

## The Use of Mediative Strategies in Traditional Legal Practice

by  
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While formal mediation is desirable and ought to be encouraged for the management of many family conflicts, the timing, resistance of a party or opposing counsel, cost, or other circumstance may be a block to the use of that process.<sup>1</sup> However, when a matter is not susceptible to formal mediation and is in the traditional posture where parties are each represented by separate counsel, one or both attorneys can still be effective in facilitating settlement by the use of mediative skills and strategies. This is so even when one attorney is resistant and “plays hardball.” Some who encourage mediation tend to rely upon or be motivated by a more humanistic value orientation. That orientation, although helpful, is not essential for the effective use of mediative strategies in mediation or in traditional practice. Just as in difficult mediations where one or both of the parties is particularly hurt, angry, or skeptical and the process still works, so too can the strategies work when employed with an opposing counsel who operates from a competitive orientation. Since mediation should first and foremost be good business, the same strategies are applicable in the more competitive context of traditional practice.

Formal mediation has gained acceptance in many areas of the county. Many legislatures and court systems are incorporating mediation into the institutional structure.<sup>2</sup> This suggests some of the initial resistance to mediation, such as its dismissal as an

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<sup>1</sup> Frank E. A. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?* 70 A. B. A. J. 50 (Nov. 1990)

<sup>2</sup> NANCY H. ROGERS & CRAIG A. McEWEN. *MEDIATION LAW POLICY AND PRACTICE*, App. C (2d ed. 1994 and 1997 Cum. Supp.)

idealistic fad, has dissipated.<sup>1</sup> One of the residual effects of the advent of mediation practice has been the incorporation of mediative strategies into traditional legal practice. This has expanded and altered the landscape of professional legal practice.

The purpose of this article is to catalog the skills, strategies and techniques that have been observed to aid the facilitation of settlements in the formal mediation process and to suggest ways to systematically integrate and adapt them into lawyers' approaches to the traditional practice of law. While the examples in this article are directed toward the family law context, the strategies can be applied in all contexts of legal practice. However, some attention needs to be given first to the overall approach and thinking of the lawyer if he or she is to effectively use mediative strategies. Specifically, three general areas need to be considered: first, the client and the family system in which the conflict arises; second, the lawyer's understanding of his or her role as an advocate; and third, the sources of conflict. With this backdrop, this article will consider the application of mediative strategies in each stage of the legal process from pre trial client preparation, discovery, and settlement negotiation, to trial and post trial matters.

## I. Systems Theory and Mediative Strategies

### A. *The Client and The Family System*

The underlying theory and operating premises of mediation is systems theory. That same theory is applicable to legal conflicts in traditional settings. From the systemic perspective a family system is an entity in which the whole is greater than the sum of its parts. In short, the family is an organism in its own right in which each member of the family is inextricably connected to every other member. Families viewed as organic systems are never ended or terminated, they are only restructured to function in different ways based on personal (intrafamilial) or cultural (extrafamilial) cues or forces.<sup>2</sup> By contrast, in traditional legal thinking the family is viewed more mechanistically: it is merely a group of interchangeable members, which can be created or dissolved by judicial fiat, such as adoption or termination of parental

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<sup>1</sup> See Maria R. Volpe & Charles Bahn, *Resistance to Mediation: Understanding and Handling It*, 3 *Negotiation J.* 297 (1987).

<sup>2</sup> SALVATORE MINUCHIN, *FAMILIES* (1974).

AND FAMILY THERAPY 46-66,



rights. The family system the mediator works within is the same system the traditional attorney must consider if he or she is to be effective in managing conflict.

The traditional attorney may have a hard time observing the importance of the systemic perspective because he or she typically works with only one individual client. The attorney tends to limit his or her focus to the legal issues and discount or de-emphasize interpersonal, economic, or other factors in case analysis and planning. The legal mode of analysis is frequently constrained to linear propositions about what can be proven or argued in court, not about how problems can be resolved.<sup>3</sup> In mediation practice, the mediator must use a multi-variate mode of analysis — simultaneously sorting through, clarifying and organizing economic, interpersonal, as well as legal issues, to allow for effective problem solving. Effective family law attorneys intuitively, and perhaps unwittingly, apply this systems thinking. In this strategic practice of law they recognize that their client is a part of a whole family system that must function after the immediate dispute is managed and that solutions are seldom solely a matter of legal determination. For such matters to be settled and not just determined, the outcome must be economically feasible and personally tolerable as well as legally appropriate. In short, better attorneys are usually effective systemic problem solvers.

#### B. *The Concepts of Advocacy and Adversarial Practice*

Too often, mediation is juxtaposed against the adversarial system or litigation: mediate or litigate. They are false opposites. Even the discussion of which mode of dispute resolution is the “alternative” tends to frame the discussion in linear, either/or terms, and set up an unnecessary polarity.<sup>4</sup> This kind of thinking underlies the resistance of some traditional family law practitioners and some mediators to the integration of different kinds of dispute resolution modes in the service of their clients. Anecdotal remarks suggest some mediators believe everyone should be compelled to mediate, and some lawyers think only they and the courts can settle divorces and other family conflicts.

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<sup>3</sup> Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 J. DISP. RESOL. 25.

<sup>4</sup> See CLAUDE LEVIS-STRAUSS, 1 *THE RAW AND THE COOKED: INTRODUCTION TO A SCIENCE OF MYTHOLOGY* (1983).

Legal advocacy is at the heart of traditional legal practice. Zealous representation by a lawyer of the client's interests is at once a noble professional calling and unfortunately sometimes a rationalization for less refined or even unprofessional behavior. Therefore, the concept of advocacy is critical and must be clarified. Frequently, lawyers view being an advocate as synonymous with being adversarial, which presumes a narrow if not confused notion of advocacy. While an attorney may find it necessary to be adversarial in some circumstances, advocacy per se does not require that approach in all instances. Being adversarial, therefore, is merely a part, not the whole, of advocacy.

