

# The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger

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# THE DILEMMA OF THE VENGEFUL CLIENT: A PRESCRIPTIVE FRAMEWORK FOR COOLING THE FLAMES OF ANGER

ROBIN WELLFORD SLOCUM\*

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## I. INTRODUCTION

First, “do no harm.”<sup>1</sup> This familiar Hippocratic oath presents a very real challenge to the lawyer who counsels a vengeful client. Consider, for example, this not uncommon occurrence in the law office of a typical family law lawyer.<sup>2</sup> A client seeking a divorce relays to the lawyer a laundry list of wrongs committed by his spouse—from being selfish and greedy, to being a spendthrift and habitual liar. The lawyer learns that the client has two young children and that the client has been the primary breadwinner, while his spouse has been a stay-at-home mother following the birth of the couple’s first child. The lawyer experiences some pangs of empathy for the obviously distraught client as she learns that the client’s spouse has been having an adulterous affair for the past two years. During the meeting, the lawyer agrees to represent the client and a week later files divorce papers on behalf of the client.

During their next meeting, the lawyer and client begin to discuss the couple’s assets, the client’s objectives, and custodial issues. During this discussion, the client states:

I want you to ask for custody of the children. I know we can get a better financial deal if we threaten custody because

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1. Hippocrates, *Of the Epidemics*, in 10 GREAT BOOKS OF THE WESTERN WORLD 44, 46 (Robert Maynard Hutchins ed., 1952). Although these exact words do not appear in the Hippocratic oath, the oath is commonly understood to include that language.

2. Although this Article explores a family law scenario, vengeful clients are by no means limited to family law litigation. Any communication between two or more individuals or business entities has the potential for misunderstandings, attributions of “bad” motives, and blame. With ineffective communication skills, any such misunderstandings and attributions can result in anger, resentment, and a desire for revenge. Thus, anger and the desire for vengeance can arise in business relationships as well as in personal relationships and can be a driving force behind legal strategies in transactional as well as litigation matters.

the kids are Rebecca's life and she'll do anything to avoid losing them. Besides, I don't want that SOB she's sleeping with to raise *my* children.<sup>3</sup>

Surprised by this request, the lawyer asks the client to clarify his position: "Bob, are you telling me that you would like primary physical custody of the children?" The client responds: "No way. I've got a busy career, and I'm not up to handling the children on a full-time basis."<sup>4</sup>

The lawyer then attempts to dissuade the client from this negotiating ploy, informing the client that she is prohibited by ethical rules from making demands that do not have a factual basis.<sup>5</sup> The client responds:

Well, don't worry about it. I could always assume primary custody of the children if necessary; after all, I love my children. In fact, I could hire a full-time nanny for

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3. See Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 788-93, 798-804 (2004) (exemplifying a similar dialogue between lawyer and client and an evaluation of the lawyer's efforts to dissuade the client from such tactics).

4. This tactic appears to be common. See Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 495-96 (1995) (concluding from surveys and interviews with judges and lawyers that this tactic is fairly commonplace); Andrea K. Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 616-18 (2006) (concluding from an empirical study that family law lawyers were reported as being more adversarial and unethical than in any other specialty area); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 646 (1992) (contending that this strategy is "common in divorce contests"). But see Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS* 37, 50 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (contending that this type of threat does not occur very frequently or meet with great success).

5. Most lawyers consider this bargaining strategy to be immoral and unethical. See Altman, *supra* note 4, at 500. According to Altman's survey of family law lawyers:

Three out of four lawyers asserted that threatening custody litigation is never ethical. Among those who thought it sometimes ethical, some indicated in written comments that they believed the practice is permitted by the codes of professional responsibility, though not necessarily by morality. A few indicated that litigation threats or other pressures to trade were inevitable, a natural part of bargaining, demanded by zealous advocacy, or acceptable in limited circumstances, such as in response to inappropriate actions from the other side.

*Id.*

Rule 2.25 of the suggested standards of conduct promulgated by the American Academy of Matrimonial Lawyers specifically states that "[a]n attorney should not contest child custody or visitation for either financial leverage or vindictiveness." STANDARDS OF CONDUCT R. 2.25 (Am. Acad. of Matrimonial Lawyers 1991). The comments state that not only is it improper for a lawyer to assist a client in such conduct, but also that the lawyer should withdraw from representation if the client persists. *Id.* at 2.25 cmt.

them—yeah, I could make it work. And besides, the children would be better off with me than with that SOB trying to be their father.

The lawyer continues to remonstrate with the client, asking the client to consider the morality of such a ploy and the effect of his actions on his children. When the client remains adamant, the lawyer remarks that some clients find it helpful to seek the help of a mental health professional while going through a divorce. The client not only refuses to do so but angrily proclaims: “You’re supposed to be my lawyer; you’re supposed to be on *my* side. If you can’t represent me, then I’ll just have to think about finding someone who can.”<sup>6</sup>

With that, the lawyer is faced with a quandary—whether to resign as the client’s lawyer<sup>7</sup> or agree to do the client’s bidding. Unfortunately, the economic reality of losing this fee-paying client makes it difficult for the lawyer to decline to represent her client.<sup>8</sup> Therefore, she quells the small voice inside that whispers “this isn’t right” and reluctantly agrees to serve as the client’s “hired gun.”<sup>9</sup> The lawyer justifies the ploy by reminding herself that the demand is within the bounds of ethics—the client has, after all, stated that he is willing to assume custody if necessary.<sup>10</sup> The lawyer also reminds herself that she is on the side of “right”—the client really *does* seem to have

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6. The lawyer’s lack of success in dissuading the client from such a course of action is relatively common. See Altman, *supra* note 4, at 499–500.

7. The Model Rules of Professional Conduct allow lawyers, under certain conditions, to withdraw from representing a client if the client “insists upon taking action that the lawyer considers repugnant.” MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2002). The withdrawal must have no “material adverse effect on the interests of the client,” *id.* at 1.16(b)(1), and, in matters before a tribunal, the attorney must comply with applicable law that might require the attorney to obtain the permission of the tribunal, *id.* at 1.16(c).

8. The economic fear likely extends beyond the loss of this particular client to clients in general, with the lawyer fearing that many clients similarly wish to hire a gladiator. See Robert F. Cochran, Jr., Deborah L. Rhode, Paul R. Tremblay & Thomas L. Shaffer, *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 607 (2003) [hereinafter *Symposium*]. Rhode notes that “lawyers’ reluctance to challenge clients’ self-interest makes perfect sense. These individuals are, after all, generally footing the bill for the lawyers’ services.” *Id.*; see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 58 (1988) (noting that “three hundred dollars an hour has been known to buy a lot of partisanship, and will even stand in quite nicely for nonaccountability, especially around the first of the month”).

9. See Joseph Allegretti, *Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun*, 24 CREIGHTON L. REV. 747, 749 (1990) (discussing the metaphor of the lawyer as hired gun).

10. Because the client insists that he would assume custody if necessary, the lawyer justifies the bargaining strategy by reasoning that there is the requisite factual basis for the lawyer to press forward with such a bargaining ploy, however weak the basis may be. See MODEL RULES OF PROF’L CONDUCT R. 3.1 (2002) (prohibiting the assertion of frivolous claims); see also DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 295 (2d ed. 2004).

been exploited by his dishonest and immoral spouse.<sup>11</sup> After seemingly endless months of legal wrangling and an escalation of hostility, the lawyer eventually attains a favorable financial package for the client in exchange for dropping the demand for primary physical custody.

Has the lawyer served her client well? The client walks away from this experience with a favorable financial package. At the same time, however, the client is experiencing greater anger and stress the day the divorce becomes final than he was the day he walked into the lawyer's office to file for divorce.<sup>12</sup> He is angry at his spouse's outrageous demands during the litigation process; he is furious at his spouse's lawyer, convinced that the lawyer is a ruthless shark; and he is still angry that another man will be a primary male role model in the lives of his children. The client is also suffering from debilitating headaches, and he experiences shortness of breath during times of stress. The stress the client is experiencing is heightened by his concern for his children, whose grades have suffered and who have become alternately withdrawn and angry.<sup>13</sup>

The lawyer, too, does not experience much satisfaction in her role as a "hired gun"<sup>14</sup> in this litigation. The lawyer regrets that she was not able to persuade the client to do "the right thing" and privately longs to make a more meaningful contribution to the lives of her clients. The lawyer reluctantly acknowledges that she has become somewhat apathetic to a career that once held such promise.

This experience is not limited to family law. The mutual dissatisfaction of both the client and lawyer reflects a more widespread dissatisfaction with the

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11. It is all too easy to rationalize why such tactics are fair game, particularly when the lawyer has bought into the client's self-view as a victim of a laundry list of wrongs committed by the spouse. *See, e.g., Symposium, supra* note 8, at 612. Rhode notes that lawyers are not exempt from self-serving psychological biases. *Id.* Thus, lawyers often shift their initial judgments about their clients, ultimately identifying with their clients' decisions. *Id.*

12. This experience is quite common among clients who participate in adversarial litigation, with the litigation process escalating the tension between the participants. *See, e.g.,* Thomas W. Porter, Jr., *The Spirit and the Law*, 26 *FORDHAM URB. L.J.* 1155, 1157 (1999); Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 *N.C. L. REV.* 979, 980 (2006); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 *U. MIAMI L. REV.* 79, 132-33 (1997).

13. This is quite common among children whose parents exhibit hostility and aggression during a divorce. Such children are at increased risk of depression, substance abuse, poor academic performance, and poor social competence. Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce*, 43 *WAKE FOREST L. REV.* 441, 454 (2008).

14. *See generally* Allegretti, *supra* note 9 (discussing the metaphor of the lawyer as a hired gun). Allegretti posits that the metaphor of the lawyer as a hired gun is pervasive within the legal profession. *Id.* at 749. He argues that law students are "trained to see themselves as the hired guns of clients," with their personal values and beliefs playing no role in how they should perform their job. *Id.*

American legal system in general. The public commonly perceives lawyers as unethical, slick tricksters who will resort to any tactic to win.<sup>15</sup> Within the legal profession itself, an excessive focus on the economic outcomes of legal matters, to the exclusion of psychological and emotional costs,<sup>16</sup> has contributed to an environment of brutal competition and unethical behavior—an environment where “[e]veryone is a potential adversary” and “[t]rust is a mirage on the horizon.”<sup>17</sup>

Within the midst of this crisis of conscience, legal scholars have argued that lawyers should, where appropriate, dissuade their clients from unethical or immoral acts.<sup>18</sup> However, vengeful clients are remarkably resistant to appeals based on morality and even economic self-interest.<sup>19</sup> Thus, it is not surprising that lawyers have been largely ineffective in their efforts to dissuade angry clients from using the legal system as a battlefield.

Although psychology and neuroscience offer critical insights into why angry clients do not behave as rational actors,<sup>20</sup> there is a dearth of legal scholarship addressing how these disciplines can help lawyers recognize, understand, and effectively counsel the vengeful client. This Article takes an interdisciplinary approach to understanding and resolving this important yet neglected problem.

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15. See *id.* at 749–50. Allegretti notes that the public commonly views lawyers as “hired guns who put the interests of clients ahead of the common good, and who are willing to do everything in their power to defend the guilty and frustrate justice by resorting to legal ‘technicalities.’” *Id.* at 750; see also Linda Meyer, *Between Reason and Power: Experiencing Legal Truth*, in MORALITY, JUSTICE, AND THE LAW: THE CONTINUING DEBATE 109, 109 (M. Katherine B. Darmer & Robert M. Baird eds., 2007) (describing lawyers as being vilified as “sharks, snakes, liars, word-twisters, hair-splitters, [and] crowd-panderers”).

16. Interestingly, one survey reflects that, although lawyers believe that clients are most interested in whether they have “won,” clients report that they care more about the process itself and whether a fair and equitable settlement has been achieved. See Tom Tyler, *Client Perceptions of Litigation—What Counts: Process or Result?*, TRIAL, July 1988, at 40, 40. In fact, clients report that the number of assets they end up “winning” is the *least* important factor. *Id.*; see also Strickland, *supra* note 12, at 981 (finding that “[d]espite all the animosity, most clients just want a fair result”).

17. STEVEN KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE 10 (1999).

18. See, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 58 (2000); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS 138 (1998); David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 83, 118 (David Luban ed., 1984).

19. See discussion *infra* Part II.B.5.

20. Legal scholars have examined behavioral economics to explore the biases and perceptions that explain why clients may not behave as rational actors. See, e.g., BINDER ET AL., *supra* note 10, at 351–56; ROBERT F. COCHRAN, JR. ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 122–34 (2d ed. 2006); see also Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055–56 (2000); Cass R. Sunstein, *How Law Constructs Preferences*, 86 GEO. L.J. 2637, 2637 (1998).

Building on studies in neuroscience, psychology, and medicine, Part II of this Article explores the hidden psychological, emotional, and physiological costs incurred by angry clients when lawyers agree to serve as their hired guns. This section also sheds light on why vengeful clients are so resistant to rational appeals based on morality and economic self-interest. In Part III, this Article argues that lawyers are not only uniquely situated to help angry clients, but that they must in fact address the client's underlying emotional pain in order to provide competent representation. Part IV of this Article provides a prescriptive framework for lawyers to use in helping vengeful clients significantly reduce the anger that otherwise impairs lawyers' ability to engage in effective client counseling.

## II. THE DILEMMA OF THE VENGEFUL CLIENT

### A. *Defining the Vengeful Client*

This Article is not suggesting that all anger is unhealthy or that lawyers should in every instance attempt to persuade clients to relinquish anger. Indeed, anger can be an important catalyst for action. For example, anger can galvanize one to move away from an abusive or dangerous situation,<sup>21</sup> or it can help move a client from a state of despair and hopelessness toward a healthier emotional state.<sup>22</sup> Anger can also inspire people to move into action to right a social injustice. For example, anger was presumably a motivating factor that spurred Martin Luther King III to lead the civil rights movement and to argue for legal change in our society. Thus, healthy responses to anger serve a useful purpose by galvanizing people into actions that help effect positive change, and lawyers can serve an important role in helping clients use the legal system to effect such change.

However, anger becomes a problem when it is not released after it has served its limited purpose but is instead allowed to simmer and fester.<sup>23</sup> When anger is allowed to fester, the client can become swept up in blame and bitterness and have difficulty releasing the resentment that is only magnifying the pain.<sup>24</sup> Far from finding personal empowerment through anger, the

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21. See FRED LUSKIN, *FORGIVE FOR GOOD: A PROVEN PRESCRIPTION FOR HEALTH AND HAPPINESS* 13–14 (2002).

22. See ESTHER HICKS & JERRY HICKS, *ASK AND IT IS GIVEN: LEARNING TO MANIFEST YOUR DESIRES* 115–19 (2004).

23. See LUSKIN, *supra* note 21, at 14 (contending that it is the act of *holding on to* anger and carrying a grudge that causes psychological and physiological problems).

