov, I. P., *Conditional Reflexes*, London: Oxford University Press, 1927.

[11] Skinner, B. F.., "Experimental Analysis of Behavior," *American Scientist*, 1957, 45, p.p. 347-371.

[12] Glasser, William, M.D., Reality Therapy, *A New Approach to Psychiatry*, Harper and Row, Pub., New York, 1965.

[13] *Ibid*. p. 68.

"UNBUNDLED" LEGAL SERVICES: Be afraid, be very afraid

By Edward L. Kainen, Esq.

This article was not intended to be comedic; not entirely, anyway. However, in drafting it, the article became an opportunity to express very real concerns about what I perceive to be the dangers associated with the *irresponsible implementation* of the concept of unbundled legal services. I am not opposed to the "concept," but I am unnerved by the dangers associated with the implementation of a system of unbundled legal services without earnestly addressing the serious consequences associated with the same.

I had the distinct pleasure of attending the National Conference on "Unbundled" Legal Services, in Baltimore Maryland, in October of last year. This experience gave me a whole new perspective on the area of unbundled legal services. At the risk of being offensive (those of you who know me, recognize the sincerity of this concern), the future is extremely scary!

The conference was opened by the ABA President-elect, Robert Hirshon, who had, what I perceived to be, the most rational approach of anyone who attended the conference. The import of his message was that, unbundled legal services are coming and the concept must be handled responsibly. In retrospect, his message contained a good deal of foreshadowing of what I sense to be the ABA's well-founded fear that this concept will be carried out without sufficient responsibility and forethought.

WHAT ARE UNBUNDLED LEGAL SERVICES?

In order to illustrate the concept of unbundled legal services, every participant was handed seven "ice-cream pop sticks" wrapped in a gold band. Each "ice-cream pop stick" had one of the following words printed on it:

1. Gather facts;
2. Research law;
3. Advise client;
4. Negotiate;
5. Discovery;
6. Draft documents; and
7. Court presentation.

The concept the speaker was attempting to symbolize by the display was that lawyers could be hired for "discreet lawyer tasks," as illustrated by the named tasks above. In that regard, the concept of "unbundled" legal services allow a lawyer to be hired only to negotiate, or only to advise the client, or only for court representation; hence "unbundling" the traditional aspects of full representation.

The next concept introduced was akin to a physician's Hippocratic Oath, in that unbundled legal services should "do no harm." In that regard, discussion continued and it was suggested that unbundled legal services or "limited representation" should be permitted when, "under the circumstances," the same will do more good than harm.

From my perspective, many of the individuals who spoke at the conference were nothing less than unmitigated zealots for unbundled legal services without any ability to give any serious consideration to the problematic aspects of the concept. In forming my opinion, it should be noted that private practice lawyers made up only a small portion of the attendees. The majority of the approximately 200 attendees were largely legal services related. In that regard, there were several legal services directors or staff members, court administrators, judges, law professors and only a few members of the private bar.

THE PROBLEMS WITH "UNBUNDLED" LEGAL SERVICES

The reality is that there are significant obstacles to fully implementing the concept of unbundled legal services. Most of the obstacles are systemic, or a natural result of the way that law has been practiced for several hundred years.