In the same way, discussions about negotiation styles are often unhelpfully presented in polarized terms: soft, mediative, cooperative, trusting lawyers who settle cases are juxtaposed against tough, aggressive, competitive, manipulative lawyers who litigate. The paradox is that the negotiation style and requirements of a good mediator are more the same than dissimilar to a good litigator. Specifically, both require a high tolerance for conflict, the ability to think orderly under pressure, the ability to restate questions or issues, and ultimately, intuiting and communicating the underlying interests and needs of the clients or parties concerned. Both effective advocacy and effective negotiation require and allow for the use of both assertive and cooperative styles, depending on the circumstances.<sup>5</sup>

The use of mediative strategies in traditional practice is an appropriate part of advocacy in seeking to realize a client's interests. As most lawyers know, the parties' interests need not be mutually exclusive. The use of mediative strategies in traditional law practice is therefore in keeping with the most traditional notions of zealous advocacy. The intention is not for lawyers to become mediators, but merely more effective advocates because of a greater depth of understanding of the factors that give rise to conflicts.<sup>6</sup> As more attorneys learn and apply mediative skills and strategies and integrate that analytical framework into practice, our legal culture will continue

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<sup>5</sup> Robert D. Benjamin, *A Beginning Compendium of Mediative Strategies Applicable in the Traditional Practice of Law*, 27 FAM. & CONCILIATION CTS. REV. 51 (1989).

<sup>6</sup> Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984).

to shift away from a linear, legalistic perspective toward a broader multi-dimensional, systemic perspective of problem solving.

### C. Sources of Conflict

Many lawyers tend to assume conflict between disputing parties is solely the result of scarce tangible resources — time, money, or property. Scarce resources certainly play a part in the creation of conflict; however, other significant sources of conflict lie in client confusion and misperception and the lack of psychological security or a sense of powerlessness.<sup>7</sup>

Most people in conflict feel they are in crisis. A crisis is typically the result of two factors: (1) the lack of information or the presence of misinformation, and (2) feeling overwhelmed by the circumstances. If those factors arise as a result of an outside event — a war or natural disaster — the crisis is a real one. Many times, however, the source of the crisis is the person himself; people keep themselves confused and overwhelmed. If the conflict is to be managed, then this “perceptual crisis” must be addressed. Many clients believe they are helpless and powerless and expect the lawyer to save them. Too many lawyers try to oblige them and do the impossible — make decisions for their clients and rescue them. To quell a good measure of unnecessary conflict, this perceptual crisis on the part of clients must be managed. The use of mediative strategies allows the client to be an active participant in the legal process and negotiation, assume responsibilities, and obtain a sense of control. The lawyer’s responsibility will be to assure the client has sufficient and accurate information and a clearly structured map of the process so the client can effectively participate in the management of his or her case.<sup>10</sup>

## II. Pre Trial Strategies

### A. Client Education

#### 1. Client preparation

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<sup>7</sup> ROBERT D. BENJAMIN, *THE MEDIATION OF BUSINESS, FAMILY AND DIVORCE CONFLICTS: PRACTICE FORMS AND HANDBOOK*, (Mediation and Conflict Management Services, St. Louis, rev. ed. 1997); see also, PAUL

WATZAWICK, *THE SITUATION IS HOPELESS BUT NOT SERIOUS* (1983). <sup>10</sup> BENJAMIN,

*supra* note 9.

Issues presented to lawyers are typically framed as legal even though they are seldom solely legal in origin or in effect. Interpersonal dynamics and extralegal circumstances contribute to most conflicts. Simply because an issue has legal aspects does not require that it be addressed strictly from a legal perspective; both legal and extralegal options for resolution ought to be explored. From the start then, how an attorney clarifies and presents issues will have a significant impact on how the matter is managed and the opportunity for constructive resolution, in or out of the legal system.<sup>8</sup>

## 2. *Setting client expectations: piercing operating mythology*

Clients are typically outcome oriented. They go to doctors for a cure and to lawyers for right answers and results. They expect clear final determinations from courts that will resolve problems decisively and completely. They expect “to win.” Most have acquired their understanding of legal process and justice from the popular media such as television and the movies.<sup>9</sup> Clients operate under certain myths — stories of significance that people tell themselves to make sense of their world. The primary operative myths are: First, “because I believe I am right, then a fair and impartial judge will see that I am right and decide for me,” the “Myth of Justice.” Second, because clients believe legal principles and legal analysis are based on a system of logic or formula, what the court will decide is knowable and predictable, the “Myth of Rationality.” Third, when the case is decided, the conflict will be finally and completely resolved, the “Myth of Finality.”<sup>10</sup>

Most lawyers know that justice is a far more elusive concept than clients often appreciate. Judges and courts are not nearly as rational and predictable as many would like to believe. One of the most frustrating and sometimes aggravating aspects of practice is for lawyers to find ways to explain the realities of the legal process to their clients, especially in family law matters. To do so requires piercing what are

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<sup>8</sup> Menkel-Meadow, *supra* note 5.

<sup>9</sup> Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 *YALE L. J.* 1579 (1989).

<sup>10</sup> Robert D. Benjamin, *The Physics of Mediation: The Reflections of Scientific Theory in Professional Mediation Practice*, 8 *MEDIATION Q.* 91 (1990).

viewed by many clients to be sacred myths upon which many people rely.<sup>11</sup>

How an attorney educates clients about the legal process and helps them set realistic expectations will be a critical preparatory function. How problems are framed and how expectations are set often determines how susceptible those issues are to resolution. Thus, if a client expects that the court will restrict her former husband's visitation with the children because he does not dress them properly for cold weather, the client is likely to be profoundly disappointed in the legal system and in her lawyer if that unrealistic expectation goes unchecked.<sup>12</sup>

Attorneys have four immediate responsibilities in preparing the client in the legal process:<sup>13</sup>

1. To set realistic expectations regarding the likely outcomes or resolutions of the matter;
2. To assure that the client has sufficient understanding of the legal process and especially the "wild cards" and limitations of the legal system "to cure" the perceived problem;
3. To make sure that the lawyer's and client's understanding of the attorney's role and notions about advocacy are sufficiently similar. If the client's idea of advocacy by counsel is a tough adversarial approach and the attorney is working to settle the matter thoughtfully, those differences will probably result in friction unless the risks of that approach (time, cost, emotional strain) are more fully appreciated by the client;
4. To make sure the client understands his/her role and responsibilities in resolving the matter. Giving clients some responsibility and control for their case is crucial to their investment in and acceptance of the outcome.<sup>14</sup>

## B. *Effective Communication*

### 1. *Neuro-linguistic programming*

Most professionals operate on the faulty assumption that because they have said or explained something to their client, he or she has

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<sup>11</sup> Benjamin, *supra* note 9.