24. For example, divorcing couples often carry grudges for years and even decades. Maldonado, *supra* note 13, at 447. For example, one study suggests that in “as many as twenty-five percent of divorced families, high levels of parental conflict continue long after the divorce is final,” resulting in repeated trips to the courthouse and motions to modify aspects of the divorce decree. *Id.*

vengeful client is unhappy and suffering from the delusion that inflicting pain on the other party will end his suffering.<sup>25</sup> The vengeful client is by no means limited to family law disputes. Instead, the vengeful client can be an unhappy participant in any litigation matter in which a personal relationship has soured or in which the client believes that he has been wronged in some way.<sup>26</sup> In short, the vengeful client can be found in the law offices of a typical litigation attorney, of a mediator, or even of a transactional lawyer or collaborative lawyer.<sup>27</sup>

*B. The Difficulty of Counseling the Vengeful Client Effectively*

1. The Client Is Not a Rational Actor

The dilemma any conscientious lawyer faces when counseling an angry, emotionally reactive client is that the client's emotionality frequently interferes with the lawyer's ability to accurately assess the perceived threat posed by the other party and the consequences of potential litigation decisions. When gripped by anger or fear, biochemical changes in the brain disrupt the brain's ability to access the higher-level reasoning capabilities of the prefrontal cortex, which mediates the more complex reasoning functions.<sup>28</sup> Instead, the centrally located limbic system, which coordinates the activities of the upper and lower regions of the brain, signals the lower regions of the brain to activate pre-programmed survival processes.<sup>29</sup> This activation of

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at 453.

25. One tragic case in New York resulted in a physician's death from the injuries he incurred as he "blew up his six million dollar home so that his ex-wife could never have it." Maldonado, *supra* note 13, at 449–50 n.32; see also Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 610 (1985). Sugarman contends that "countless" plaintiffs find "more aggravation than satisfaction" when using the legal system for vengeance. *Id.* He concludes that, although there may be "occasional plaintiffs . . . who derive satisfaction from the humiliation of an adversary at trial," these plaintiffs are "only a minute proportion of the people who actually file claims." *Id.*; see also *infra* Part II.B (discussing the psychological, emotional, and physiological costs of holding onto anger).

26. Because corporations must act through human agents, even corporate conflicts can escalate into hostility and the desire for revenge. In today's economic climate, it would not be surprising to see an increasing number of lawsuits involving angry and resentful shareholders and former employees of floundering corporations.

27. Collaborative law is an emerging field, in domestic relations cases in particular, in which both parties and their lawyers agree to work collaboratively to resolve the conflict without resorting to litigation. See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 3–4 (2d ed. 2008).

28. See DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* 10 (1999) [hereinafter SIEGEL, *THE DEVELOPING MIND*]; DANIEL J. SIEGEL & MARY HARTZELL, *PARENTING FROM THE INSIDE OUT* 155–56 (2003).

29. See LOUIS J. COZOLINO, *THE NEUROSCIENCE OF PSYCHOTHERAPY: BUILDING AND REBUILDING THE HUMAN BRAIN* 23–25 (2002); PIERCE J. HOWARD, *THE OWNER'S MANUAL FOR*

survival processes engages the body via the sympathetic branch of the autonomic nervous system, placing the body in a heightened state of readiness for “fight or flight.”<sup>30</sup>

In this state, the resulting stress and anger narrow the client’s perceptual field. Perceptual psychologists label this perceptual narrowing as “downshifting.”<sup>31</sup> In a state of “downshift,” the client has a limited ability to be creative, to perceive and generate new meaning,<sup>32</sup> and to perform complex intellectual and problem-solving activities.<sup>33</sup> The client is also likely to be impulsive, rigid, lacking in self-reflection, and prone to stereotyped thinking and behavior.<sup>34</sup> This reduced ability to think logically and clearly has been characterized as “view[ing] situations through a narrow-angle lens. Intellectually you know there may be a bigger picture, but emotionally you don’t buy it. It’s like you have two people living inside you—a rational person ready to move forward, and an emotional person who feels and acts like a hurt child.”<sup>35</sup>

Moreover, because the desire for vengeance is motivated by the largely unconscious drive to heal the emotional pain that underlies the anger,<sup>36</sup> the

THE BRAIN: EVERYDAY APPLICATIONS FROM MIND-BRAIN RESEARCH 39 (2d ed. 2000).

30. See COZOLINO, *supra* note 29, at 23–25; HOWARD, *supra* note 29, at 39; W. ROBERT NAY, TAKING CHARGE OF ANGER: HOW TO RESOLVE CONFLICT, SUSTAIN RELATIONSHIPS, AND EXPRESS YOURSELF WITHOUT LOSING CONTROL 34 (2004) (noting that as adrenalin and cortisol are released into the bloodstream to trigger the “fight-or-flight” response, the muscles tighten as they poise to “fight” or “flee” from the situation).

31. See RENATE N. CAINE & GEOFFREY CAINE, MAKING CONNECTIONS: TEACHING AND THE HUMAN BRAIN 69–70 (1994).

32. See CAINE & CAINE, *supra* note 31, at 140.

33. *Id.* at 76 (citing studies that revealed these behavioral and cognitive characteristics of anxious people); see also SIEGEL, THE DEVELOPING MIND, *supra* note 28, at 259. Siegel suggests that in states of excessive arousal:

the ‘higher’ processing of the neocortical circuits is shut down, and that the direction of the energy flow within the brain and especially within the orbitofrontal regions is determined more by input from the ‘lower’ processing centers of the brainstem, sensory circuits, and limbic structures than by input from the cortex.

*Id.* Siegel notes that in this state, “we don’t think; we feel something intensely and act impulsively.” *Id.*

34. See CAINE & CAINE, *supra* note 31, at 76; SIEGEL & HARTZELL, *supra* note 28, at 155–56; see also Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 110 (2000) (contending that when the limbic system is under stress in this way, “[h]igh cortisol levels produce mental errors, distraction, and impairment in the ability to remember and to process information”).

35. DOC CHILDRE & DEBORAH ROZMAN, TRANSFORMING ANGER: THE HEARTMATH SOLUTION FOR LETTING GO OF RAGE, FRUSTRATION, AND IRRITATION 13 (2003).

36. Anger is only a secondary emotion that masks deeper emotional pain, such as betrayal, guilt, shame, or fear. See MATTHEW MCKAY & PETER ROGERS, THE ANGER CONTROL WORKBOOK

client is likely to discount and minimize the lawyer's warnings of the economic and strategic risks he incurs by escalating the conflict.<sup>37</sup> And, from a vantage point of fear and anger, the vengeful client may also overestimate the danger posed by the other party and the need to "strike first." There may well be an element of truth to the client's fears; however, so long as the client is operating from a reactive, emotional state, neither the client nor the lawyer can accurately assess just how realistic the client's concerns may be.

In short, the vengeful client is a client whose thinking is impaired by emotional pain and whose anger, rather than clear-headed thinking, is driving his decisions. From this vantage point, the lawyer cannot be entirely sure of the likely economic consequences of the client's proposed actions or of the risks involved in exploring various alternatives; thus, she may not be optimally effective in her efforts to counsel the client.

## 2. Simply Following the Vengeful Client's Directives Imposes Hidden Psychological and Physiological Costs

Should the lawyer elect to resolve the dilemma by simply following the directives of the vengeful client, however ill-conceived they might appear to be, the harmful consequences of such a decision may well extend beyond third parties,<sup>38</sup> the lawyer,<sup>39</sup> and society as a collective whole<sup>40</sup> to the client

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16 (2000). However, without thoughtful prodding by the lawyer, the typical client will not openly admit that anger is driving his litigation decisions and may not even be wholly *aware* of his motivations.

37. *See, e.g.*, Scott, *supra* note 4, at 646–47. Scott contends that in divorce litigation in particular, the parties are often

not constrained by rational self-interest. The spiteful party knows that his conduct is costly to himself as well as to his opponent but is willing to pay a price for the gratification of inflicting injury and defeating his opponent's prospects for a satisfactory outcome. Spite thus exacerbates bargaining costs, greatly enhancing the likelihood of a negative-sum interaction.

*Id.* at 647 (footnote omitted).

38. *See* Scott, *supra* note 4, at 646 (concluding that the "fallout" from adversarial divorce litigation is "likely to impose psychological costs on [their] children"); *see also* Maldonado, *supra* note 13, at 452–59; Nancy B. Rapoport, *Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783, 783–84 (1995); Steven H. Resnicoff, *The Attorney-Client Relationship: A Jewish Law Perspective*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 349, 350–52 (2000).

39. Given the unethical behavior and brutal competitiveness of adversarial litigation, it should come as no surprise that lawyers, as a group, suffer from a high incidence of depression and psychological distress. *See, e.g.*, KEEVA, *supra* note 17, at 5 (reporting that, while alcoholism and substance abuse in the general population is about 10%, it is estimated that about 15% to 18% of the nation's lawyers abuse alcohol or drugs); RHODE, *supra* note 18, at 25 (noting that lawyers "are four times more likely to be depressed than the public at large, and they have the highest depression rate of any occupational group"); Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 55 (2006) (noting that "[l]awyers experience alcoholism,

himself.<sup>41</sup> Although the client might experience temporary satisfaction with the thought of “war,” the other party typically retaliates against the client’s act of aggression with another act of aggression, with the cycle of war intensifying.<sup>42</sup> Thus, as tempting as it may be to exact vengeance through the

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depression, and other forms of psychological distress and dissatisfaction at a rate of about twenty percent—about twice the amount found in the general population” (citing SUSAN SWAIN DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 8 (2004)).

These results may stem, in part, from the “deep deposits of fear and guilt, paranoia and defensiveness” that are created from unethical acts. ROGER WALSH, *ESSENTIAL SPIRITUALITY: THE 7 CENTRAL PRACTICES TO AWAKEN HEART AND MIND* 121 (1999). “Though perhaps hidden from awareness by our defenses, they nevertheless agitate and cloud our minds, making it difficult to achieve calm and clarity.” *Id.*; see also RHODE, *supra* note 18, at 64 (arguing that the “avoidance of ethical responsibility is ultimately corrosive for lawyers, clients, and the legal framework on which they depend”).

40. See Allegetti, *supra* note 9, at 771–72. Allegetti notes:

There is little doubt that hired gun thinking contributes to the delay, the costs, the gameplaying, the large number of frivolous lawsuits, and the procedural abuses that plague the American legal system. When lawyers see themselves as hired guns, they are willing to do whatever it takes to win a case. . . . Hired gun thinking leads (perhaps inevitably) to no-holds-barred advocacy, where the courtroom becomes the OK Corral. . . . There is a natural tendency for litigation tactics to sink to the lowest common denominator permitted by the codes of professional responsibility.

*Id.* (footnote omitted).

Sadly, many lawyers “live down” to their clients’ expectations of them as hired guns, contributing to the public distrust of lawyers. See *id.* at 772; see also Rapoport, *supra* note 38, at 783–84; Resnicoff, *supra* note 38, at 350–51; David Sweet, *Sacrifice, Atonement, and Legal Ethics*, 113 *YALE L.J.* 219, 243 (2003).

41. See Weinstein, *supra* note 12, at 132–33. Weinstein argues that, in traditional divorce litigation, the legal system itself causes additional trauma to the divorcing parties, as well as a further deterioration in the parties’ relationship. *Id.*; see also Porter, *supra* note 12, at 1157. Porter observes:

Lawyers essentially have become hired guns. Instead of resolving conflicts, the process increases animosity and estrangement. Everyone is wounded.

Ironically, although the goal becomes winning at all costs, most clients come away from litigation feeling that everyone has lost, and that the lawyers are the only ones who benefit from the process.

*Id.* In family law litigation in particular, “[c]lients typically emerge from . . . settlements dazed and angry’ because they have unrealistic expectations about what they will get as a result of the process.” Strickland, *supra* note 12, at 980–81 (quoting Pauline H. Tesler, *Collaborative Family Law*, 4 *PEPP. DISP. RESOL. L.J.* 317, 322–23 (2004)).

42. See THICH NHAT HANH, *ANGER: WISDOM FOR COOLING THE FLAMES* 23 (2001). Thich Nhat Hanh, a Vietnamese Buddhist monk, counsels that although many believe they will feel better if they can make their tormentor suffer, this is a fallacy. *Id.* He concludes that “when you make the other suffer, he will try to find relief by making you suffer more. The result is an escalation of suffering on both sides. Both of you need compassion and help. Neither of you needs punishment.” *Id.*; see also Scott, *supra* note 4, at 646 (contending that interactions during divorce proceedings that

use of the legal process, the painful result “is usually only a dizzying spiral of ever-increasing anger, attack, and counterattack.”<sup>43</sup> The “litigation-as-war” model of conflict resolution exacts a psychological, emotional, and physiological toll on the client—irrespective of the economic outcome, the client is harmed by the litigation experience.

### 3. The Hidden Psychological and Emotional Costs of Resentment and Anger

Recent discoveries made by neuroscientists underscore the psychological and emotional costs associated with the pursuit of vengeance. In the past, neuroscientists believed that the functions of the structure that make up the brain are fixed and that the brain is incapable of creating new neurons.<sup>44</sup> However, within the last ten years, neuroscientists have discovered that the brain has “stunning powers of neuroplasticity,” including the power to grow new neurons and to develop new neural pathways.<sup>45</sup> What this means is that our thoughts actually change the hardwiring of the brain itself, including the neuropathways of the brain.<sup>46</sup>

To illustrate, consider the metaphor of a hill of virgin snow.<sup>47</sup> The first child who sleds down the hill cuts a path through the snow. As more children slide down the hill on that path, the path becomes trampled and deepens. If a child decides to sled down another part of the hill, a new path is formed.

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intensify feelings of anger and resentment “create substantial impediments to cooperative settlements” and “reduce the prospects for a satisfactory agreement”) (footnotes omitted).

43. WALSH, *supra* note 39, at 133.

44. SHARON BEGLEY, TRAIN YOUR MIND, CHANGE YOUR BRAIN: HOW A NEW SCIENCE REVEALS OUR EXTRAORDINARY POTENTIAL TO TRANSFORM OURSELVES 6 (2007). Begley states:

To some extent, the dogma was understandable. For one thing, the human brain is made up of so many neurons and so many connections—an estimated 100 billion neurons making a total of some 100 trillion connections—that changing it even slightly looked like a risky undertaking, on a par with opening up the hard drive of a supercomputer and tinkering with a circuit or two on the motherboard.

*Id.* at 7.

45. *Id.* at 8; DANIEL J. SIEGEL, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING 31–32 (2007) [hereinafter SIEGEL, THE MINDFUL BRAIN]; see also COZOLINO, *supra* note 29, at 68 (noting that “[t]here are approximately 12,000,000,000 neurons in the brain, with between 10 and 100,000 synaptic connections each, creating an almost unlimited number of associations among them”).

46. BEGLEY, *supra* note 44, at 8; SIEGEL, THE MINDFUL BRAIN, *supra* note 45, at 31–32.

47. The snowy hill metaphor was used by Daniel Siegel to explain the relationship between the mind (our thoughts) and the hardwiring of the brain, in a keynote address at a conference for health care professionals in Anaheim, California, on April 29, 2007. See also BEGLEY, *supra* note 44, at 8 (concluding that “[t]he actions we take can literally expand or contract different regions of the brain”); SIEGEL, THE MINDFUL BRAIN, *supra* note 45, at 32 (noting that where we direct our thoughts “will stimulate neural firing in specific areas, and they will become activated and change their connections within the integrated circuits of the brain”).