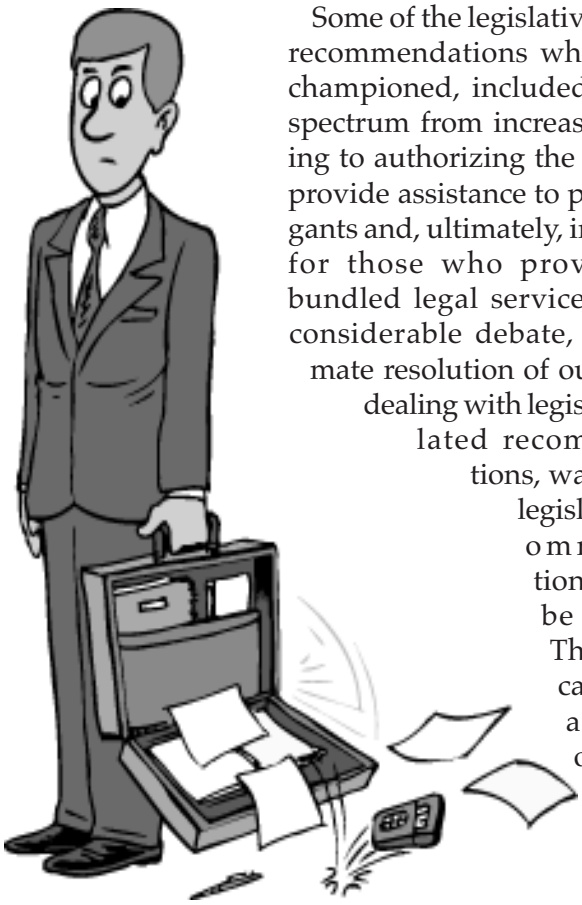
In the effort to fully implement a program of unbundled legal services, many of its advocates are championing the destruction of the practice of law as we know it. To further that effort, several other concepts were discussed, including abolishing conflict of interest laws, eliminating the concept of the formation of an attorney-client relationship, various forms of immunity for those practicing unbundled legal services, and an overall change in the idea of the lawyer being the "director" of a case to simply being a "resource" for litigants who otherwise direct their own cases.

Throughout the conference participants were divided into five plenary discussion groups. Each of the groups was charged with discussing and making recommendations on various aspects of unbundled legal services, such as general statements, system recommendations, court-related recommendations, organized private bar-related recommendations, and legislative-related recommendations. All of the plenary discussion groups addressed the general statements involving unbundled legal services and each discussion group addressed one of the other topics. My group dealt with the legislative-related recommendations.

In terms of the General Statements, there seemed to be a consensus in our plenary discussion group, and apparently in most others, on two concepts:

(1) That unbundled legal services offer potential benefits to the justice system; and

(2) Unbundled legal services are not a substitute for full attorney representation.



Beyond these basic statements, there seemed to be a significant fracture between the zealots in favor of unleashing a system of limitless unbundled legal services and those with experience in the private practice of law. While everyone seemed to agree that unbundled legal services should not be a substitute for full representation, it became difficult to accept that concept without relegating unbundled legal services to a "second class" system. No one wanted to call the concept of unbundled legal services a second class system, but the reality is that unbundled legal services, when carried out, are in fact a lesser form of the practice of law. I believe that this was the "unspoken" sentiment throughout the conference, but it was just impolite to question the foundation of the subject which brought us all together. It was tantamount to rejecting the premise on which the conference was based. However, the reality is that those who can afford full legal services are likely to receive more substantial justice.

Some of the legislative-related recommendations which were championed, included the full spectrum from increased funding to authorizing the courts to provide assistance to pro se litigants and, ultimately, immunity for those who provide unbundled legal services. After considerable debate, the ultimate resolution of our group, dealing with legislative-related recommendations, was that no legislative recommendations should be made. This was a case where a minority of us carried the day. The group ultimately decided that unbundled legal services need to be addressed within a lawyer's existing ethical obligation and not by legislation.

The concept of courts providing assistance to pro se litigants raised serious questions regarding conflicts of interest that have been dealt with and addressed by the Self-Help Center in Las Vegas, which remains independent of the courts. The question

of immunity or even qualified immunity brought the most heated debate. After considerable discussion, our group took the position that removing the ability to sue a lawyer for malpractice was tantamount to an admission that those providing unbundled legal services were not competent to provide "good" legal representation and, if the concept of unbundled legal services was to succeed, it had to have the same credibility as the provision of traditional legal services. Therefore, lawyers had to act knowledgeably, responsibly and ethically regardless of whether they were providing full legal services or unbundled legal services. The concept of immunity was rejected by the group and, with it, all other legislative recommendations.