<sup>12</sup> JAY HALEY, *PROBLEM-SOLVING THERAPY* (2<sup>nd</sup> ed 1987); *see also* James Kochalka, *Coping with Client Expectations in Divorce*, 72 FLA. B. J. 55 (Feb. 1998).

<sup>13</sup> Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996).

<sup>14</sup> Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); *see also* Mary M. Zulack, *Rediscovering Client Decision Making: The Impact of Role Playing*, 1 CLINICAL L. REV. 593 (1995).

understood what was said the way it was meant. The assumption is particularly dubious when taking into account that most clients are emotionally stressed when in conflict and that the attorney in presenting legal concepts and terms for all intents and purposes is speaking a foreign language. Effective communication means not just that the attorney understands the clients' real issues (not necessarily the same as the stated issues), but also that counsel has effectively conveyed to the client that he or she is understood.

Neuro-linguistic programming is an approach that can be helpful to an attorney in effective communication.<sup>15</sup> In neuro-linguistic programming, the transmission of information and communication goes beyond mere words to include nonverbal and other forms of communication. People receive and integrate information audially (hearing), visually (seeing), and kinesthetically (experiencing). The least effective way to present information is didactically — just telling — which is, unfortunately, the method most relied upon. For clients in conflict, understanding what their lawyers are telling them in the midst of their stress is daunting to say the least. Many trial lawyers intuitively appreciate the importance of neuro-linguistic programming; few would present a complex case to a judge or jury in court without visual aids. Effective attorneys are almost always good story tellers, a skill that goes beyond mere words. Yet not enough lawyers apply the same understanding of communication when talking alone with their clients. Most clients cannot effectively integrate what they are being told merely by being talked to by their lawyers, no matter how rational or logical the presentation. The essence of neuro-linguistic programming as it applies to lawyer-client communication is for the lawyer to learn to assess how the individual client receives and integrates complex information and to use every verbal and nonverbal technique available to assure that integration.

Communications theory and neuro-linguistic programming underlie many of the strategies suggested in this article. Two of the most important techniques are described below: the use of words and language and graphics.<sup>16</sup>

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<sup>15</sup> GENIE Z. LABORDE, *INFLUENCING WITH INTEGRITY* (1987); JOSEPH O'CONNOR & JOHN SEYMOUR, *INTRODUCING NEURO-LINGUISTIC PROGRAMMING: PSYCHOLOGICAL SKILLS FOR UNDERSTANDING AND INFLUENCING PEOPLE* (1990).

<sup>16</sup> RICHARD BANDLER & JOHN GRINDER, *THE STRUCTURE OF MAGIC*



## 2. *The use of words and language*

Communications theory posits that people construct reality by their use of words and language. Therefore, listening and observing the words, language, and stories used by a person to describe matters can provide important insight into how they see the world, themselves, and the conflict at hand. Alternatively, how words, language, and stories are used can be an effective technique to shift a person's construction of reality.<sup>17</sup> Specifically, some words and language are linear and static and encourage positional, entrenched, "hard line" thinking; they exclude consideration of other perspectives. Other words are inclusive and more dynamic, encouraging a greater receptivity to settlement. For example, the legal terms "custody and visitation," regardless of what the attorney may understand them to mean, set up in the client's mind a win-lose — who gets custody and who doesn't — construction of reality. By contrast, the term "parenting responsibility" allows for more open inclusive thinking that suggests both parties will need to share time arrangements and decision making for their children.

Too often, lawyers are conditioned to using the legal terms because they are more familiar without considering the kind of positional thinking those words often set up in the client's mind. Semantics are important. To encourage settlement, an attorney should consider the use of language to express not only what he or she means but also to consider how the client is likely to understand the words used. Troublesome common terms include "compromise," which many clients understand to mean "giving in," or negotiation "demands" or "positions" which both clients and lawyers often understand to be nonnegotiable, hard-and-fast postures not susceptible to discussion. A preferable term for "compromise" might be "how can you get what you need?" Instead of "demands" or "positions" an alternative phrasing could be "your negotiating perspective" which allows for a dynamic range of possible settlement options. Just because the conflict is set in the legal context does not require that the language used to describe the issues in controversy be unduly legalized.<sup>18</sup>

## 3. *The use of graphics*

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<sup>17</sup> *Id.*

<sup>18</sup> BENJAMIN, *supra* note 9.

The use of graphics allows for the visual display and organization of complex, detailed information in a manner that permits clients to visually observe as well as hear. This technique provides a multi-dimension, non-linear means of communication that bolsters the prospect of client understanding. With modern technology, photocopies of the charts, lists or graphic descriptions of the matters at hand made in a lawyers-client conference can be given to the client for study and review. As well, counsel can also refer back to specific graphics in later sessions if necessary. Graphics can be used effectively to list, describe, and compare and contrast concepts including issues, strategies, and settlement options. For example, listing client concerns will assure that they are all addressed, setting meeting agendas helps maintain a sense of organization, and comparing the risks and benefits of trial as opposed to settlement allows for a more thoughtful discussion of the options. Graphics also can help to distinguish legal issues from interpersonal and business issues, identify stages in the legal process, and clarify client and attorney roles and assignments and expectations in a way that words alone cannot.<sup>19</sup> Finally, the graphics produced in client conferences provide an ongoing record of the attorney/client negotiation process. For all of the same reasons, graphics are also useful in multiparty settlement conferences.

### C. *Assessment and Strategic Use of Client's Support System*

In certain cases the attorney may want to encourage the client to bring another person familiar with the matters at issue to at least some client conferences. Especially in complex cases, counsel may want to glean a sense of what friends or relatives the client relies upon for advice and support. Those persons might prove to be a valuable resource for the attorney. While only the client is identified as a legally necessary party, from a systemic perspective attorneys would do well to realize that significant others are frequently consulted and have a role in the decision making. The involvement of those other persons can offer an important support system to the client. When options and courses of action are discussed, the client will have another person who has heard the same information with whom to discuss the matter. It is often difficult for most clients to understand fully what their attorney has said, given their level of stress. Finally, if third parties who attend the attorney conferences with the client are familiar with the cast of

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<sup>19</sup> *Id.*; see also EDWARD R. TUFTS, ENVISIONING INFORMATION (1990).

characters in the conflict, their observations and perceptions as to the issues may provide counsel with a far greater depth of perspective as to the origins and possible strategies for the resolution of the conflict. The caveat, of course, is to be mindful of protecting client privilege and confidentiality.