Eventually, if everyone abandons the first path, with a fresh snow the old path ceases to exist. The snowy hill is like the brain, with each thought either deepening an old neuropathway or carving new terrain by developing new neuropathways.<sup>48</sup> Thus, *in response to the thoughts to which we devote our attention*, the brain “forges stronger connections in circuits that underlie one behavior or thought and weakens the connections in others.”<sup>49</sup>

The implications of these findings are disturbing when one considers what often happens in adversarial litigation. The very act of obsessing over thoughts of anger and revenge changes the hardwiring of the brain, as the brain deepens the neuropathways that tell us the world is unfair and that we have the right to be angry.<sup>50</sup> Other studies from the scientific community corroborate these findings. Each time we think about an injustice, the brain and sympathetic nervous system respond as if the initial hostile act were happening all over again.<sup>51</sup> In fact, when we ruminate on an injustice, our ruminations tend to fuel the fire of anger, heightening and reenergizing the anger.<sup>52</sup> Thus, the continued venting of anger often leaves us feeling more enraged, not less.<sup>53</sup>

Moreover, with each retelling of the narrative about an injustice, we come to believe more fervently in the injustice to which we have so “innocently” been subjected, which has a self-fulfilling aspect. Studies performed in the field of cognitive behavioral psychology suggest that when we believe negative thoughts, we selectively interpret the world in a manner that validates and affirms our “private logic.”<sup>54</sup> Thus, a person who believes the

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48. BEGLEY, *supra* note 44, at 8.

49. *Id.*

50. *See, e.g., id.* at 9; SIEGEL, *THE MINDFUL BRAIN*, *supra* note 45, at 32. These findings from neuroscience are consistent with Buddhist thought. As Thich Nhat Hanh explains: “When you vent your anger, you simply open the energy that is feeding your anger. The roots of anger are always there, and by expressing anger like that, you are strengthening the roots of anger in yourself. That is the danger of venting.” HANH, *supra* note 42, at 116.

51. LUSKIN, *supra* note 21, at 79; WALSH, *supra* note 39, at 79; Rollin McCraty et al., *The Effects of Emotions on Short-Term Power Spectrum Analysis of Heart Rate Variability*, 76 AM. J. CARDIOLOGY 1089, 1089–93 (1995); Charlotte vanOyen Witvliet et al., *Granting Forgiveness or Harboring Grudges: Implications for Emotion, Physiology, and Health*, 12 PSYCHOL. SCI. 117, 122 (2001).

52. Michael E. McCullough et al., *Rumination, Emotion, and Forgiveness: Three Longitudinal Studies*, 92 J. PERSONALITY & SOC. PSYCHOL. 490, 490 (2007); *see also* Don Ellinghausen, Jr., *Venting or Vipassana? Mindfulness Meditation’s Potential for Reducing Anger’s Role in Mediation*, 8 CARDOZO J. CONFLICT RESOL. 63, 68 (2006).

53. WALSH, *supra* note 39, at 80.

54. *See* GERALD COREY, *THEORY AND PRACTICE OF COUNSELING AND PSYCHOTHERAPY* 115–16 (6th ed. 2001). Aaron Beck, the father of the cognitive behavioral therapy movement, conducted a number of studies that support this notion. *Id.* at 315–16. Alfred Adler, the father of the Adlerian therapeutic model, calls this distorted logic “private logic.” *Id.* at 115–16. Adlerian psychologists conclude that one’s negative thoughts are self-fulfilling because we seek to validate

world is unfair and hostile will selectively interpret what is happening around him in a manner that validates that belief.<sup>55</sup> And, because he is on some level seeking to validate his beliefs, his negative thoughts about the world will tend to be fulfilled as he attracts angry people into his experience.<sup>56</sup> In contrast, a person who believes the world is just and good will selectively interpret the world in a manner that validates that belief.<sup>57</sup>

There is a neurological explanation for this filtering phenomenon. “[T]he vast majority of the information we acquire and encode is both outside of conscious awareness and processed *prior* to conscious awareness . . . .”<sup>58</sup> This is because “[h]idden layers of neural processing . . . predigest and organize our experience before it emerges into awareness.”<sup>59</sup> Thus, “[i]n the few hundredths of a second it takes for us to become consciously aware of [an experience,] the hidden layers of neural processing shape and organize it, trigger related networks, and select an appropriate presentation for conscious awareness.”<sup>60</sup> These hidden layers of neural processing “highlight some aspects of experience while diminishing others, direct us to orient to certain aspects of the environment, and *completely block awareness of others*. By definition, the hidden layers are never directly seen.”<sup>61</sup>

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our private logic. *Id.* Studies in neuroscience also support the notion of selective perception, contending that unconscious neural processing in the brain selects those aspects of an experience to highlight and to block. *See* COZOLINO, *supra* note 29, at 157–62; *see also* MICHAEL S. GAZZANIGA, *THE MIND’S PAST* 26 (1998). Gazzaniga states that the left brain is like an “interpreter” that weaves a story about reality to convince us that we are in full control. *Id.*

55. *See* COREY, *supra* note 54, at 115–16.

56. Research in the field of critical discourse analysis helps explain this phenomenon. Much of the meaning conveyed in conversation is transmitted through nonverbal and paralinguistic communication. *See* Susan Jenkins & Isabel Parra, *Multiple Layers of Meaning in an Oral Proficiency Test: The Complementary Roles of Nonverbal, Paralinguistic, and Verbal Behaviors in Assessment Decisions*, 87 *MODERN LANGUAGE J.* 90, 91–95 (2003). We implicitly recognize and interpret meaning by drawing from a vast inventory of behavioral practices that are widely shared by members of a discourse community. *Id.* Certain nonverbal behaviors, such as smiling and eye contact, are widely interpreted as conveying warmth and regard. These behaviors tend to attract other people and are positively correlated with trust and liking. *Id.* at 92. Other nonverbal behaviors are widely interpreted as conveying hostility, aggression, or anger, and tend to either repel people or trigger a retaliatory act. *See* NAY, *supra* note 30, at 34 (listing the physical signs of anger). Some of the physiological symptoms are internal, while others manifest outwardly, such as tightened muscles in the face and neck region, a flushed face, shallow breathing, and dilated pupils. *Id.*

57. *See* COREY, *supra* note 54, at 115.

58. COZOLINO, *supra* note 29, at 158.

59. *Id.* at 159.

60. *Id.* at 160.

61. *Id.* at 161 (emphasis added); *see also* DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 30–33 (1999). In *Difficult Conversations*, the authors note how we each notice different things about an experience and yet come away from the experience believing that we have “the facts.” *Id.* This belief that we know “the facts” is one cause of conflict.

Because this constant stream of neural processing is unconscious, we have no experience of the world other than our own conscious perception, which represents only a single vantage point, or lens, through which to view a complex world.<sup>62</sup> Because we see the world only through a single vantage point, we make the false assumption “that the world we experience and the objective world are one and the same.”<sup>63</sup> We are blind to the reality that the neuropathways in our brain selectively interpret the world, highlighting aspects of “reality” that reinforce our beliefs and “completely blocking” aspects of “reality” that do not fit into our belief systems.<sup>64</sup> This egocentric bias results in perceptual biases and distortions.<sup>65</sup>

Consider the significance of these scientific findings on the quality of a client’s life when the client participates in a lengthy and contentious litigation proceeding. As the cycle of “war” escalates, with each hostile act met with a corresponding hostile act, the client replays in his mind the growing laundry list of perceived wrongs he has endured and repeatedly ruminates about the injustices visited upon him. As the client ruminates on such injustices, he is likely to increasingly see himself as an innocent “victim,” powerless to obtain “justice.” This anger and resentment is not only likely to bleed into the client’s experiences in the world in general, but, over time, the angry, negative experiences have a cumulative effect, deepening the brain’s neuropathways that believe the world is a hostile place and that the client is a helpless victim. As the client’s resentment grows over time, the client increasingly experiences the world as hostile.<sup>66</sup> Thus, contentious litigation characterized by hostility and aggression strengthens the client’s perception that the world is an unfair and hostile place, a place in which the client must fight to get what’s his.<sup>67</sup> As the client pays greater attention to these thoughts, the client not only selectively perceives the world as hostile but also is likely to create more hostile experiences in his life.<sup>68</sup>

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62. COZOLINO, *supra* note 29, at 161–62.

63. *Id.* at 161.

64. *See id.* at 161–63.

65. *Id.* at 159.

66. *See, e.g.,* NAY, *supra* note 30, at 42. Moreover, the more hostile the client’s world view, the less satisfying the relationships are in the client’s life. *Id.* Healthy people generally avoid significant contact with people who are habitually angry and vengeful. *Id.* Coworkers who are forced to deal with the angry client will likely treat the angry client differently, whether in retaliation for the client’s anger or simply in self-defense. *Id.*

67. Interestingly, when the client eventually tires of assuming the role of victim, with the lawyer being the rescuer, the client “transfers responsibility for the perceived inequities of the system to the attorney. Attorneys inevitably become part of the problem.” DAVID A. TRACY, A.B.A. CTR. FOR CONTINUING LEGAL EDUC., THE ROLE OF THE LAWYER IN RELATION TO THE CLIENT: BOSS, HUMBLE SERVANT OR DR. PHIL? 17 (2007).

68. *See, e.g.,* NAY, *supra* note 30, at 42.

#### 4. The Adverse Health Costs Associated with Resentment and Anger

The vengeful client does not just incur psychological and emotional costs by holding onto anger and resentment. A significant body of research in the medical field provides compelling evidence of the adverse health effects of holding onto anger and blame. The heart's rhythmic pattern, or heart rate variability (HRV), is a barometer of our emotional states.<sup>69</sup> When someone is angry or frustrated, the HRV pattern becomes rough and jagged, or incoherent, and causes the sympathetic and parasympathetic branches of the autonomic nervous system to become out of sync,<sup>70</sup> thereby increasing one's blood pressure and heart rate.<sup>71</sup> Preoccupation with angry thoughts, over time, damages the heart and blood vessels by creating an overactive sympathetic nervous system, which makes it difficult to calm down.<sup>72</sup>

The long-term health cost of holding onto anger is severe, with study after study concluding that anger plays a lethal role in both heart disease and cancer.<sup>73</sup> For example, in one study, eighty percent of the participants who

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69. McCraty et al., *supra* note 51, at 1089, 1092.

70. CHILDRE & ROZMAN, *supra* note 35, at 20–21.

71. LUSKIN, *supra* note 21, at 79. Luskin reports that in one study college students were asked to actively recall a grudge they had against an offender and then to intersperse those periods by imagining that they had forgiven the offender. *Id.* When thinking about the grudge, the students' blood pressure and heart rate rose and the subjects reported feeling uncomfortable and less in control. *Id.* When imagining that they had forgiven their offenders, the subjects' blood pressure and heart rate were not adversely affected, and the subjects reported greater feelings of relaxation and positive emotions. *Id.* (citing vanOyen Witvliet et al., *supra* note 51, at 117–23); *see also* McCraty et al., *supra* note 51, at 1089–93.

72. CHILDRE & ROZMAN, *supra* note 35, at 22. A recent study of patients in Florida found a 2.8-fold increase in life-threatening cardiac arrhythmias in the thirty days after the terrorist attacks of September 11, 2001. Omer L. Shedd et al., *The World Trade Center Attack: Increased Frequency of Defibrillator Shocks for Ventricular Arrhythmias in Patients Living Remotely from New York City*, 44 J. AM. OF CARDIOLOGY 1265, 1266 (2004). Another study concluded that this is most likely explained by a decrease in the calming protection normally provided by the parasympathetic nervous system. Rachel Lampert et al., *Heart Rate Variability During the Week of September 11, 2001*, 288 J. AM. MED. ASS'N 575, 575 (2002).

73. WALSH, *supra* note 39, at 80. Walsh notes that the "harried person who is constantly busy and irritable may be particularly prone to heart attacks, while people who carry an enormous residue of rage but stuff it out of awareness may increase their risk of cancer." *Id.*; *see also* DOC CHILDRE, FREEZE FRAME: A SCIENTIFICALLY PROVEN TECHNIQUE FOR CLEAR DECISION MAKING AND IMPROVED HEALTH 4–5 (Bruce Cryer ed., 2d ed. 1998). Childre cites a Harvard Medical School study of heart attack survivors that found when the subjects got angry, their risk of another heart attack was more than double of those subjects who remained calm. *Id.* at 4. Childre reports three other ten-year studies that "concluded that emotional stress was more predictive of death from cancer and cardiovascular disease than smoking; people who were unable to effectively manage their stress had a 40% higher death rate than non-stressed individuals." *Id.* at 5. These health costs are as true for people who suppress anger as they are for those who vent their anger. *See* MCKAY & ROGERS, *supra* note 36, at 11 (citing Ray H. Rosenman, *Health Consequences of Anger and Implications for Treatment*, in *ANGER AND HOSTILITY IN CARDIOVASCULAR AND BEHAVIORAL DISORDERS* (Margaret A. Chesney & Ray H. Rosenman eds., 1985)).

had heart disease were classified as “type A” personalities, a personality type associated with heightened aggression, impatience, and anger.<sup>74</sup> Over an eight-and-a-half-year study, the “type A” subjects were twice as likely to have heart attacks as the other subjects.<sup>75</sup> In evaluating the data, the anger-hostility characteristics proved to be “the dominant characteristic among the coronary prone type A behaviors.”<sup>76</sup>

Other studies reflect that “people who evidence higher degrees of blame suffer more from a variety of illnesses,” not just heart disease and cancer.<sup>77</sup> In one study, as part of a health evaluation, law students took a test measuring hostility.<sup>78</sup> In a twenty-five-year follow-up study, a remarkable twenty percent of those law students who scored in the top quartile on the hostility scale were dead.<sup>79</sup> In contrast, those students who scored in the bottom quartile on the same test exhibited only a five percent mortality rate.<sup>80</sup> In short, although there may be temporary satisfaction in plotting revenge or wallowing in blame, there is a significant long-term health cost to be paid.

## 5. Appeals to Morality or Economic Self-Interest Are Unlikely to Dissuade the Vengeful Client

### *a. Resistance to Appeals to Morality*

Not surprisingly, vengeful clients are often resistant to appeals based on morality and even economic self-interest. Because the client’s thirst for vengeance is driven by underlying emotional pain, the client’s reactive emotional state is likely to blind the client to the finer points of moral dialogue. Should the lawyer merely ask an angry, resentful client whether he has considered the effect his actions might have on other people, this dialogue has little potential to move a client from a fixed position.<sup>81</sup> Should the lawyer

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74. MCKAY & ROGERS, *supra* note 36, at 11 (citing Rosenman, *supra* note 73).

75. *Id.*

76. *Id.*

77. LUSKIN, *supra* note 21, at 78 (citing Linda K. George et al., *Spirituality and Health: What We Know, What We Need to Know*, 19 J. SOC. & CLINICAL PSYCHOL. 102 (2000)); Sid Sarinopoulos, *Forgiveness and Physical Health: A Doctoral Dissertation Summary*, WORLD OF FORGIVENESS, Jan.–Feb. 2000, at 16, 18.

78. MCKAY & ROGERS, *supra* note 36, at 11.

79. *Id.*

80. *Id.*; see also Richard B. Shekelle et al., *Hostility, Risk of Coronary Heart Disease, and Mortality*, 45 PSYCHOSOMATIC MED. 109, 113 (1983) (finding a correlation between high hostility scores and increased mortality in a twenty-year follow-up study of nearly 2000 initially healthy employees of the Western Electric Co.).

81. For example, if the lawyer were merely to ask an angry client to consider “what would be fair?”, that question would be unlikely to spark a genuine dialogue about fairness—to an angry client, revenge seems fair. See, e.g., *Symposium, supra* note 8, at 599 (advocating this approach to moral dialogue as an aspect of the collaborative lawyering approach); see also *id.* at 610–11 (“[P]arties who

decide to push the client a bit further by pointing out her own concerns about the harmful effect of the client's proposed actions on other parties, the moral dialogue is likely to generate defensiveness. Because the client is angry and emotionally reactive, this more "directive"<sup>82</sup> approach tends to lock clients into defending their positions rather than candidly reflecting on the morality of their actions.