The session entitled "Ethics and Professionalism – a Comparative Analysis of Unbundling Issues in Different Contexts" was perhaps the scariest session of the entire seminar. I understood the collective belief of the presenters to be that the American Justice System favors those who have counsel and know their rights (well, duh!). This, they contended, results in our system of justice being biased and prejudiced against those without counsel. Their argument rests on the premise that we are holding *pro se* litigants to a higher standard, because court rules and form of pleadings require *pro se* litigants to try harder since they do not have the same base of knowledge as lawyers. Of course, the basis of their view is that no one "chooses" to be without counsel, but people are "coerced by financial circumstances or personal beliefs" not to have counsel.

They contend that a court should determine whether someone is permitted to proceed *pro se*, by employing the standard of informed consent. The speakers considered the concept of appointing lawyers to represent all such situated persons and reluctantly rejected the idea, only for cost and practicality reasons. I mistakenly believed this was a sign that a good alternative was going to be posited. However, the general consensus of the panel was that the practice of law should be "deregulated" and that people who have attended law school should not be entitled to continue their "monopoly" on the practice of law. Again, this was by far the scariest of all of the sessions.

NEVADA'S RESPONSE

At least one important insight came from this conference. I have been under the distinct impression that Nevada was way behind the curve in providing legal services to those who cannot afford a lawyer's assistance. We have all heard about the progressive nature of the Maricopa project in Arizona. Clearly, the Maricopa project sets the standard. However, it is worth noting that a significant part of this conference was conducted in small breakout groups that gave most participants a chance to interact with other participants. Consequently, anyone who was willing to make even a minimal effort was able to speak personally with a majority of the people who attended this conference. The truth is that Nevada's projects, specifically the Self-Help Center in Clark County and the Family Court Facilitator's Office in Reno, are among the country's leaders; being surpassed only by the Maricopa project in Arizona.

I believe that the Nevada programs are a success because they were formed with representation and involvement from those in all aspects of the system from groups looking out for the indigent, to those in private practice, and all levels of the Court system. In that regard, attendance at this session did cause me to believe that we need to do everything we can to support our programs, which deliver much-needed services in a responsible manner. I believe that our support should recognize the positive accomplishments of those involved in our Nevada programs, which carry out their intended purpose without the perilous consequences which are likely to result from the positions advocated by some of those attending the conference in Baltimore.

In all of this, there is a message to the private bar which is of critical importance. Get involved with, support, and work to improve the <u>good</u> programs which benefit our communities. Take a few *pro bono* cases each year. Our failure to eradicate, or at least reasonably address, the inherent problems discussed herein can have dire consequences. There is a real likelihood that we will find ourselves on the receiving end of a significantly less-desirable program or we may have programs, like those advocated in Baltimore, foisted upon us.

Family Law in Ely

Thursday, March 14, 2002

9:00 – 5:30	**Registration**
10:00 – 3:15	**Nuts and Bolts of Family Law Practice**
	Parental Alienation
	Business Valuation for Dummies
3:30 – 5:30	**Family Law Judge's Panel** (2 CLE hours)
5:30 – 6:00	**Family Law Section Meeting**
6:00 –???	**Cocktails, Dinner & Entertainment**

Friday, March 15, 2002

8:30 – 11:45	**Litigating a Child Custody Case**
11:45 – 1:00	**Luncheon**
1:00 – 3:15	**Family Law Breakouts:**
	Immigration for Family Law Attorneys • Social Security & Family Law
	Domestic Torts • QDRO's for Dummies
	Domestic Battery Defense • Pre/Post Nuptial Agreements
3:15 – 4:00	**Case Law Update**, Family Law General Session (.75 CLE hours)
4:00 – 4:45	**Legislative Update** Family Law General Session (.75 CLE hours)
5:00 – 6:30	**Cocktail Reception**, White Pine Co. Courthouse
6:30 –???	**Annual Banquet & Entertainment**

Saturday, March 16, 2002

8:30 – 10:00	**Mock Bankruptcy Consultation** (1.5 CLE hours)
10:15 – 11:45	"**Up from the Ashes"** Family Law General Session (1.5 Ethics CLE hour)

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