In some circumstances, the failure to involve significant third persons may limit the attorney's ability to settle a matter. In post divorce motions to modify where the client has remarried and the new spouse is a strong influence, the absence of that spouse in settlement discussions may inhibit or even block the settlement process. From a strictly legal perspective, new spouses are not necessary parties; from a systemic perspective, they are necessary parties. Experienced family attorneys know that new spouses frequently have strong feelings against their husband's or wife's former spouse. Likewise, in other family conflicts, clients are typically influenced by their parents or other family members regarding legal actions to be taken or settlement proposals to be considered. If counsel does not acknowledge the outside influences, he or she may be at odds with those other persons and, at the very least, the client will be confused or even immobilized. Too often lawyers try to exclude significant others under the guise of client control. The acknowledgment and, in appropriate instances, inclusion in the discussion of other significant persons or family members in the case discussions may more effectively allow for the client's cooperation.

### III. Settlement Negotiations and Discovery

#### A. Relations With Opposing Counsel

##### 1. Letters and correspondence

One of the greatest risk areas for attorneys is in letters and correspondence. "Demand" letters are a frequent and traditional "ritual" of negotiation. In our culture, we believe that written settlement offers are more precise and rational. In point of fact, demand letters often inhibit effective negotiation. Metaphorically and literally, such writings are viewed and often intended as "black and white" positional stances and thus can contribute to miscommunication and misunderstanding. Because of space and time considerations, most writings are limited to the presentation of only one or a few possible options for consideration, omitting other viable options.<sup>20</sup> Letters tend to focus on the outcome, not the process of negotiation. Letters that state positions or contain

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<sup>20</sup> BENJAMIN, *supra* note 9.

demands or ultimatums are typically perceived as threatening, if not by the attorney then almost certainly by the client, and often will predictably draw a response in kind. Settlement offers, no matter how carefully written or qualified for discussion only, are understood as being the fixed, immovable position of the writer; and further discussion is frequently chilled if not cut off entirely.

Written correspondence does have two constructive uses in the negotiation process: (1) at the beginning of the negotiation process to clarify and set the agenda; and (2) at the end of the negotiation process to confirm the understandings of the parties.

*2. Counsel's self reflection and assessment of other counsel  
— the "Jurogenic" effect*

As most lawyers are aware, theirs and opposing counsel's egos are significant factors to be taken into account in the traditional negotiation process. Even the most conscientious attorney runs the risk of being caught up in the "game" of the legal process, and becoming preoccupied not with settlement of issues but with outfoxing and manipulating the other attorney. Those urges are particularly strong when opposing counsel does some act or takes some posture viewed as obstreperous or intentionally aggravating; counsel often has the strong desire to respond in kind.

The reining in of those natural but unhelpful retributive tendencies is important. This is the primary source of the "jurogenic," or lawyer and legal system induced conflict. Whatever the primary conflict is about, the lawyers and the presumed formal requirements of the legal process often create a secondary conflict that sometimes overtakes the primary conflict. While often an unintended consequence, it is the reason many clients view attorneys to be making their situation more complex, acrimonious, and costly. Lawyers are not alone in the risk of becoming a part of the problem. In the health care system, an iatrogenic effect occurs where the doctor or the treatment becomes the source of difficulty that exacerbates the patient's condition. And in mental health, the "therogenic" effect exists where the therapist or counselor may induce an emotional disability separate from the original presenting difficulty.<sup>24</sup>

In the traditional process, counsel takes responsibility for the client's welfare and protection. Many attorneys like to believe they are objective, neutral observers and above the fray. In reality, they are

active participants in the conflict and need to gauge their role in the conflict system. From this perspective, the attorney can assess his or her own and the other attorney's negotiation style. If opposing counsel is abrasive and unduly adversarial, then counsel will want to be braced and particularly mindful of not becoming enmeshed in that contentiousness. Some attorneys strategically intend for their conduct to be unsettling. Counsel needs to remain focused on maneuvers that facilitate settlement of the conflict, regardless of opposing counsel's conduct, and not allow themselves to be drawn into peripheral conflicts. The use of intermediaries or third parties is an effective

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<sup>24</sup> Sources that allude to this complex dynamic include: in the health care system, IVAN ILLICH, *MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH* (1976) and SHERWIN NULAND, *HOW WE DIE: REFLECTIONS ON LIFE'S FINAL CHAPTER* (1994); in the legal system, GRIFFIN B. BELL WITH RONALD J. OSTROW, *TAKING CARE OF THE LAW* (1982) and PHILLIP K. HOWARD, *THE DEATH OF COMMON SENSE* (1996); and in mental health, PETER D. KRAMER, *SHOULD YOU LEAVE? A PSYCHIATRIST EXPLORES INTIMACY AND AUTONOMY AND THE NATURE OF ADVICE* (1997) and JOEL ELIZUR & SALVATORE MINUCHIN, *INSTITUTIONALIZING MADNESS: FAMILIES, SOCIETY AND MADNESS* (1989). way for an attorney to buffer him or herself from the problematic behaviors of another attorney.<sup>21</sup>

### 3. *Initial contacts with other counsel*

The initial contacts with opposing counsel generally set the tone for future negotiations. Therefore, the first contact is best done in person, set up by a telephone call or brief letter which outlines the issues to be discussed. Identify as quickly as possible those items either of process or substance that might be agreed upon with little risk in order to establish some level of good faith. Those items that require immediate attention might be most effectively framed not as demands, but as concerns with which you need the help of the other attorney. Move to establish a discovery schedule and finally, try to schedule the first four-way conference with clients and counsel all present. Set the stage for the negotiation process together with the other attorney. Especially in hard cases, resist the temptation to focus on the outcome

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<sup>21</sup> See generally Martin A. Frey, *Representing Clients Effectively in an ADR Environment*, 33 TULSA L. J. 443 (1997). <sup>26</sup> Benjamin, *supra* note 7.

— “what we/they want” instead, focus on establishing a process — how both sides together should approach the issues.