Such power struggles<sup>83</sup> may result from the quandary the typical client faces when, out of anger and hurt, he feels compelled to engage in conduct that does not comport with his self-view as a moral, decent human being. The client reconciles the vengeful conduct with his self-view as a decent human being by portraying himself as an innocent victim who is somehow *entitled* to wreak vengeance on an evil wrong-doer.<sup>84</sup>

Scientific and psychological research help explain why it is all too easy to fall into an "innocent victim" mentality. Due to a phenomenon called "fundamental attribution error," we tend to attribute our own mistakes and flaws to the situation or environment, while explaining other people's behavior by ascribing character flaws to them.<sup>85</sup> Moreover, we tend to ascribe malicious intentions to others based on the depth of our subjective reactions to the behavior.<sup>86</sup> Because of these perceptual distortions we become polarized in our thinking,<sup>87</sup> labeling the other as "bad" or "corrupt" and ourselves as the innocent victim. And, as we begin to catalogue a list of character flaws and malicious intentions, the neuropathways in our brain begin to highlight those aspects of "reality" that reinforce our beliefs and minimize or completely

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are most in need of ethical advice are probably among those least likely to commit to fair and cooperative problem solving.").

82. Scholars who advocate what has been coined as the "directive" or "contextual" approach to lawyering argue that, in the proper contexts, lawyers have the right and even the responsibility "to assert control of moral issues that arise during legal representation" and to act in accordance with their own moral convictions. *Id.* at 594.

83. A power struggle is a dialogue in which each participant attempts to persuade the other of the validity of her position, rather than listening and being willing to learn from the other participant. *See, e.g.,* Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 759-61 (1989) (describing the power struggle within the student-teacher relationship in law school).

84. This egoic defense mechanism is entirely unconscious, of course. *See* RUDOLF DREIKURS, FUNDAMENTALS OF ADLERIAN PSYCHOLOGY 54-55 (1953).

85. *See* COZOLINO, *supra* note 29, at 163. For example, under the fundamental attribution error phenomenon, when "[w]e fail a test [it is] because we didn't have time to study or because the professor wasn't very good; others fail because they are not very bright." *Id.*

86. *See* STONE ET AL., *supra* note 61, at 46. Thus, if we are hurt by another person's actions, we conclude that they intended to hurt us. *Id.* If we feel slighted, we assume they intended to slight us. *Id.* "Our thinking is so automatic that we aren't even aware that our conclusion is only an assumption." *Id.*

87. *See* COREY, *supra* note 54, at 311.

block those aspects of “reality” that do not support our belief systems.<sup>88</sup> In psychological terms, this phenomenon is called “belief perseverance.”<sup>89</sup>

Therefore, a lawyer who attempts to persuade the client that his actions are immoral is likely to be met with defensiveness. Due to perceptual biases and distortions in the way the client interprets “reality,” the client fervently believes he is an innocent victim. And, because the desire for revenge is unlikely to be satisfied until the underlying wound is healed, the client’s self-view as a decent human being requires that he continue to defend and justify his actions.

*b. Resistance to Appeals to Economic Self-Interest*

Even appeals to the client’s economic self-interest are unlikely to persuade the angry, vengeful client to relinquish the goal of using the legal system as legalized war. Perhaps the most important reason why such appeals tend to be unsuccessful is because they do not capture the heart of why an angry client wants to use the legal system as a weapon for revenge. Anger is only a secondary emotion that masks deeper emotional pain, such as betrayal, guilt, shame, or fear.<sup>90</sup> The drive for revenge is simply a misguided attempt to heal the underlying emotional pain—the client believes the pain will somehow dissipate if he can exact a pound of flesh. However, exacting revenge provides only temporary satisfaction at best and doesn’t actually heal the underlying pain, so the drive for vengeance only continues and escalates into a vicious cycle of attack and counterattack.<sup>91</sup> Therefore, it is not surprising that, although most lawyers seem to agree that it is appropriate to

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88. See COZOLINO, *supra* note 29, at 163. Cozolino explains that the hidden layers of neural processing

are conservative in the sense that they hold onto a way of understanding the world that has, thus far, led to survival. This may, in part, explain why many people with negative beliefs about themselves hold onto those beliefs with such tenacity, and why racial prejudice often continues despite evidence to the contrary.

*Id.* (citation omitted).

89. *Id.* at 163–64. Cozolino concludes: “*Belief perseverance is the enemy of neural plasticity.*” *Id.* at 164. In other words, it is impossible to create new neuropathways to release anger and resentment by clinging to set beliefs.

90. See MCKAY & ROGERS, *supra* note 36, at 16. However, without thoughtful prodding by the lawyer, the typical client won’t openly admit that anger is driving his litigation decisions and may not even be wholly *aware* of his motivations.

91. See LUSKIN, *supra* note 21, at 27–28. Luskin notes that the desire for revenge is “primarily the result” of stress chemicals released by the body when the sympathetic nervous system is engaged. *Id.* at 27. The desire for revenge is a primitive response of the reptilian brain rather than the result of “careful or productive thinking. Our problem is the choices these stress chemicals offer us are inadequate in helping to regain control of our emotional life. Simply put, these are poor choices. They do not help us . . . come to grips with painful life experiences . . .” *Id.*

dissuade their clients from vengeful acts,<sup>92</sup> they have been largely unsuccessful in their efforts to do so.<sup>93</sup>

*c. The Lawyer's Internal Dilemma*

The relative lack of success lawyers have in dissuading clients from using the legal system as legalized war may also stem, in part, from an internal conflict as to whether it is appropriate for lawyers to impose their moral values on their clients. After all, lawyers do not necessarily have a monopoly on morality.<sup>94</sup> This is difficult terrain and an issue that has spawned a spirited debate among legal scholars.<sup>95</sup> One concern is that the lawyer might be so persuasive, or overpowering, in her efforts to dissuade the client from conduct she deems immoral or offensive that the lawyer's personal moral code will override the client's moral code.<sup>96</sup> Under agency law, as reflected in ethical rules, the client is the principal and the lawyer is only the agent,<sup>97</sup> who "shall abide by a client's decisions concerning the objectives of representation,

92. Although there is clearly an economic justification for making baseless demands for child custody, the anger and threats that are part and parcel of many divorces suggest that these kinds of threats are fueled, in part, by anger and a desire for revenge—to exact financial punishment on a spouse. *See, e.g.,* Maldonado, *supra* note 13, at 449–52.

93. *See, e.g.,* Altman, *supra* note 4, at 500. In Altman's study, although 95% of the surveyed lawyers reported that they tried to dissuade their clients from using such a ploy, they reported an underwhelming measure of success in their efforts, stating that their efforts were successful somewhere between "not often" and "as often as not." *Id.* at 536. Moreover, 61% of the responding lawyers reported receiving a threat of custody litigation for more favorable financial terms at least once in the preceding year. *Id.* at 499, 534. This statistic suggests that not only are lawyers often not successful at dissuading their clients from taking such actions but that they agree to participate in such a scheme rather than decline representation. Altman also concludes that this tactic, among others, is fairly commonplace in certain jurisdictions. *Id.* at 495–97.

94. *See* Dinerstein et al., *supra* note 3, at 794–95 (cautioning against assuming that the lawyer's ideas about right and wrong are necessarily correct, and noting that "lawyers have no monopoly on wisdom"); *see also* BINDER ET AL., *supra* note 10, at 293–94 n.38.

95. The dilemma of whether to impose one's own views on a client has been widely debated. Scholars who advocate what has been coined as the "directive" or "contextual" approach to lawyering, argue that lawyers have the right, and even the responsibility, to act in accordance with their own moral code when appropriate. RHODE, *supra* note 18, at 58; SIMON, *supra* note 18, at 138; Luban, *supra* note 18, at 118. Other legal scholars criticize the "directive" approach, in part, because the lawyer should not presume that her moral code is inevitably "right." *See, e.g.,* Symposium, *supra* note 8, at 595–96 (Cochran argues that one of the "troubling aspects" of the directive approach is that the lawyer might be wrong). *But see id.* at 617–20. Tremblay argues that lawyers need not be concerned about imposing their own values on clients because values are not idiosyncratic but are, rather, shared values about what is good. *Id.* at 618. He argues that disagreements about values are, in reality, almost "invariably about facts, not about values as such." *Id.*

96. *See, e.g.,* Dinerstein et al., *supra* note 3, at 796 (arguing that "[t]he more able the client is to make an independent judgment, the more appropriate" it is for the lawyer to urge her moral views on the client).

97. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071 (1976) (arguing that the nature of the relationship dictates that the lawyer should adopt the client's interests as her own).

and . . . [who] *shall consult* with the client as to the means by which they are to be pursued.”<sup>98</sup> Thus, if the client’s professed goal is to obtain the best possible financial settlement in a divorce, and warrior tactics might help secure the best economic package, this dilemma creates an internal conflict for the lawyer who wants to do the “right” thing.<sup>99</sup>

This dilemma is exacerbated by the inherent tension between the duty of loyalty to the client and the duty of fairness to other parties.<sup>100</sup> The notion that “zealous” representation requires warrior-like behavior runs rampant within the ranks of litigators.<sup>101</sup> Indeed, “[a]mong the metaphors that shape how lawyers view themselves and are viewed by others, none exercises a more powerful hold than the metaphor of the hired gun”—a hired gun whose “skills are to be used solely and unreservedly to obtain what the client wants.”<sup>102</sup>

98. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002) (emphasis added). However, there clearly is some room for the attorney to attempt to dissuade a client from insisting on taking action on an issue that is otherwise within the client’s province. For example, the comments note that although “lawyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected,” there is room for disagreement. *Id.* at 1.2 cmt. 2. Although the “[r]ule does not prescribe how such disagreements are to be resolved,” lawyers are encouraged to “consult with the client and seek a mutually acceptable resolution of the disagreement.” *Id.* at 1.2(a) cmt. 2. Moreover, lawyers are specifically encouraged to “refer not only to law but to other considerations such as moral, economic, social and political factors.” *Id.* at 2.1. Thus, “[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” *Id.* at 2.1 cmt. 2.

99. The fact that many lawyers narrowly view “winning” solely in economic terms makes them even less likely to pursue moral dialogue if the client’s desire for warrior tactics seems likely to result in a better economic result. See Pauline H. Tesler, *Collaborative Law: What It Is and Why Lawyers Need to Know About It*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 187, 192 (Dennis P. Stolle et al. eds., 2000).

100. For example, the Model Rules of Professional Conduct instruct lawyers to “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2002). Indeed, the rules governing conflicts of interest are premised on the principle that loyalty is an “essential element[] in the lawyer’s relationship to a client.” *Id.* at 1.7 cmt. 1. However, although “[r]esponsibility to a client requires a lawyer to subordinate the interests of others to those of the client, . . . that responsibility does not imply that a lawyer may disregard the rights of third persons.” *Id.* at 4.4 cmt. 1. Thus, the Model Rules prohibit lawyers from using “means that have no substantial purpose other than to . . . burden a third person,” *id.* at 4.4, from making frivolous discovery requests, *id.* at 3.4(d), from making “false statement[s] of material fact or law” to third parties, *id.* at 4.1(a), or from offering false evidence or making false statements to tribunals, *id.* at 3.3(a)(1)(3).

101. See Tesler, *supra* note 99, at 189–92.

102. Allegretti, *supra* note 9, at 749. Allegretti observes:

From the first day of law school, in class and out, in what is said and left unsaid, prospective lawyers are trained to see themselves as the hired guns of clients . . . . Their personal values and beliefs are to play no role in how they do their job. They owe their clients uncompromising loyalty. If they have moral

This notion is even reinforced by the Model Rules of Professional Conduct, which, to date, have declined to expressly condemn the use of “offensive tactics” or the treatment of other parties with a lack of “courtesy or respect.”<sup>103</sup>

The lawyer’s internal conflict is made even more difficult by the typical client’s prevarications about his motivations. Questions about morality are often not clear-cut but are, rather, shaded with gray.<sup>104</sup> Like the client in the vignette, many clients change their minds about what they want during litigation, particularly a client whose judgment is clouded by anger. For example, a client who initially states that he is not interested in assuming primary custody of his children is entitled to change his mind and is certainly entitled to be conflicted about what he really wants. Moreover, as the lawyer listens to the client’s narrative of victimization, the internal tension is likely to become even more acute as the lawyer begins to empathize with the client’s plight.<sup>105</sup> With greater empathy and identification with the client, efforts to

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qualms about a client, or about the means needed to achieve a client’s goals, then they should refuse to take the case. But once they take a case they are in, all the way in, and the client has the right to expect them to do everything possible to win the case, subject only to the constraints of the law and the codes of the legal profession.

*Id.*

103. See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2002). The comment instructs lawyers to act “with zeal in advocacy upon the client’s behalf” and then explains that “[t]he lawyer’s duty to act with reasonable diligence does not *require* the use of offensive tactics or *preclude* the treating of all persons involved in the legal process with courtesy and respect.” *Id.* (emphasis added). By failing to prohibit offensive tactics or require courtesy and respect, the language seems to reflect the drafters’ ambivalence about offensive conduct. See LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 291–92 (2d ed. 2008).

104. See *Symposium, supra* note 8, at 621–22. Tremblay observes that clients “do not present unambiguous stories of injustice, corruption, or unconscionability.” *Id.* at 621. Instead,

[t]he rich guy has excuses; he has accusations about the poor guy; he has a history that makes his case far more complicated. *Justice is on my side*, he says. The lawyer may suspect that all of this is just twaddle, but for him to betray his client he must be sure—ever so sure—that it is indeed twaddle. I suspect that lawyers are very seldom so sure.

*Id.* at 622; see also BINDER ET AL., *supra* note 10, at 295. Binder concludes that “moral tensions arrive in shades of gray, and individuals are very seldom openly or admittedly immoral. A client who suggests a scheme that you consider immoral will undoubtedly offer a reasoned defense based on assumed facts which you cannot be sure are wrong.” *Id.*

105. See Allegretti, *supra* note 9, at 766 (contending that, as lawyers “become intimates of their clients, . . . their own moral values come more and more to resemble those of their most important clients, so that over time their professional values are no longer truly their own”); see also *Symposium, supra* note 8, at 612 (noting that “many attorneys acknowledged shifting or suspending judgment in the course of representing clients”).

dissuade the vengeful client increasingly begin to seem like unjustified interference with the client's autonomy and dignity.<sup>106</sup>

The lawyer's internal conflict about dissuading the client from vengeful acts may also be a reflection of the reality that efforts to dissuade the client from immoral acts are likely not only to be unsuccessful but also to strain the lawyer-client relationship. Because a client is not likely to be receptive to rational arguments based on morality or even economic self-interest, such a dialogue risks jeopardizing the trust and respect that is essential to a strong lawyer-client relationship.<sup>107</sup> When defending the legitimacy of his position, the client is likely to fall prey to polarized thinking, concluding that the lawyer is not "on my side" because "whoever isn't with me is against me."<sup>108</sup> Thus, such a dialogue has the distinct potential to impair trust and to alienate a client on whom the lawyer is economically dependent.<sup>109</sup> Even if the client decides to continue working with the lawyer, the awkwardness of the dialogue may well have a crippling effect on the lawyer-client relationship.<sup>110</sup>

### III. THE LAWYER AS A FACILITATOR FOR HEALING

#### A. *Addressing the Client's Emotional Pain and Self-Interest Is a Better Approach*

Lawyers have extraordinary potential to facilitate healing. As Chief Justice Warren Burger once lamented: "The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts."<sup>111</sup> When working with an angry client who may be blinded by

106. See *Symposium, supra* note 8, at 623–24.

107. See Stephen L. Pepper, *Autonomy, Community, and Lawyers' Ethics*, 19 CAP. U. L. REV. 939, 944–57 (1990) (discussing the risks involved in moral dialogue); see also Dinerstein et al., *supra* note 3, at 802 (recognizing that ineffective moral dialogue risks jeopardizing the client's trust in the lawyer).

108. See COREY, *supra* note 54, at 311.

109. See Dinerstein et al., *supra* note 3, at 793–94 ("[L]awyers who contemplate beginning such dialogues will hesitate because of their own fear of losing clients . . .").

110. See Robert J. Condlin, "What's Love Got to Do With It?"—"*It's Not Like They're Your Friends for Christ's Sake*": *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 281 (2003). Condlin questions why a client would welcome "moral critique and exhortation" from a lawyer he "hardly know[s]." *Id.* Condlin wonders whether it isn't "perhaps a little impertinent, after all, to tell people . . . who have come to you for legal help, that their moral perspectives are narrow or self-centered, mostly because they are not the same as yours." *Id.* (footnote omitted).

111. Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 66; see also Richard M. Calkins, *Caucus Mediation—Putting Conciliation Back Into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 DRAKE L. REV. 259, 272 (2006) ("[M]any conclude that peacemaking is the highest calling in the legal profession and one of the highest callings in

the desire for vengeance, a lawyer is more likely to be successful in helping the client when she directly addresses the source of the client's emotional pain, and the client's self-interest, rather than attempting to "reason" with the client. And, by helping the client release the anger that is driving the desire for vengeance, the lawyer is more likely to succeed in helping the client realistically weigh the advantages and disadvantages of a litigation strategy that will best serve his economic and quality-of-life objectives.

Although the lawyer will likely need to persuade the client to entertain the possibility of releasing some of the anger that has impaired his ability to assess his legal options, the dialogue outlined below in this Article avoids many of the problems inherent in reasoned appeals based on logic and morality. Persuading a client to entertain the prospect of releasing the anger that has affected the client's clarity and quality of life does not raise the same troubling internal dilemma of whether it is appropriate to impose the lawyer's personal moral values on the client. Although some might argue that letting go of anger and hostility is itself a moral virtue, the dialogue urged in this Article does not invite the lawyer to impose her personal moral beliefs on the client by sparring about the morality of anger. Instead, the lawyer's efforts to persuade the client focus on the client's underlying emotions and concern for the client's ultimate well-being.

To illustrate the distinction, a lawyer who engages in a moral discussion with an angry client is likely to ask the client to focus his thoughts on other people. The lawyer might ask the client to consider "what is fair" or, in a child custody dispute, to consider the effect of the client's actions on his children. The lawyer might even attempt to openly discuss whether the proposed strategy is moral. In contrast, the dialogue outlined in this Article invites the lawyer to focus the discussion on the *client's* underlying interests and well-being. As discussed in greater detail in Part IV of this Article, the lawyer begins the dialogue by asking the client to identify his ultimate objectives and expressly invites the client to consider quality-of-life as well as economic objectives. The lawyer then uses the client's professed quality-of-life objectives as a starting point to discuss the lawyer's concern that the client's anger and frustration is likely to thwart his efforts to attain those objectives.<sup>112</sup>

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life."); Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 690–92 (1982). Judge Re argues that the legal profession needs to reprioritize its values by recognizing that one of the most important roles a lawyer has is that of counselor—a counselor who "serves as an instrument of peace." *Id.* at 691.

112. Although the discussion is focused on the client's self-interest rather than the interests of other parties, by reducing the level of anger and frustration the client is experiencing, the client is also likely to back down from insisting on litigation strategies that are borne out of the desire for vengeance. Thus, the client might ultimately end up choosing to act in a manner the lawyer

Nonetheless, one might argue that this is merely a semantic distinction, and that it is just as presumptuous and paternalistic for a lawyer to persuade a client to release the anger that is driving his litigation decisions as it is for the lawyer to impose her moral values on the client. However, the prospect of the paternalistic lawyer persuading a client to release anger and blame is not troubling for several reasons. First, only the client can make the ultimate decision to release the anger and resentment he has directed against the other party; it is simply not possible for any lawyer to compel an unwilling client to choose to release the emotions that are causing the client pain. It is entirely possible, of course, that an overly zealous lawyer might unwittingly persuade a reluctant client to *feign* a change of heart.<sup>113</sup> However, the dialogue presented below in this Article<sup>114</sup> requires a genuine self-exploration that cannot be forced or easily feigned. The choice of whether to release the anger and resentment that is troubling the client rests, ultimately, with the client.<sup>115</sup>

Of course, as with any sensitive issue that arises between a lawyer and client, it is possible that an overbearing lawyer with poor interpersonal skills could so aggressively attempt to force the client into letting go of anger that her efforts would alienate the client and weaken the lawyer-client relationship. However, this is a potential risk inherent within *any* sensitive dialogue between a lawyer and a client.

Moreover, it is unlikely that the lawyer's efforts to persuade a client to let go of the anger and resentment that is impairing the client's quality of life would jeopardize the trust that is essential to the lawyer-client relationship. Unlike moral dialogue, the lawyer who collaborates with the client in this manner is not attempting to convince the client that he is "wrong" to feel the way he does. Therefore, this dialogue is not as likely to culminate in a power struggle that would lock the client into a defensive posture. As a compassionate ally, the lawyer acknowledges that the client is in pain, educates the client about the hidden costs of holding onto anger, and helps the client find an outlet to heal the pain. In fact, because the lawyer is acknowledging the client's pain and offering a solution to alleviate that pain,

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considers to be moral, even though the lawyer and client might never have expressly discussed the morality of the client's actions on third parties.

113. When a client feels compelled to feign a change of heart in order to work with a lawyer, then clearly the lawyer has overstepped the boundaries of acceptable persuasion. The client would not reap any of the benefits of a genuine release from anger, and the dialogue itself would strain the lawyer-client relationship.

114. See discussion *infra* Part IV.

115. See Robert D. Enright & Bruce A. Kittle, *Forgiveness in Psychology and Law: The Meeting of Moral Development and Restorative Justice*, 27 *FORDHAM URB. L.J.* 1621, 1630 (2000) (making a similar argument about working with clients to help them find forgiveness).

such a discussion, when conducted by a competent lawyer, should strengthen the lawyer-client relationship rather than weaken it.

This sense of working together as allies also helps minimize the internal tension between the lawyer's duty of loyalty to the client and the duty of fairness to other parties. Faced with evidence from the fields of science and cognitive psychology that documents the costs of holding onto anger, there is arguably no higher service a lawyer could perform for a client than helping the client release the anger that drives the desire for revenge. As Ellen Bass so eloquently expressed: "There's a part of everything living that wants to become itself—the tadpole into the frog, the chrysalis into the butterfly, a damaged human being into a whole one."<sup>116</sup> There is, within every vengeful client, a longing for healing, a longing to be freed of the anger that is poisoning his quality of life.<sup>117</sup>

Neither should a concern for the client's autonomy present an ethical or moral dilemma for the lawyer who works with the vengeful client. An angry client's insistence on escalating conflict through unethical or arguably immoral ploys implicates no values that are worthy of deference.<sup>118</sup> Indeed, because of the rigidity of the client's thinking when in a state of anger or fear, the vengeful client can view his options only through a "narrow-angle lens"<sup>119</sup> that is stuck on a single perspective—that of vengeance. In contrast, when the lawyer helps a client let go of some of the anger and emotional pain that are driving the quest for revenge, the lawyer is, in effect, paying the ultimate

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116. KEEVA, *supra* note 17, at 31 (quoting ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE* 156 (1988)).

117. See DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* 103–04 (1999). It is this truth—that there lies within each of us a longing for, and capability of, healing—that served as the guiding force behind the healing work of the Truth and Reconciliation Commission in South Africa. *Id.* Bishop Tutu relays the story of a young activist in the South African Black Consciousness Movement who was frequently captured and routinely tortured by the South African Security Police. *Id.* This remarkable young activist clung to this truth even as the police were torturing him. *Id.* While being tortured, he would remind himself: "[T]hese are God's children and yet they are behaving like animals. *They need us to help them recover the humanity they have lost.*" *Id.* at 104 (emphasis added).

118. As moral philosophers such as David Luban and Deborah Rhode have argued, a client's autonomy has no intrinsic value in and of itself. See Luban, *supra* note 18, at 118; *Symposium, supra* note 8, at 606–07. Instead, the importance of a client's autonomy "derives from the values it fosters, such as personal creativity, initiative, and responsibility. If a particular client objective does not, in fact, promote those values, or does so only at much greater cost to third parties, then deference to that objective is not ethically justifiable." *Symposium, supra* note 8, at 606 (footnote omitted). *But see* Fried, *supra* note 97, at 1074 (arguing that there is moral value itself in "preserv[ing] and express[ing] the autonomy of [the] client vis-à-vis the legal system").

119. CHILDRE & ROZMAN, *supra* note 35, at 13; *see also* LUSKIN, *supra* note 21, at 27. Luskin notes that when the brain is in survival mode, stress chemicals attempt to keep us alive by diverting our energy from the thinking and reasoning parts of the brain to the reptilian brain. *Id.* at 128. Unfortunately, this fixation on "fight or flight" limits our ability to think. *Id.*

deference to client autonomy.<sup>120</sup> In the expansive state that results from the act of letting go of negative emotions, the client's perspective about his options is similarly likely to expand.<sup>121</sup> From the vantage point of a clear and open mind, the client can consider a number of different perspectives and how they might impact his options in terms of litigation and settlement strategies. Thus, the lawyer can more effectively help the client evaluate which options will best serve his short-term and long-term objectives.

### B. *Lawyers Are Ideally Situated to Help the Vengeful Client*

Lawyers are ideally situated to respond to the call for healing.<sup>122</sup> An angry client who seeks to exact revenge through the legal process is a client whose call for help transcends the legal issues involved—this is a client in crisis.<sup>123</sup> When a vengeful client reaches the point where he seeks the help of a lawyer, arguably at least three of the four essential human biological needs<sup>124</sup> are in chaos: the need for certainty and comfort,<sup>125</sup> the need for love and connection,<sup>126</sup> and the need for validation.<sup>127</sup> Not surprisingly, an angry

120. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 43 (1994). Shaffer and Cochran argue that a lawyer who engages the client in a discussion about the moral implications of his actions may have “a greater respect for the autonomy of the client than lawyers who lead clients to follow their initial and angriest and most selfish inclinations”—that is, “if autonomy includes taking informed, thoughtful direction in life.” *Id.*

121. See SIEGEL & HARTZELL, *supra* note 28, at 155–56. Seigel and Hartzell contend that making decisions from the prefrontal cortex rather than from the limbic system “allows for mindfulness, flexibility in our responses, and an integrating sense of self-awareness.” *Id.* at 156.

122. See Maldonado, *supra* note 13, at 486.

123. See Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 18 (1996). Williams argues “that the lawyer-client relationship does help to stabilize clients while they are in crisis and to reduce the likelihood they will ‘act out’ in ways that are destructive to themselves or others.” *Id.* Williams notes that clients who are in conflict “typically choose between two courses of action. One is self-help, with its attendant risks. The other is to submit the matter (and one’s own self) to a lawyer.” *Id.* He concludes that the lawyer-client relationship is significant because it can offer “crucial support to people in conflict that goes far beyond the legal protection lawyers provide, especially when lawyers are attuned to the nature of conflict and the processes by which it can be resolved.” *Id.*

124. See ANTHONY ROBBINS & CLOÉ MADANES, *ULTIMATE RELATIONSHIP PROGRAM: ACTION BOOK* 23–29 (2005). Robbins and Madanes contend that human motivation is driven by the need to fulfill four basic needs, and that these needs “are the primal forces which shape all of our choices.” *Id.* at 23. In addition to the four basic *biological* needs that are essential for everyone’s survival, they suggest two additional spiritual needs, which are “essential to human fulfillment”: the need for growth, and the need to make a contribution. *Id.* at 30–31.

125. The need for certainty has been described as a “fundamental survival instinct, common to all animals as well.” *Id.* at 24.

126. *Id.* at 29. During adversarial litigation, the lawyer presumably fulfills, in part, the need for connection. However, adversarial litigation arises precisely because of the splintering and disintegration of an important connection in the client’s life.

127. The need for “significance” entails the need to feel special and important in some way and to feel proud of one’s accomplishments. *Id.* at 27. This need is also in chaos during adversarial

client who takes the ultimate step of seeking legal help to engage in adversarial litigation has often given up hope that he can solve the problems in his life by himself.

The lawyer, therefore, represents hope. Indeed, the mere act of deciding to seek the help of a lawyer provides the client with some measure of hope.<sup>128</sup> This phenomenon is separate and apart from the support a client might receive from an encouraging and competent lawyer. Of course, due to the popular image of lawyers as hired guns, and the vengeful client's limited capacity to envision solutions that do not involve warfare, the client's hope may well be that the lawyer assume the role of gladiator. However, the task of the lawyer is to redirect that energy into a more positive hopeful vision for the client's future—a future in which the client effects a resolution to the conflict that will ultimately prove to be more satisfying than “war.”

As a beacon of hope, the lawyer is uniquely situated to address both the legal alternatives available to the client and the humanistic concerns raised by the client's anger and frustration.<sup>129</sup> The idea that lawyers should address non-legal concerns while counseling clients is not new or novel.<sup>130</sup> Clients do not typically walk into their lawyers' offices with legal questions that are neatly isolated from the rest of their lives. Clients are complex human beings, and their legal questions often have nonlegal ramifications that competent lawyers should encourage the client to address. Thus, discussions between a lawyer and client must necessarily involve aspects of counseling in order for the lawyer to facilitate the client's ability to engage in effective problem-solving.

When a lawyer counsels a vengeful client whose thinking is impaired by emotional pain, the need to address the humanistic concerns is particularly

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litigation, such as a divorce, because most people view divorce as a personal failure rather than a success.

128. See C. R. Snyder et al., *Hope Theory: Updating a Common Process for Psychological Change*, in HANDBOOK OF PSYCHOLOGICAL CHANGE: PSYCHOTHERAPY PROCESSES & PRACTICES FOR THE 21ST CENTURY 128, 133 (C.R. Snyder & Rick E. Ingram eds., 2000).

129. Although lawyers are ideally situated to address the legal and humanistic concerns raised by their clients' anger and emotional reactivity, many lawyers have neither been trained to address their clients' emotionality nor have they focused on the need to address these issues. See, e.g., Schneider & Mills, *supra* note 4, at 619. The law school curriculum and continuing legal education programs should provide training in addressing this important issue.

130. Indeed, each of the major legal textbooks on client counseling emphasizes the importance of the lawyer's role in helping clients identify the non-legal consequences of their legal options. See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 255–57 (1990); BINDER ET AL., *supra* note 10, at 9; COCHRAN ET AL., *supra* note 20, at 6–9; G. NICHOLAS HERMAN ET AL., LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH 71–72 (2001). The Model Rules of Professional Conduct also provide room for lawyers to discuss non-legal considerations when counseling clients. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002).

acute. Indeed, the lawyer cannot competently perform her responsibilities as an advisor to the client by focusing solely on the legal issues while ignoring the humanistic concerns.<sup>131</sup> Due to biochemical changes in the brain,<sup>132</sup> the angry, frustrated client suffers from perceptual distortions<sup>133</sup> and a limited ability to engage in effective problem-solving.<sup>134</sup> It would therefore be naïve to suggest that a lawyer could competently advise such a client without addressing the humanistic concerns that are so clearly imbedded within the legal decisions.