## B. Conferences

### 1. *Four-way conferences with attorneys and clients*

The four-way conference, where both clients and counsel meet together in person to discuss issues, is the most obvious and direct application of a mediative strategy to problem solving in traditional practice. However, while becoming more common, it is still infrequently used. Many attorneys consider the parties in divorce too emotional and volatile to risk this approach; the frequently overheard conventional wisdom is that “the clients are both crazy and will kill each other if they are in the same room together.”<sup>26</sup> Formal mediation is often dismissed based on the same assumption. Too many attorneys and judges simplistically believe: “If people could communicate, they wouldn’t need a divorce.”

The four-way conference is an important strategy because the client is directly involved and given a role in the negotiation process. In contrast to the conventional wisdom, some have conjectured that it may be that clients “act crazy” because they have no opportunity to express themselves and no sense of control over what is happening to them in the legal process. Many clients express the desire for “their day in court,” but this phrase may be taken too literally. Most mean by the expression a forum in which to be heard and a sense of involvement in resolving the matter.

A number of guidelines should be considered for the successful use of the four-way and other conferences:

1. Make sure to prepare your client before the conference. Discuss the purpose and strategy of a four-way conference; remind your client that you will be spending some time listening to and seeking to draw out the opposing party’s interests. Remember that clients typically expect their attorneys to be aggressive and to “fight for their cause” and may not be used to an attorney working as a problem solver.
2. Carefully observe formal protocols of courtesy; never presume familiarity. At the opening of a four-way conference counsel should be careful to request permission before acting or addressing the opposing party and counsel. Ask permission, for instance, to be on a first name basis with both the other client and counsel, to address the other party directly, to use a flip chart, or to set out an agenda of the items to be discussed.

3. Use the four-way conference as an opportunity to join with (or perhaps finesse) the opposing attorney. Speaking to the parties about how both counsel desire to seek an amicable resolution of the issues and about how you are both concerned that the parties not become embroiled in prolonged litigation that is emotionally and financially costly allows little room for opposing counsel to object. Make sure to honor and include the other attorney so that he or she feels a part of the process and be cautious about appearing to take control too directly.<sup>22</sup>
4. Make sure to establish the conference as being the first of a series of discussions in the process of settlement and indicate that this initial foray is not intended to solve all the issues in one sitting. Some consider the four-way conference a failure if complete settlement is not obtained immediately. In that vein, make sure to set a timetable, schedule the next conference and give assignments to both parties, such as what they are to think about, or the further information to be gathered. Just as in mediation, structuring the negotiation process with target dates and time frames within which to work offers clients a sense of order and control.<sup>23</sup>
5. Use caucuses freely both with your client and with the other counsel. When the attorneys are meeting separately, the parties have the opportunity to talk directly to each other.
6. Regularly “check in” with your own client to assure that there is no gap developing between what the client expects and the direction that counsel may be moving in the negotiation.

The most important benefit of a four-way conference is the opportunity to directly involve your clients in the negotiation process so that they are more committed to whatever resolution is obtained. Conversely, if negotiations break down, the client can directly and more readily identify the source of the difficulty. The attorney is not left to explain why the other attorney or client is so difficult; the client can see what is happening for him or herself. A four-way conference is valuable because it minimizes the miscommunication that frequently occurs when attorneys carry messages back and forth to their respective clients, and an in-person meeting offers an important opportunity to discover the underlying interests of the other party.

## 2. *Three-way conferences*

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<sup>22</sup> Robert D. Benjamin, *The Constructive Uses of Deception*, 13 *MEDIATION Q.* 3 (Fall 1995).

<sup>23</sup> BENJAMIN, *supra* note 9. <sup>29</sup> *Id.*

If opposing counsel remains hesitant to include his or her client in four-way conferences, counsel may still be well advised to include his or her own client in a three-way conference with the other attorney alone. For the same reasons identified in the four-way conference, the importance of involving your client and giving that client some measure of control in the negotiation process cannot be underestimated.

In some measure, this is a manipulative technique that involves the constructive use of deception. When the opposing party hears the other client was present — even in the waiting room — the other client will likely want to be present the next time. Counsel can merely explain that his or her client insisted on being present and could not be refused.<sup>29</sup>

### 3. *Multiple-party conferences*

In complex cases, such as child abuse (especially sexual abuse) or matters in which grandparents or other family members are involved, a conference with all parties or all professionals or both is particularly important. In these complex multiparty cases the level of miscommunication and misunderstanding is usually extremely high. Also, with the involvement of professionals from other disciplines, such as mental health professionals or child protective service workers, an increased likelihood exists minimal significant communication has occurred within or between the disciplines. Simply arranging conferences so that the areas of agreement and disagreement with regard to treatment strategies or interests can be identified and discussed is critically important and frequently overlooked. In a child abuse case as many as ten different professionals with varying disciplines and case orientations may be involved. With each person taking a narrow view of the problem from the linear perspective of his or her client alone, a much greater likelihood exists that problem solving will become more difficult unless direct communication structures are in place. While arranging these meetings may be a logistical nightmare, they can be instrumental in facilitating a settlement.<sup>24</sup>

### C. *Strategic Management of Discovery*

Formal discovery, while necessary to some extent, is often employed to pester opposing counsel or in recent years, with the advent

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<sup>24</sup> Robert D. Benjamin, *Mediative Strategies in the Management of Child Sexual Abuse Matters*, 29 Fam. and Conciliation Cts. Rev., 221 (1991).



of defensive legal practice, for attorneys to cover themselves. In some cases formal discovery is indicated; for many, though, counsel can obtain necessary and sufficient information through a more informal negotiated process.

Start by making a list of the basic documentation desired (personal/corporate tax return for five years, account statements, and so on) of the other party and offer to provide that same documentation to the other attorney. Next, if questions arise, have a conference with the parties present and identify the further documentation that might be required from each side.

If the issues involve complex assets and/or valuation of assets, then consider negotiating a process to jointly select an expert and set guidelines for his or her valuation of the assets. Such a discussion would include the expert's proposed methodology, fees, timetable, communication with clients and counsel, and future role as an expert witness if the matter is ultimately litigated.<sup>25</sup>

Those procedures can minimize the necessity, time, and costs of formal discovery. Especially in complex cases, the risk arises of doubling the costs of expert valuations with each side retaining its own expert without necessarily increasing or enhancing the accuracy of the information obtained. In many cases where a professional practice, closely-held corporation or family business, pension, or other complex asset is at issue, the cost of valuation can quickly exceed the value of the asset.