Nor is it practical to suggest that the client should simply seek the help of a mental health professional to address the client's anger and resentment, and limit the lawyer's role to a discussion of the legal issues.<sup>135</sup> Although a vengeful client might ideally seek the assistance of a mental health professional while undergoing legal counseling, there is, to some clients, a stigma in seeking the help of a mental health professional; for other clients, the daunting prospect of a long, drawn-out therapeutic process dissuades them from seeking help.<sup>136</sup>

This is not to suggest that the lawyer is a substitute for a mental health professional, an accountant, or any other professional who might be of service to the client. Just as a corporate lawyer who advises a client about the tax consequences of a proposed business decision may not be a substitute for an accountant, so, too, the lawyer who helps a client reduce the level of anger and frustration that is driving his decisions is not a substitute for a mental health professional. Nor is this Article suggesting that the lawyer assume the role of a mental health professional while facilitating this process.<sup>137</sup> Unlike a

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131. See, e.g., BINDER ET AL., *supra* note 10, at 9; *Symposium*, *supra* note 8, at 608 (identifying survey evidence suggesting that "lawyers significantly underestimate the extent to which clients would welcome non-legal advice").

132. See COZOLINO, *supra* note 29, at 23–25; SIEGEL, THE DEVELOPING MIND, *supra* note 28, at 10.

133. See COZOLINO, *supra* note 29, at 157–62.

134. See CAINE & CAINE, *supra* note 31, at 76; see SIEGEL, THE DEVELOPING MIND, *supra* note 28, at 259; SIEGEL & HARTZELL, *supra* note 28, at 155–56.

135. Although ideally the client should seek the help of a mental health professional, as a practical matter, many clients refuse to do so. See Maldonado, *supra* note 13, at 486.

136. Arguably, if a client is unwilling to seek the help of a mental health professional, the client would likewise be unwilling to engage in a discussion with his lawyer aimed at letting go of anger. However, the client's own lawyer would not have the stigma some clients associate with mental health counseling. Moreover, the lawyer can make direct appeals to the client's self-interest, with the potential for psychological and emotional relief in the short-term. These appeals can allay the client's concern that therapy is a long, drawn-out process in which the client does not have the "time" to engage.

137. Indeed, many lay people have successfully unbound themselves from anger through the process of cognitive questioning that this Article has adapted, in part, from an inquiry called "The Work," as originated by BYRON KATIE, *LOVING WHAT IS: FOUR QUESTIONS THAT CAN CHANGE YOUR LIFE* (2002).

psychotherapist, the lawyer is not being asked to revisit a client's personal history in an effort to heal the psychic injuries from the client's past. Nor is the lawyer being asked to apply a therapeutic modality while helping the client evaluate and heal the myriad of emotional issues with which a client might presently be struggling.<sup>138</sup>

Instead, in the dialogue described in Part IV of this Article, the lawyer's role is specifically targeted toward educating the client about the costs of anger and asking questions that can help the client release the emotional reactivity that is impairing the client's ability to evaluate which legal options best serve his objectives. Moreover, because the dialogue is Socratic in nature,<sup>139</sup> the lawyer is well-suited to lead the client through this process.

#### IV. COUNSELING THE VENGEFUL CLIENT

##### A. *Recognizing the Vengeful Client*

The vengeful client is not likely to jump up and brazenly admit that he wants to use the legal process for vengeance. Instead, the vengeful client will more likely have reasoned explanations for making what might seem to be unethical, immoral, or unwise demands in litigation.<sup>140</sup> How, then, might the lawyer recognize when a client's thinking is impaired by anger and resentment? The signs of vengeance are likely to become evident early in the client meeting, as the client provides the lawyer with a preliminary explanation of the legal problem and his objectives and begins to describe a timeline of the relevant events. At times, however, the signs of vengeance

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138. Ideally, an angry, embittered client who is in crisis should be working with a mental health professional, and lawyers should recommend this course of action to such clients. Although the cognitive inquiry described in this Article is consistent with such therapeutic modalities as cognitive and rational emotive therapy and Freudian psychology, it is significantly more limited in scope than the work that psychotherapists employ with their clients.

139. See Enright & Kittle, *supra* note 115, at 1626–27 (noting that a new cognitive awareness typically precedes the emotional feelings that come from the release of anger associated with forgiveness); Linda Ross Meyer, *Forgiveness and Public Trust*, 27 *FORDHAM URB. L.J.* 1515, 1521–22 (2000).

140. For example, a client who demands to threaten child custody as a negotiating ploy might argue that this strategy will enable him to obtain a better financial package. However, if the client does not genuinely want primary physical custody of the children, there is clearly something else going on beneath the surface. Although there may well be an economic basis for making baseless demands for child custody, such threats are often fueled, in part, by anger and a desire for revenge—to exact financial punishment on a spouse who deserves to be punished. See Scott, *supra* note 4, at 646–47 (concluding that “spite” is a “familiar aspect of divorce negotiations”); Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 *J. AM. ACAD. MATRIMONIAL LAW.* 69, 71 (2001) (“Children are frequently the unknowing victims in the adversarial process, as the parents’ anger and frustrations heighten, often resulting in using the children as bargaining chips for financial advantages.”).

might become evident only during a follow-up meeting, when the client appears to be emotionally reactive, adamantly insisting upon litigation tactics that appear hostile, aggressive, or unrealistic.

In addition to the more obvious nonverbal signs of anger,<sup>141</sup> the lawyer should be attuned to the client's language. A vengeful client will tend to speak in terms of blame, portraying himself as a hapless victim and the other party as a "bad" person (e.g., "I tried my best, and look at how she's repaid me"). The vengeful client will tend to make all-or-nothing blanket statements that reflect polarized thinking (e.g., "She is a selfish [expletive]," or "I'm getting screwed here").<sup>142</sup> The lawyer should also be alert to verbal leaks that indicate the goal of revenge (e.g., "[The other party] is only getting what he or she deserves") or an element of glee at the thought of the other party's response to a hostile litigation strategy (e.g., "Let's see how he or she feels when . . .").

The client's underlying motive of vengeance should also become apparent when the lawyer and client discuss the client's objectives and the advantages and disadvantages of various legal alternatives. The client's professed objectives may appear on their face to implicate the goal of vengeance (e.g., "I want to take her to the cleaners"). Even when the goal of vengeance is not that explicit, there is commonly an element of reactivity and distrust in the vengeful client's reasoning and demands.<sup>143</sup> The client may express the fear that if he doesn't aggressively protect his financial interests by playing "hardball," then he will be taken to the proverbial cleaners by the other party.<sup>144</sup>

The client may insist on making demands the lawyer perceives to be irrational and counterproductive.<sup>145</sup> The vengeful client is likely to be unreceptive to the lawyer's discussion of alternatives that do not involve warfare and to minimize or ignore the lawyer's warnings of the risks he incurs

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141. Although some of the physiological symptoms of anger are internal, others manifest outwardly, such as a raised voice, tightened muscles in the face and neck region, a flushed face, shallow breathing, and dilated pupils. See NAY, *supra* note 30, at 34 (listing the physical signs of anger).

142. See COREY, *supra* note 54, at 311 (defining polarized thinking as interpreting our experiences in "either-or-extremes," and labeling events in "black or white terms").

143. See, e.g., Scott, *supra* note 4, at 646-47.

144. It may well be true that the other party might try to take advantage of the client and that the client might have to aggressively protect his financial interests. This Article is not suggesting that the lawyer must dissuade a client from seeking to obtain the best financial relief the client can lawfully achieve. Instead, this Article suggests that the polarized thinking of an angry, vengeful client can result in a distorted perception of the danger posed by the other party and of the risks involved in pursuing various litigation options.

145. See, e.g., Maldonado, *supra* note 13, at 467-68.

by escalating the conflict.<sup>146</sup> The vengeful client is also likely to be dismissive of the potential negative impact of his actions on third parties, including his children and other family members.<sup>147</sup>

The lawyer can also recognize the goal of vengeance by paying attention to her own behavior. If the lawyer begins to notice that she is either expending energy trying to encourage the client to “listen to reason” or is fighting the desire to argue with the client, then it is quite possible that the client’s emotional reactivity is blinding the client to his own self-interest.<sup>148</sup> Because the client’s underlying emotions may be impeding his ability to engage in a reasoned discussion of the advantages and disadvantages of various legal alternatives, the lawyer is likely to experience some degree of frustration when attempting to engage a vengeful client in a rational discussion.

### B. Beginning the Client Conference: Setting the Stage

#### 1. Creating an Appropriate Role Expectation

The American system of justice is widely perceived to be built on the idea of retribution, punishment, and a win-lose mentality.<sup>149</sup> Movies, television, and news articles often portray lawyers as slick tricksters eager to engage in war.<sup>150</sup> The Internet has also become a breeding ground for perceptions of

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146. See Scott, *supra* note 4, at 648; see also CAINE & CAINE, *supra* note 31, at 76; SIEGEL & HARTZELL, *supra* note 28, at 155–56.

147. See Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, in THE RESOLUTION OF FAMILY CONFLICT 364, 367–70 (John M. Eekelaar & Sanford N. Katz eds., 1984).

148. See Roger A. Ballou, *Adlerian-Based Responses for the Mental Health Counselor to the Challenging Behaviors of Teens*, 24 J. MENTAL HEALTH COUNSELING 154, 156–57 (2002). Ballou suggests that therapists examine their own emotional responses to their clients’ behavior as a means of helping them identify their clients’ hidden goals. *Id.*

149. For example, a recent edition of the American Bar Association’s Litigation Manual counsels that, when communicating with clients, lawyers should tell the client “not to think of the attorney-client relationship as *you* assisting *her* in her fight against the other side but to realize that it is both of *you against them*.” A.B.A., THE LITIGATION MANUAL, FIRST SUPPLEMENT 49 (Priscilla Anne Schwab ed., 3d ed. 2007); see also Re, *supra* note 111, at 690–92. Re argues that, although counseling clients is one of the more important roles lawyers have, the public is misled “into believing that the lawyer’s only, or principal, function is representation in the adversary process.” *Id.* at 691 (quoting Louis M. Brown & Harold A. Brown, *What Counsels the Counselor? The Code of Professional Responsibility’s Ethical Considerations—A Preventative Law Analysis*, 10 VAL. U. L. REV. 453, 465 (1976)). He notes that “[w]hile stellar advocates are lionized by the profession and the public, the best counselors work in obscurity.” *Id.*; see also Porter, *supra* note 12, at 1158 (arguing that the “paradigm of retributive justice . . . fuels an adversarial system which encourages the zealous, win-at-all-costs advocacy”).

150. The metaphor of lawyer as gladiator can be seen daily on television (e.g., *Boston Legal* (ABC television broadcast); *Shark* (CBS television broadcast)) and in the movies (e.g., *THE DEVIL’S ADVOCATE* (Warner Bros. Pictures 1997), *RUNAWAY JURY* (Regency Enters. 2003), *MICHAEL CLAYTON* (Samuels Media 2007)).

lawyers as depraved gladiators with no interest in healing conflict. One such professed advertisement on YouTube is a sad testament to the depraved hired-gun narrative. Accompanied by pictures of a raging fire and general mayhem, a person who portrays himself as a lawyer named “The Hammer” screams: “I cannot rip out the hearts of those who hurt you; I cannot hand you their severed heads. But I can hunt them down and settle the score. I’ll squeeze them for every dime I can—[with voice escalating] every . . . single . . . dime.”<sup>151</sup>

Against this backdrop, many clients undoubtedly walk into a lawyer’s office with the expectation that their lawyer will be a gladiator ready to “fight the battle for them.”<sup>152</sup> However, the lawyer can reframe any such pre-existing expectations by expressly discussing the client’s expectations and, if necessary, introducing to the client a somewhat different role for the legal representation. Such a discussion might easily take place toward the beginning of the client meeting, when the lawyer provides the client with an overview of the meeting and advises the client of what to expect from the meeting. Or, the topic might arise when it first becomes clear from the client’s stated objectives or litigation demands that the client’s judgment is clouded by emotional pain and reactivity.

The lawyer might normalize any pre-existing client expectations by expressly bringing up the popular media portrayal of lawyers as hired guns or gladiators ready to engage in battle.<sup>153</sup> For example, the lawyer might state something like: “You know, many people walk into a lawyer’s office expecting to see a lawyer like the ones we see on television—like Denny Crane in *Boston Legal* or Sebastian Stark on *Shark*.” The lawyer might then acknowledge the surface appeal, at least, of hiring a lawyer like the attorneys portrayed in the media, while also sharing how clients often end up frustrated and unhappy with that kind of representation. For example, the lawyer might explain:

Despite the media portrayal of lawyers as angry, avenging gladiators, such a role is less common than most clients think. Now I know that a lot of people think that it

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151. YouTube.com, Jim “The Hammer” Shapiro, <http://www.youtube.com/watch?v=hFZigCwRhI8&NR=1> (last viewed Mar. 21, 2009). Although many of the YouTube ads, such as this one, are mere spoofs of the legal profession, they contribute to the public perception of lawyers as morally corrupt hired guns. For example, the series of so-called ads by Jimmy “The Hammer” Shapiro have alone registered close to 28,000 hits as of March 21, 2009. *Id.*

152. See Schneider & Mills, *supra* note 4, at 618.

153. See Williams, *supra* note 123, at 18–19 (arguing that, although we “understand and interpret the world largely by means of metaphors . . . we are strangely unaware of their importance and power”).

would be great to have a guy like Sebastian Stark fighting the battle for them. But in *real* life, lawyers like the ones we see on TV and in the movies often end up costing their clients money—that kind of “litigation-as-war” mentality usually ratchets up the attacks and counterattacks, with the clients becoming even angrier and more frustrated as the litigation escalates into all-out war. And the end result is not only that the lawsuit ends up costing both parties a lot of money in legal fees, but also that clients often end up pretty unhappy with the whole legal process, even if they end up getting much of what they wanted in terms of a financial outcome. Far from getting the justice they wanted and believe they deserve, they end up feeling that the legal system let them down.<sup>154</sup>

The lawyer should then move quickly to allay any potential concerns the client might have that, as a different breed of lawyer, she will not be a strong advocate for the client. At the same time, the lawyer can begin laying a foundation for a different vision of the lawyer’s role by alluding to the more intangible and less obvious quality-of-life issues that will almost certainly have an impact on the client. For example, the lawyer might state:

As your lawyer, I want you to know that I will work hard to zealously protect your financial interests and the other tangible goals you have set for yourself. At the same time, if you achieve those goals only at the cost of your quality of life, your health, and your peace of mind, and only at great legal expense, and you leave the litigation process angrier and more frustrated than you were when you asked me to represent you, then I don’t think that either of us would feel that I truly served your interests. The “litigation-as-war” mentality might or might not get you what you want in terms of a financial outcome, but it almost certainly will not leave you satisfied.

The lawyer might then begin to broaden the client’s conception of the purpose of legal representation by including within the list of potential client goals such intangible objectives as the client’s quality of life, health, peace of mind, and personal satisfaction. The lawyer could normalize this broader role by sharing with the client the wisdom of former Chief Justice Warren Burger:

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154. See *supra* notes 41–80 and accompanying text.

You know, a former Chief Justice of the United States Supreme Court once implored lawyers not to forget that we “ought to be healers—healers of conflicts,”<sup>155</sup> not courtroom gladiators. And I take that broader vision of my role seriously. My view of my role here is really twofold. First, I will work hard to help you get a satisfactory result in this litigation; second, I want to collaborate with you during this process in a way that will hopefully contribute to your emotional and psychological well-being, not to mention your health. My hope and my desire is that you emerge at the end of this process with a sense of inner peace and a belief that the process was fair and just.

In interactions with the client, the lawyer must also be careful to use rhetoric and metaphors that are consistent with the role she wishes to assume in the litigation. This may mean that the lawyer might have to consciously redirect the client’s rhetoric into language that is more in alignment with the goal of helping the client attain his quality-of-life objectives. It is natural for clients, who see themselves as victimized by another, to use adversarial win-lose rhetoric when discussing the conflict.<sup>156</sup> However, beneath the surface of a client’s angry rhetoric is simply a person whose thinking and vision is distorted by emotional pain. A client who is caught within the snare of anger or despair is not best served by having his angry, reactive rhetoric met in kind. Instead, the client is in need of a mentor who can be a visionary for the client.<sup>157</sup> This is an important part of the lawyer’s gift—to be a safe vessel for the client’s pain and to see what the client cannot yet see—a hopeful vision for the future.<sup>158</sup>

Therefore, the lawyer should refrain from discussing the legal process in terms of a “battle” between “us” and “them” or a battle that will result in a “winner” and a “loser.” Instead of the metaphors of “war” and “battles,” the lawyer might reframe the litigation process as “an opportunity for you to put this behind you and to move on with your life.” Instead of responding in kind to angry denunciations about the other party, the lawyer might instead reframe

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155. See Burger, *supra* note 111, at 66.

156. COREY, *supra* note 54, at 311.

157. See Calkins, *supra* note 111, at 303 (“One of the secrets to successful mediation is to remain positive, even in the darkest moments. From the opening statement to ultimate resolution, the mediator should constantly affirm that settlement is not only feasible, but will happen.”).

158. See Morton Deutsch, *Internal and External Conflict*, in *THE NEGOTIATOR’S FIELDBOOK* 231, 236 (Andrea K. Schneider & Christopher Honeyman eds., 2006). Deutsch notes that “conflicting parties must have some hope that a mutually acceptable agreement can be found. This hope may rest upon their own perception of the outlines of a possible fair settlement or it may be based on their confidence in the expertise of third parties, or even on a generalized optimism.” *Id.*

the client's narrative by helping the client identify with a more hopeful future. (E.g., "It sounds like this is taking its toll on you. [Pause] When this litigation is behind you, I'm imagining that you're going to feel such relief.") The lawyer might also remind the client of the intangible quality-of-life objectives that are likely important to the client by making liberal use of such terms as "fairness," "hope," and "your well-being."

This new paradigm of the lawyer as a facilitator for healing is not as far-fetched or naïve as some lawyers might believe. Indeed, there is already a quiet revolution within this country that recognizes the lawyer's potential to facilitate healing.<sup>159</sup> Numerous disciplines within the "comprehensive law movement" recognize that the client is more than the sum-total of a legal problem, but a human being with psychological, emotional, and even spiritual needs that can either be harmed or helped through the use of the legal process.<sup>160</sup> These disciplines encourage lawyers to consider the impact of the legal process on these "extra-legal" concerns. To the extent a legal result can be achieved while also optimizing the extra-legal concerns, the comprehensive law movement advocates that lawyers work with clients in a way that enhances their psychological and emotional well-being.<sup>161</sup> In fact, it is this tantalizing prospect of navigating through the legal system with one's dignity and humanity intact that increasingly draws many clients in the family law field to collaborative law.<sup>162</sup>

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159. See, e.g., Maldonado, *supra* note 13, at 478. Changing our own cultural narrative about the purpose of legal representation will not occur overnight. However, the emergence of the comprehensive law movement and the spiritual hunger within the population in general are signs that our legal world is already within the midst of a paradigm shift. If enough lawyers begin to entertain such dialogues and begin to reframe their relationships with clients in this manner, a critical mass of the population will begin to reframe the way in which they view legal representation. See, e.g., *Symposium*, *supra* note 8, at 634 (Rhodes notes that, although she is reluctant to overstate the role of moral musings in a law school classroom, entertaining such dialogues is key to changing the course of lawyers' behavior.).

160. See, e.g., Daicoff, *supra* note 39, at 1–4 (for an interesting and thorough discussion of the shared characteristics of the various movements defined as the comprehensive law movement). The comprehensive law movement has cut a broad swath through the disciplines, including therapeutic jurisprudence, preventive law, restorative justice, transformative mediation, facilitative mediation, holistic law, and collaborative law. *Id.*; see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 79 (rev. ed. 2005); SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 13–17 (2004); Tesler, *supra* note 99, at 199–200; David B. Wexler, *Lowering the Volume Through Legal Doctrine: A Promising Path for Therapeutic Jurisprudence Scholarship*, 3 FLA. COASTAL L.J. 123, 123 (2002); see also International Alliance of Holistic Lawyers Home Page, <http://www.iahl.org/> (last visited Mar. 21, 2009) (promoting lawyers as "healers, helpers, counselors, problem-solvers, and peacemakers").

161. Daicoff, *supra* note 39, at 4–5, 7.

162. See, e.g., Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 49 (2004). Cox concludes from survey results that collaborative law meets the clients' goal of participating in a peaceful process. *Id.* In fact, "[w]hen asked the open-ended

## 2. Building Rapport and Trust

### a. *The Importance of the Lawyer-Client Relationship*

Before collaborating with the client to help the client release some of the strong negative emotions that are impairing the clarity of the client's thinking, it is essential that the lawyer form a collaborative working alliance with the client that is characterized by mutual respect and trust.<sup>163</sup> Because the work described in this Article is challenging and, ultimately, humbling, without trust no client would otherwise expose himself to the rigorous self-inquiry and transparency that is required of such work.<sup>164</sup> Scholars in the field of psychotherapy describe the nature of the collaborative working alliance between client and therapist as the single "most important variable" in predicting the success of treatment.<sup>165</sup> In fact, the most common feature of effective psychotherapists, irrespective of the theoretical approach used, is the ability to establish a strong collaborative working alliance early in the relationship.<sup>166</sup>

Throughout the collaborative dialogue, the lawyer must respect the client's humanity, honor the challenges facing the client, and recognize that, ultimately, only the client can walk down this path. At the same time, as

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question of what they liked best about the collaborative law process, forty percent of those responding volunteered some variation on the theme of the divorce being amicable." *Id.*; see also Gary L. Voegelé et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 973 (2007). Indeed, based on the success of collaborative lawyering in family law, lawyers are beginning to engage in collaborative lawyering in medical malpractice cases. See generally Kathleen Clark, *The Use of Collaborative Law in Medical Error Situations*, 19 HEALTH LAW., June 2007, at 19.

163. EDWARD TEYBER, *INTERPERSONAL PROCESS IN PSYCHOTHERAPY: A RELATIONAL APPROACH* 32 (4th ed. 2000). The "collaborative relationship or working alliance" might best be defined as one in which the client perceives the lawyer "as a capable and trustworthy ally" who will collaborate with the client to help the client find a satisfying and empowering solution. *Id.*; see also Robin Wellford Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 297-99 (2004) (adopting such a model to describe the ideal student-teacher relationship in law school).

164. See COZOLINO, *supra* note 29, at 27. Cozolino contends that "a safe and trusting relationship" is important to neural growth and integration, which is essential to healing. *Id.*

165. See Edward Teyber & Faith McClure, *Therapist Variables*, in *HANDBOOK OF PSYCHOLOGICAL CHANGE: PSYCHOTHERAPY PROCESSES & PRACTICES FOR THE 21ST CENTURY*, *supra* note 128, at 62, 70; see also Charles J. Gelso & Jean A. Carter, *Components of the Psychotherapy Relationship: Their Interaction and Unfolding During Treatment*, 41 J. COUNSELING PSYCHOL. 296, 296 (1994).

Although I am not suggesting that lawyers assume the role of a therapist or engage in psychotherapy, the rigor and vulnerability required of this process make the lawyer-client relationship itself critical to the success of such work.

166. TEYBER, *supra* note 163, at 33, 35; see also Winick, *supra* note 34, at 117 (noting the importance of the lawyer's listening abilities "at the early stages of the professional relationship" so that the lawyer understands the client's interests and values).

Albert Einstein once remarked, “No problem can be solved from the level of consciousness that created it.”<sup>167</sup> Therefore, like a wise ally, the lawyer must be willing to challenge the client’s biased perceptions and take a leading role in helping the client see the world from a new perspective.<sup>168</sup> However, because the self-exploratory process requires the client’s active and willing participation, the lawyer cannot force the process or substitute the lawyer’s will for the client’s will. The nature of the working alliance requires true collaboration between lawyer and client.

*b. The Importance of Listening*

Listening is perhaps even more important with an emotionally distraught client than with the typical client, although, of course, active listening skills are important in all client communications.<sup>169</sup> The angry, emotionally reactive client will often need to vent some of the angry emotions that are causing him distress before he can even begin to entertain a dialogue about letting go of some of the anger that has been causing him pain.<sup>170</sup> In fact, efforts to ignore a client’s distress, or to talk a client out of a feeling of distress, would only deepen the client’s sense of despair and isolation.<sup>171</sup> Similarly, premature efforts to evaluate and critique the client’s perspective, however angry and

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167. EinsteinQuotes.com, Einstein’s Quotes about Thinking and Knowledge, <http://www.einstein-quotes.com/content/view/23/37/> (last visited Mar. 21, 2009).

168. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 133 (1993). Kronman argues that “a significant portion of the problems with which lawyers deal” require the lawyer to deliberate with the client “about the wisdom of their clients’ ends, as opposed simply to supplying them with the legal means for realizing their desires.” *Id.* He argues that the lawyer “must work particularly hard to sustain an attitude of detachment when deliberating on the client’s behalf, since this is just what an impetuous client cannot do.” *Id.* at 131; see also Calkins, *supra* note 111, at 314 (noting that in mediation, a mediator must sometimes “signal to a party that the position taken is untenable” because to do otherwise would do a disservice to the client).

169. See Dinerstein et al., *supra* note 3, at 758–62 (noting the importance of active listening and providing illustrations of active listening within the context of lawyer-client dialogue). The importance of active listening skills is emphasized in each of the major textbooks on legal interviewing and counseling. See, e.g., BASTRESS & HARBAUGH, *supra* note 130, at 19–57; BINDER ET AL., *supra* note 10, at 41–63; COCHRAN ET AL., *supra* note 20, at 29–54; HERMAN ET AL., *supra* note 130, at 33–34.

170. Indeed, this was an important goal of the Truth and Reconciliation Commission in South Africa—to offer victims of brutality an opportunity for healing by sharing their stories. TUTU, *supra* note 117, at 107; see also Winick, *supra* note 34, at 116. Winick notes that “[p]eople highly value ‘voice,’ the ability to tell their story, and ‘validation,’ the feeling that what they have had to say was taken seriously.” *Id.* Winick contends that, “[f]or many litigants, these process values are more important than winning.” *Id.* at 117; see also ALLEN E. IVEY & MARY B. IVEY, *INTENTIONAL INTERVIEWING AND COUNSELING: FACILITATING CLIENT DEVELOPMENT IN A MULTICULTURAL SOCIETY* 124 (5th ed. 2003).

171. See TEYBER, *supra* note 163, at 40–46.

distorted the client's perspective might be, would jeopardize the trust that is essential to the attorney-client relationship.<sup>172</sup>

Thus, as the client describes his objectives and concerns and "tells his story" during the initial phases of the client meeting, the lawyer should refrain from identifying the flaws or disadvantages of the client's professed objectives or concerns.<sup>173</sup> Instead, the lawyer should simply be a good listener, listening with compassion and curiosity.<sup>174</sup> From the perspective of "[h]elp me understand,"<sup>175</sup> the lawyer who listens with compassion and nonjudgment can help the client shift into an emotional and cognitive state more conducive to ultimately releasing such negative emotions.<sup>176</sup>

Importantly, the lawyer is not being asked to assume a therapeutic role or to devote an entire meeting to the client's feelings. Indeed, that would be counterproductive. However, providing a safe harbor for a client to express the angst and heartache that informs the client's objectives and concerns is essential to forming a collaborative working alliance.

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172. See, e.g., Calkins, *supra* note 111, at 314–15 (cautioning that premature problem spotting too early in a mediation can be perceived as threatening).

173. In the client-centered and collaborative models of lawyering, the client interview proceeds in stages, with the client first providing the lawyer with an overview of his objectives and concerns and then proceeding into a more detailed timeline of the relevant events. See BINDER ET AL., *supra* note 10, at 112; COCHRAN ET AL., *supra* note 20, at 59. During these phases of the meeting, it would be counterproductive for the lawyer to begin critiquing the client's goals. See also Winick, *supra* note 34, at 117. Winick contends:

Clients have a human need to tell their stories and to feel listened to by their lawyers in a way that is non-judgmental and empathic. The lawyer needs to convey sympathy and understanding. The lawyer needs to encourage the client to "open up," to communicate what has occurred and the feelings it produced.

*Id.*

174. See HANH, *supra* note 42, at 3–5. Hanh points out that "the practice of compassionate listening" is essential to understanding and transforming anger. *Id.* at 3. He describes "compassionate listening" as listening that does not involve judgment or blame. *Id.* at 4. "You listen just because you want the other person to suffer less." *Id.* at 4–5.

175. STONE ET AL., *supra* note 61, at 167.

176. See, e.g., Calkins, *supra* note 111, at 280. Calkins notes that, in mediations, "[w]hen the parties have released their emotions, there is a decided change in their demeanor, and the mediation can become quite productive. Many people just want to be heard by someone." *Id.*

### C. *The Steps to Releasing Anger*

#### 1. Identifying the Client's Ultimate Objective: Vision Statement

##### a. *Vision "In This Moment"*

Although it is essential that the client have the opportunity to tell his "story," it is also important that the lawyer know when to shift into a dialogue that will facilitate some reduction in the level of the client's anger and resentment. Allowing a client to wallow in his own anger, without shifting into another perspective, only reinforces and deepens the client's narrative of victimization.<sup>177</sup> Thus, after providing appropriate reflection statements<sup>178</sup> and other encouragers,<sup>179</sup> the lawyer can begin to shift the dialogue by asking the client to envision what he would like to have in his life "in this moment." The lawyer might ask:

I want to shift, for a moment, into thinking about some of the more intangible objectives you might have in this litigation that concern your quality of life. And I think it might be helpful to begin with the here and now, and we can work forward from there. So, assuming everything was right with the world, how do you imagine you would feel *right now*, in this moment?

The client might respond that he would like the dispute to magically disappear, or that he wishes the lawsuit had already been resolved with a favorable financial outcome. The client might also candidly respond that he would like to see the other party suffer. However, these examples represent only the surface conditions of what the client really wants—they do not convey the underlying *quality of life* they represent to the client. Therefore, the lawyer might continue asking the client probing questions until the client

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177. See LUSKIN, *supra* note 21, at 79; WALSH, *supra* note 39, at 80; McCullough et al., *supra* note 52, at 490, 502.

178. In a reflection statement, the lawyer takes a sentence stem from the client's statement and attaches a feeling label to it that captures the underlying meaning. See IVEY & IVEY, *supra* note 170, at 149. Reflection statements are an important means of conveying empathy. See, e.g., *id.* at 148–52.

179. Research in critical discourse analysis suggests that listeners subtly give speakers permission to continue speaking by using verbal and nonverbal reinforcers that signal their continued interest in listening. See Jenkins & Parra, *supra* note 56, at 93. Common reinforcers include such verbal prompts as "uh huh," "OK," or "ummm," and such nonverbal reinforcers as the head nod, which serves as the equivalent of a verbal prompt. *Id.*; see also PETER A. ANDERSEN, NONVERBAL COMMUNICATION: FORMS AND FUNCTIONS 199, 201 (1999); IVEY & IVEY, *supra* note 170, at 139.

voices the attributes of a quality of life he wishes to experience in the present moment.