Mediative strategies are useful not just to resolve the ultimate issues of a matter but also to manage the process of discovery and effective case preparation. In a complex case, a four-way conference with clients present may be useful solely to discuss the timetable for obtaining the necessary information.

1. *Effective meeting facilitation — presenting issues and setting agendas*

The importance of effective meeting facilitation may appear obvious; far too often, however, conferences breakdown, appear inefficient, and are avoided by attorneys because the meetings are not

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<sup>25</sup> BENJAMIN, *supra* note 9.

run well. Some basic mediative strategies and techniques are directly applicable and useful to assure greater meeting efficiency:

1. Develop an agenda jointly with all participants. Make sure to identify and list all the issues in the case that need to be discussed before beginning to discuss any particular issue.
2. Assess the relative importance and difficulty of each issue to be discussed. Generally, begin with easier topics and work toward harder ones.
3. Identify what issues can be generally agreed upon, both procedurally and substantively in the case, before beginning to discuss problem areas.
4. Make sure issues are stated in a way that makes them more susceptible to negotiation. Move away from positions and identify the underlying issue before the negotiation begins.<sup>26</sup>

Structuring and organizing the process of negotiation is one of the single most overlooked strategies in traditional practice. Too often professionals start with the hardest issues first and focus on areas of disagreement which makes the differences between the parties in the case appear greater and more overwhelming.

*2. Reconsider negotiation strategies: the interactive negotiation format*

Too often, an implicit assumption arises that if the other attorney does not negotiate in the same manner you do, then he or she does not know how to negotiate or is so unreasonable that no negotiation is possible. In some instances, we even make moral judgments about others based on how we think they negotiate.<sup>27</sup> More accurately understood, negotiation is a ritual that reflects any number of variables including: race, gender, religious background, personality, culture, professional training and personal experience.

Different approaches to negotiation exist. Many presume negotiation is a strictly rational enterprise in which the interests and needs of the respective parties are analyzed and areas of overlap identified. From this vantage point, negotiation is the application of basic principles of economics, conflict is the result of scarce resources,

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<sup>26</sup> See *infra* Section III, C2.

<sup>27</sup> Robert D. Benjamin, *Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts*.“ 15 MEDIATION Q. \_\_\_ (forthcoming Spring 1998).

and resolution is thought to be simply a cost/ benefit analysis of the parties respective self interests.<sup>28</sup>

Some approach negotiation from a humanistic or collaborative perspective and assume conflict is the result of poor communication and the absence of empathy between opposing parties. Many continue to maintain a traditional perspective of negotiation and operate from an opportunistic or competitive perspective, seeing negotiation only as a means to obtain as much as one possibly can at the expense of the other party. Some people hold a moralistic view of negotiation, considering the practice as tantamount to deceit. In their view, if you possess the truth then negotiation is an anathema. While they ultimately must negotiate to survive, it is never done easily or willingly.<sup>29</sup> No one approach is sufficient in itself; effective negotiators draw eclectically from each approach. Thus, in an opportunistic approach, a good negotiator necessarily thinks strategically; from the collaborative approach, the negotiator draws the importance of communication which is essential but not sufficient for effective negotiation; from the rational approach, the evaluation of the interests and needs of the parties is clearly necessary at some point in the process; and from the moralistic approach comes the recognition that sometimes negotiation collides with values to such an extent that it is not appropriate.

The predominant ritual of negotiation in the American legal culture, could be characterized as a cross between the opportunistic and rationalistic approaches. The assumption is that one side will bid high and the other side low and that after a certain amount of “offer/counter-offer” wrangling, a bargain will be struck somewhere in the middle and a winner determined by how close the final determination was to each side’s original position. Many question the efficacy of this traditional legalized approach to negotiation.<sup>30</sup>

An alternative approach to negotiation is termed the naturalistic approach. In this style, the negotiator assesses how the other party negotiates and strategizes a means to move the negotiation process forward based on this assessment regardless of his or her approach. The negotiator thus begins the process where the other party is and not where the negotiator would like them to be in their style of negotiation. In other

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<sup>28</sup> ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES; NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2 ed. 1991).

<sup>29</sup> Benjamin, *supra* note 33.

<sup>30</sup> Menkel-Meadow, *supra* note 5.

words, the naturalistic negotiator attempts to begin the process without expectations or assumptions that would require the other party to be rational, honest, fair, thoughtful, or reasonable in order to negotiate a settlement. The specific technique of the naturalistic negotiator in contrast to the traditional “offer-counter offer” approach is the interactive negotiation format. The focus of the technique is on settlement of the conflict, not the relative rightness or wrongness of the opposing positions. The mechanics of incorporating the interactive format include:<sup>31</sup>

1. Move from positions to issues: “I want him out of the house”/“I won’t go” are the positional statements; “There is too much stress in the household”/“This house is my property” are some of the possible issues behind the stated positions of the parties.
2. Validate the issues with both parties: both parties can agree stress exists in the household and both can agree the house is a property interest.
3. Use an interactive negotiation format. What can be offered or requested by each party to reduce the stress in the household and that respects the property interests of both parties?
4. Generate options that meet the needs of both parties: (a) One moves out, (b) the other moves out, (c) both move out; (d) live in different rooms, (e) develop a schedule for each to be out of the house certain nights.
5. Consider the options: Review the transaction costs, advantages and disadvantages of each option and the alternatives available if negotiation is not successful.

*a. Establish a mediative format through a third party*

Many complex cases may involve a peripheral third party, such as a judge, another attorney, guardian ad litem or child protective service worker who has the position, personality, or understanding that might allow them to assume the role of a quasimediator. Counsel may wish to encourage that this role be taken by a third party even if he or she personally has mediative skills because counsel is obligated to be in an adversary posture in the matter or is viewed as such by the other attorney. Any effort on an adverse counsel’s part to be mediative will likely be viewed skeptically. The opposing counsel and party will often look for the counsel’s ulterior motives or misperceive the effort to negotiate as the adverse attorney’s lack of resolve in his or her case. If a suggestion to a third party cannot be made directly in a conference, then sometimes a hint or suggestion in a side telephone call to the third

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<sup>31</sup> BENJAMIN, *supra* note 9.

person can be helpful, as long as it is not an inappropriate ex parte contact.<sup>32</sup> Sometimes when attorneys recognize they have a personality conflict with opposing counsel, another attorney known by both attorneys can be an effective informal conciliator.

*b. Mediative strategies at depositions*

If the other counsel is resistant to four-way conferences or to overtures to negotiate and remains steadfastly in an adversarial posture, counsel may want to consider proceeding with formal discovery, specifically depositions. This can be a surreptitious method to compel opposing counsel and his or her client to be present in the same room together with counsel and his or her client. This maneuver allows a slight window of opportunity, and a few minutes might be taken before the deposition begins to just quickly note the areas of agreement and disagreement in the case. Sometimes even those minimal contacts expand into fullblown settlement conferences, or at the very least, seeds are planted with regard to the settlement process. If nothing else, this tactic may allow the parties to see first hand the approach and attitude of each of their attorneys and assess for themselves the sources of difficulty in the negotiation and which attorney appears to be the more concerned problem solver.<sup>33</sup>

*D. Mediation and Settlement*

*1. Pre-trial settlement conference procedures*

If court rules provide for a pre-trial settlement conference, this may offer an opportunity to compel a resistant opposing counsel to at least discuss and narrow the issues that are to be presented at trial or allow the judge to pressure both attorneys to reconsider their negotiating perspectives. If the other attorney is not responsive to more informal conferences, use the formal settlement conference procedure as a means to structure the negotiation process. Request a settlement conference early on in difficult matters and, if the court will allow, set follow-up review conferences.<sup>34</sup>

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<sup>32</sup> Benjamin, *supra* note 27.

<sup>33</sup> *Id.*

<sup>34</sup> See also William L. Adams, Comment, "Let's Make a Deal": Effective Utilization of Judicial Settlements in State and Federal Courts, 72 OR. L. REV. 427 (1993).

In a pre-trial conference an effective negotiation strategy sometimes may be “to occupy the reasonable ground,” forcing the other counsel to appear more unreasonable and extreme.

This strategy may be particularly effective in family law matters where the judge has greater discretion and typically is less tolerant of what appears to be unnecessarily drawn-out trial proceedings. What is necessary in the first instance to effectuate the strategy, however, is to have the client well briefed to understand and accept the approach. Certain risks exist: if opposing counsel has taken an extreme position and the judge lacks the time, training, experience, or inclination to gauge the matter carefully and he or she merely splits the difference or compromises somewhere in the middle between the extreme and the reasonable position counsel has offered, the result can be skewed. As a general rule, however, the strategy is effective because it offers the path of least resistance to the trial judge who will find it easier to identify with the party who is being reasonable rather than the party who has taken an extreme position.

Finally, consider requesting that the parties be allowed to be present at the settlement conference. Some judges will allow the parties’ presence and this helps clients develop a first-hand view of the process and gives them a heightened sense of participation in the process. For attorneys who negotiate effectively, this opportunity allows counsel to be “on stage” and can give counsel greater credibility.

## *2. Agreements: the use of plain language*

Contrary to conventional wisdom, the settlement agreement is not only a legal document, but is also a personal understanding between and guide for the parties. The agreement has both therapeutic and ceremonial value as well as legal value. The document should be organized and written in plain English with a minimum of “legalese” that frequently accompany legal documents so that it is optimally useful to the parties and not just for the court or attorneys. The first names of the parties are generally preferable to the legalized appellations of “petitioner” and “respondent,” “husband” and “wife,” or “mother” and “father,” all of which may be confusing and patronizing. A table of contents may also be helpful for the clients’ understanding of the agreement. The use of plain language follows naturally from counsel’s use of words and language discussed above.<sup>35</sup>

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<sup>35</sup> See *supra* Section II, A2.

The agreement serves as a working document with guidelines for future actions as well as a formal legally enforceable contract. Therefore, some provisions may be difficult, if not impossible, to enforce, but do have some meaning and value for the parties. This broader systemic perspective of divorce as a major life event, not just a legal event, is important for counsel to recognize. Too often a tendency exists in the traditional legal process for attorneys to strike provisions from agreements merely because they are considered legally unenforceable; however, that guidance language may have extralegal “therapeutic” value for the parties in the broadest sense of the word. The agreement developed, insofar as possible, should be one understood and committed to by the parties for their purposes, not by the attorneys for legal purposes.<sup>36</sup>

A written agreement is only as good as the process used to develop the understanding between the parties. Conversely, the most carefully crafted provisions of an agreement are ineffectual unless the parties understand their purpose and intent and commit to them. At the same time the preparation of the agreement also offers an important opportunity to disabuse clients of the “Myth of Finality” — the commonly held notion that the matter once concluded and under agreement will not need to be reviewed and perhaps modified and that future disagreement will not occur. Many clients are allowed to believe that written agreement are magically self enforcing. Review procedures that anticipate future conflicts can be built into the agreement that provide for the mediation or arbitration of future disputes. A well drafted agreement will address the future major life shifts likely to affect the parties, particularly with regard to the parenting plan and financial responsibilities. Those events include, among others, moves by a parent out of the geographic area, remarriage or the involvement of a parent in other significant relationships., changes in income or the needs of the children.<sup>37</sup>

#### IV. Mediative Strategies at Trial

Mediative approaches, techniques and skill are not precluded and can be effectively employed even at trial when the adversarial system is at full tilt.

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<sup>36</sup> BENJAMIN, *supra* note 9.

<sup>37</sup> See, e.g., Barbara Ellen Handschu, *13 Negotiated Provisions That Anticipate Geographic Relocation*, 14 MATRIMONIAL STRATEGIST 1 (Jan. 1997).

Trial strategies, like the negotiation strategies that precede the courtroom, are necessarily designed to realize as many of the client interests as possible. In traditional legal practice the trial strategy is geared toward establishing the linear proposition that your client is all good and the other client is all bad, and hoping for the judge to be swayed to your position. Many attorneys form their trial strategy in the negative and press to discredit, prove unfit or less fit, and otherwise ravage and attack the opposing party. If both attorneys operate their trial strategies from these premises, protracted and agonized litigation is an all too predictable consequence.<sup>38</sup> Many experienced practitioners know that as a result of such trial strategies the judge often tends to discount much of what is heard from either party. From a systems perspective, a more effective trial strategy may be one that focuses on the realistic presentation of the clients — having them compete, if at all, positively to be the party with the greatest credibility and insight as to the issues and problems presented. The focus is then removed from positional and judgmental assessments of which party is good and which is bad, assessments most judges typically try to avoid anyway, and placed instead on each party's strengths and weaknesses. By this strategy, testimony and evidence is then presented to establish the efforts your client has taken to avoid conflict and to resolve issues reasonably.

#### A. *Direct and Cross Examination*

In keeping with a trial strategy that focuses on the family as a system, what may be a more effective mode of direct and cross examination is questioning similar to that done by mediators when they seek to clarify, reframe and uncover the underlying interests of each party. Asking both your client on direct examination and the other party on cross examination to identify their strengths and weaknesses is frequently what the judge may most want to hear and is most persuasive. If your client can respond insightfully about both parties' strengths and weaknesses, he or she is likely to have an air of credibility and the other party will then be placed in the position of either accepting and acknowledging that he or she has weaknesses as a parent or in the alternative lose credibility for what will appear to be the absence of insight into that party's contribution to the conflict. Also, when the other

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<sup>38</sup> See, e.g., Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996).



party asserts misdeeds on the part of your client, and you know those actions to be of limited relevance legally or otherwise, on cross-examination, counsel may want to consider allowing some of that testimony to emphasize the frivolous complaints of the other party. This technique may illuminate the gap in the relative reasonableness between the parties.

#### B. *Reframing the Trial Process and the Ceremonial Value of Courts*

Courtroom proceedings can be a helpful agent that has an impact on settlement negotiations. In difficult and complex matters, such as sexual abuse or child abuse cases, the parties might need the opportunity to tell their story in court. Many lawyers understand that to mean that a full trial is required; the client, however, may be content to simply address the court and not require a judicial determination. The attorneys might stipulate that both parties' positions will be stated for the record in court and further agree that the judge will enter a court order in conformity with the parties' prearranged agreement. With this procedure, the parties' personal needs are met by the formal court proceeding. While the procedure has little or no legal effect, the legal process has not been compromised and the case can be resolved.<sup>39</sup>

Finally, the common assumption of most clients is that one party or another clearly wins or loses in court; in fact, court determinations are seldom that clear, especially in family law matters. Many clients take court decisions personally. With that recognition, if trial is the only alternative, counsel may prepare their clients for the process. Instead of presenting trial as a "win/ lose" proposition, discussing the possibilities of worst case scenarios and best case prospects may allow a client to understand the process more completely. The courtroom proceeding can then be more constructively understood as merely closure of a difficult issue in the client's life, regardless of outcome, and not taken as a personal evaluation of the client's worth as a human being.

### V. The Use of Mediative Strategies Post Trial

After trial and a court's determination, both parties are often dissatisfied, which may offer an opportunity for them to renegotiate the

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<sup>39</sup> Benjamin, *supra* note 30.

judge's determination in a manner that better accommodates their interests. Timing is important in negotiation and after trial clients may be more willing to discuss settlement options, especially if the legal process has been protracted and costly. Most experienced attorneys have heard judges state that they know they have done a good day's work when both people are dissatisfied. While at first blush this may appear cynical, it is more accurately a factual observation about the limitations and constraints of judges to be able to satisfy parties in most legal matters, and especially in family law cases. Therefore, after trial may be a good time to either refer the parties to mediation or to reestablish efforts to negotiate. Many appellate courts have settlement procedures for this purpose.<sup>40</sup>

## VI. Conclusion

Lawyers, especially family and divorce lawyers, have not fared well in the view of the larger society regarding how they tend to handle disputes. However, while the scorn heaped on lawyers is understandable given the difficult circumstances they deal with, it is perhaps undeserved. Most Americans do not like the idea of negotiating; they feel they are right and negotiation is tantamount to selling out or compromising their principles, or worse, yet, sinful and immoral. For many people, the movie star John Wayne is a cultural icon that is revealing of their sentiments about handling conflict — “the Duke” would not negotiate. Attorneys are disliked, perhaps not because they are any more malicious or avaricious than other professionals, but because they are negotiators and dealmakers. Lawyers may be disrespected and thought to be in league with the devil, in part, because Satan — the archetype of evil in the world — did his work by persuasion and negotiation, just as lawyers must do.<sup>41</sup> Thus, many clients are ambivalent; on one hand, they want the protection of skill of their lawyer to get a good deal for them, but dislike negotiation and the lawyers who engage in the process. A dynamic perhaps similar to, “I want to eat a good steak but don't want to see the animal slaughtered.”

Lawyers for their part, perhaps unwittingly, exacerbate the clients' confusion. While they of necessity must negotiate to settle disputes, too

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<sup>40</sup> In the many state and federal appellate courts, settlement conferences are provided early in the appellate process. Rogers & McEwen, *supra* note 2.

<sup>41</sup> Benjamin, *supra* note 33.

often their understanding of the clients' needs in the matter and involvement in the settlement process is limited and constrained. Traditionally, lawyers have been trained to legalize disputes. The real life issues between people are transformed into narrow, stylized conflicts considered in strictly legal terms. When parties become clients, too often their needs and interests become secondary to the requirements and formalities of the legal system and lawyers' routines. Once the personal dispute is transformed into a legal one, the negotiation process becomes simply a version of court adjudication with the lawyers constrained to negotiate solely in terms of what each attorney perceives a court might allow or impose. The traditional legal structure of problem-solving forces the polarization and routinization of the parties' demands and stifles a host of possible extralegal solutions.<sup>42</sup> Some of this formalization is necessary, especially in difficult cases; many other cases, however, are not exceptional but treated in the same manner nonetheless.

Ironically, the perceived constraints on lawyers' approaches to settlement are often illusory and self-imposed. System theory and applied mediative techniques and strategies offer attorneys practicing in the traditional context a far broader and expansive field of vision and allow greater opportunities to be creative problem solvers and more effective lawyers. Many lawyers justifiably feel they serve their clients well; the more developed use of mediative strategies might allow them to do so even more effectively and, as well, gain greater appreciation and respect for clients for their professional work.

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<sup>42</sup> Menkel-Meadow, *supra* note 5.