As an example, assume the client responds to the question by candidly admitting that what would make him happy would be to see his wife suffering. After acknowledging the client's honesty,<sup>180</sup> the lawyer would need to re-educate the client about the likely effect of striking out in revenge, while also redirecting the client's attention to an internal feeling rather than an external condition. Thus, the lawyer might respond:

I bet that might feel pretty good after what she's done. But you know, my experience from working with other clients is that seeing the other person suffer feels good only for a brief moment in time, and then they're right back where they started, suffering the same pain that you're experiencing right now—because inevitably she'll strike back and try to hurt you in turn, and then you'll want to strike back again in retaliation, and it becomes a vicious cycle with the pain just escalating with each go-round. What I'm really getting at here with my question is not what you would like to see happen to Rebecca—although your feelings about Rebecca are important and we can get to them later—but the *underlying quality of life* they represent to you. So let's assume that you got your wish, and that Rebecca was suffering right now, in this moment. How do you imagine you would feel?

If the client is unable to respond to these open questions, the lawyer might ask more leading questions to help the client begin to imagine a quality-of-life objective. Thus, the lawyer might ask such questions as: "Would it mean that you would be content? Happy? At peace?" Ultimately, the client should be able to identify some qualities of life that resonate with him.

*b. Vision of an Ideal Outcome*

The client's response to the preceding question sets the foundation for the lawyer to ask the client to envision an ideal quality-of-life outcome to the litigation. When swept up in bitterness and anger, some clients are likely to think too small and may not even be able to imagine an outcome in which

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180. By acknowledging the client's feelings, the lawyer relays empathy, which is essential to establishing trust. BASTRESS & HARBAUGH, *supra* note 130, at 116–17; HERMAN ET AL., *supra* note 130, at 32–33; Teyber & McClure, *supra* note 165, at 70–71. It is important that the client experience the feeling of "being heard" before offering criticism; otherwise, the client could become defensive, with a resulting lack of trust that the lawyer is indeed the client's "ally."

they emerge feeling satisfied and at peace. Therefore, as with the previous question, the lawyer may need to continue asking probing questions until the client voices the attributes of a quality-of-life objective he wishes to attain by the termination of the legal process.

## 2. Exploring the Hidden Costs of Resentment

The client's vision statements set the stage for the lawyer to help the client consider those litigation strategies that would best promote the client's ultimate quality-of-life objectives. The client is now ready to consider whether his perspective might be clearer if he could release some of the anger that is obscuring the clarity that both the client and the lawyer need to evaluate the advantages and disadvantages of various litigation strategies and options.

The lawyer might first proceed by informing the client that she has some concern that the client's anger and reactivity would impede their ability to collaborate on an effective litigation strategy. The lawyer might then express her concern that the client's anger and frustration would also thwart the client from achieving the quality-of-life objectives the client has identified.<sup>181</sup> The lawyer might also speak of her concern for the client's well-being by referring to the studies from science and medicine that reveal the health costs of holding onto anger.<sup>182</sup>

The following dialogue illustrates one way in which a lawyer might use the client's vision statements to persuade the client to consider the possibility of letting go of some of his anger:

*Lawyer:* Let's fast-forward to the end of this litigation. Setting aside for the moment the financial issues, what would be an ideal outcome for you?

*Client:* I'd like to be happy. I want my kids to be happy. I want to be able to see my kids regularly and to be a part of important events in their lives.

*Lawyer:* Those are all important objectives. So as we look at your objectives, here's my concern for you. Litigation is stressful; probably ninety-nine percent of the clients who walk into my office are under some form of stress. In fact, just by walking into my office clients take on an extra dose of

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181. See Enright & Kittle, *supra* note 115, at 1625 (observing that when a person recognizes that he is suffering emotionally by holding onto anger, that recognition "can serve as a motivator to change and to think about and try forgiveness").

182. See *supra* notes 69–80 and accompanying text.

frustration and stress. [*Smiling*] But frustration and stress, if they're allowed to build during the litigation process, are like a cancer that eats you up inside. It prevents clients from getting what they really want—to be happy, and to have some sense of satisfaction that the process was fair and reasonable.

The bottom line, Bob, is that it's been my experience that the frustration you're experiencing toward Rebecca is a big obstacle to getting what you want—both in terms of being happy and also in terms of your kids coming out of this reasonably happy. And the frustration you're feeling may also keep you from getting the financial package you want. As we talked about a minute ago, once both parties unleash their anger during the litigation process, it grows. Each time you try to hurt Rebecca, she's likely to try to hurt you back. It's a vicious cycle, Bob. And left unchecked, emotions such as anger and frustration can build and grow, so that by the end of the process, you're likely to feel angry, frustrated, and unhappy, irrespective of the financial package you ultimately end up with. And if that's not bad enough, there are lots of medical studies out there suggesting not only that anger and stress deplete us, but also that if we hold onto it, it exacts a physical toll, and can even kill us.<sup>183</sup>

It is possible the client might react by arguing that he *has* to be “aggressive” in his litigation strategy to protect his interests from the unscrupulous and unethical other party. The lawyer might respond to the client by affirming the legitimacy of the client's concern and acknowledging that this is a concern that the lawyer and client *will* address. At the same time, the lawyer might discuss the impact of anger and resentment on the brain's ability to engage in creative problem-solving.<sup>184</sup> Explaining the scientific basis for how anger causes biochemical changes in the brain can help the lawyer de-personalize the potentially unwelcome message while also educating the client.<sup>185</sup> Thus, the lawyer might respond to such a client as follows:

Bob, you're right to be concerned that we have to be careful here. The last thing either one of us would want would be for you to get taken to the cleaners. [*Legitimizing the client's concern*] At the same time, there's another piece about anger that we should consider. Anger and frustration

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183. See *supra* notes 44–80 and accompanying text.

184. See *supra* notes 28–37 and accompanying text.

185. See *supra* notes 28–37 and accompanying text.

not only don't feel good over the long haul but they actually interfere with the decision-making process.<sup>186</sup>

Our higher-level reasoning capabilities take place in the prefrontal cortex, the most highly evolved section of our brain.<sup>187</sup> The middle section of our brain, called the limbic region, is the gatekeeper between the cerebral cortex and our brain stem, which is the most primitive part of the brain.<sup>188</sup> The brain stem is sometimes called the "reptilian" part of the brain because it's the knee-jerk part of the brain that's responsible for the "fight or flight" response when we see danger.<sup>189</sup> What happens when we're angry is that the limbic region, acting as gatekeeper, activates the reptilian part of the brain, placing us in a heightened state of readiness for "fight or flight."<sup>190</sup> Unfortunately, because most of the action's taking place in the brain stem, this limits our ability to access our cerebral cortex.<sup>191</sup>

These chemical reactions in the brain actually affect our ability to evaluate risks and to forecast what other people are likely to do and respond to what *we* do.<sup>192</sup> By reducing the level of frustration and anger, we have a better chance of more accurately evaluating the risks, costs, and benefits of various litigation strategies and options.

### 3. Exploring the Benefits of Letting the Anger Go

After discussing the adverse health and psychological costs associated with resentment and anger, the client should be ready to entertain the possibility of moving forward in his life without carrying the weight of these negative emotions. However, many clients might appreciate the idea of releasing anger as a *concept*, but have no idea how they might convert the concept into a reality. The lawyer can assure the client that:

There is no magic to the process, nor is it something that happens by accident. Instead, this is a skill that can be learned, assuming you are willing to allow me to guide you

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186. See *supra* notes 28–37 and accompanying text.

187. SIEGEL, *THE DEVELOPING MIND*, *supra* note 28, at 10.

188. *Id.*

189. See COZOLINO, *supra* note 29, at 25–26.

190. *See id.*

191. See CAINE & CAINE, *supra* note 31, at 140 (noting that the "capacity to perceive and generate new meanings is reduced" when under threat).

192. *See id.*

through the process.<sup>193</sup> And the first step in the process is the mere willingness to entertain the possibility of letting the anger go.<sup>194</sup>

The client might react strongly to this prospect,<sup>195</sup> arguing that by releasing the anger, he would have to acknowledge that the other party is “right” or deserves to be forgiven. The client might angrily proclaim that the other party is “evil” (or some similar pejorative) and doesn’t “deserve” to be forgiven.<sup>196</sup> The semantics of whether one calls this process a “forgiveness” process or, rather, a process of “letting go of anger” is not substantively important.<sup>197</sup> By whatever label, the lawyer will need to educate the client about what this process actually means. This process does not mean that the client must condone the other party’s conduct, forget what happened, or seek to reconcile with the other party.<sup>198</sup> The lawyer might also assure the client that he doesn’t need to tell the other party that he has let his anger go, or even

193. LUSKIN, *supra* note 21, at 65.

194. See Enright & Kittle, *supra* note 115, at 1626 (distinguishing the *commitment* to forgive from the actual process that results in forgiveness).

195. See, e.g., Daicoff, *supra* note 39, at 23 (citing Steven Keeva, *What Clients Want: People Who Come to Arnie Herz Seeking Legal Help Leave With Some Unexpected Solutions*, A.B.A. J., June 2001, at 48). Daicoff describes Wall Street lawyer Arnie Herz, whose client began to walk out of his office, complaining: “You’re too nice. I need a tough litigator.” *Id.* at 23.

Taking a big risk, Herz responded, “I know you think you are so tough and I am not, but the truth is, in all my years of experience, I think you may be the weakest person I’ve worked with. Here you have set out a vision that was to be free of these people—you didn’t mention that you wanted to punish them, teach them a lesson, or spend \$100,000 of your own money and five years of your life doing so. What I see is that you don’t have the strength to hold on to your own vision and deal more effectively with your own anger. And I’ll bet you’ve been doing this all your life.”

*Id.*

Although the client was at first “flushed red with anger,” he recognized that there was a grain of truth in what the lawyer said. *Id.* Together, the lawyer and client agreed on a more collaborative plan of action that ultimately obtained for the client everything he wanted. *Id.*

196. LUSKIN, *supra* note 21, at 105–06. Luskin, the co-founder of the Stanford University Forgiveness Project, reports that it is this belief that thwarts many people from forgiving their transgressors. *Id.*

197. The term “forgiveness” is elusive and means different things to different people. Moreover, many people react strongly to the idea of forgiveness because of misguided beliefs about what forgiveness actually means. Therefore, the lawyer is likely to encounter less resistance if she refers to the process as one of “letting go of anger” or “releasing anger.” These phrases accurately describe the process and are also less likely to be misconstrued by clients. Nonetheless, the process described in this Article is consistent with the author’s definition of forgiveness.

198. LUSKIN, *supra* note 21, at 68; see also Enright & Kittle, *supra* note 115, at 1623 (contending that forgiveness does not mean that one condones the transgressor’s behavior, forgets the behavior, or reconciles with the transgressor).

that he forgives the other party, because this process is simply for the benefit of the client.<sup>199</sup>

The lawyer might then explain that because this process does not ask the client to condone the other party's behavior, there is no transgression so terrible that the client cannot let the anger go. Instead, the purpose of this process is to free the client from the heavy burden of carrying hurt and anger from a past experience into the future.<sup>200</sup> The lawyer might elaborate on this idea by explaining:

You know, some people associate anger with power, but in reality, anger makes us weak.<sup>201</sup> When we're angry, we have actually given our power away to another person—our happiness is now dependent upon the other person and what they have done to us, or are *not* doing for us, rather than on ourselves.<sup>202</sup> In other words, we've shifted the locus of control from the *internal* to the *external*. And, by holding onto anger, what we're really saying is that we cannot be at peace, cannot be happy, unless the past can magically be erased. Because the past can't be changed, then anger condemns us to a future of being a victim to the past, a victim to the other party. Although anger can make us feel powerful in the moment, holding onto it over time saps our strength. Far from making us powerful, anger makes us weak.<sup>203</sup>

There is a wonderful parable the lawyer might share with the client that illustrates the costs of holding onto anger and the freedom that comes from letting it go. A Taoist sage gave a disciple an empty sack and asked him to place a potato in the sack for every person for whom he carried resentment.<sup>204</sup> The sage asked the disciple to carry the bag of potatoes around for one week and then to return.<sup>205</sup> As the week progressed, the task of carrying the sack of potatoes became increasingly burdensome as the potatoes grew heavier and

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199. Cf. Susanna Braun, *Forgiveness, South Africa's Truth Commission, and Military Trials: America's Options in Dealing with Crimes Against Humanity in Light of the Terrorist Attacks on September 11, 2001*, 23 *HAMLIN J. PUB. L. & POL'Y* 493, 495–99 (2002) (contending that “forgiveness consists of more than making an injured party feel better; it is something that an injured party offers to another—typically, the wrongdoer”).

200. LUSKIN, *supra* note 21, at 63; *see also* Enright & Kittle, *supra* note 115, at 1625, 1627 (noting that there is an “awareness of internal, emotional release” that comes from forgiveness).

201. *See* Maldonado, *supra* note 13, at 481.

202. *See* CHILDRE & ROZMAN, *supra* note 35, at 13.

203. *See* Maldonado, *supra* note 13, at 481.

204. Derek Lin, *Tao of Forgiveness*, <http://www.taoism.net/living/2004/200409.htm> (last visited Mar. 21, 2009).

205. *Id.*

began to emit a ripe odor.<sup>206</sup> When the disciple returned at the end of the week, the disciple had learned a valuable lesson: the sack of potatoes was just like the negative feelings he carried with him for each person for whom he carried resentment.<sup>207</sup> The sage counseled that this “is exactly what happens when one holds a grudge”—the load of carrying that grudge becomes a burden and, ultimately, festers.<sup>208</sup> To lighten the load, one must let the anger go.<sup>209</sup>

Thus, it is through the transformative power of releasing anger and resentment that the client can regain his personal power. As Mahatma Gandhi recognized, “Each one has to find his peace from within. And peace to be real must be unaffected by outside circumstances.”<sup>210</sup> Freedom comes from the client’s ability to be at peace from within, accepting what *is*, rather than demanding that reality be different in order to find peace.<sup>211</sup> Thus, the process of releasing anger and resentment is not for the other party, but for the client himself.<sup>212</sup> This understanding, at least for some clients, may actually represent a paradigm shift of life-changing magnitude. This process does not simply lighten the heart; it is literally transformative.<sup>213</sup>

The lawyer can also educate the client about the health benefits that result from letting go of anger.<sup>214</sup> Studies reflect, almost uniformly, the physiological benefits of letting go of resentment and anger.<sup>215</sup> For example,

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* In the parable, the term “forgiveness” is used, rather than the phrase “letting the anger go.” *Id.* Again, however, the terms as used in this Article are interchangeable.

210. NationMaster.com, Encyclopedia: Inner Peace Quotes, <http://www.nationmaster.com/encyclopedia/Inner-peace> (last visited Mar. 21, 2009).

211. See LUSKIN, *supra* note 21, at 68–69.

212. *Id.*

213. See, e.g., TUTU, *supra* note 117, at 155–57. Bishop Tutu relays a moving story that illustrates the transcendent nature of forgiveness. *Id.* One woman lost her seven-year-old daughter while camping in Montana. *Id.* at 155. The man who had kidnapped and killed her daughter later called her, not to apologize, but to “taunt” her. *Id.* Although the man never apologized, the woman ultimately released the anger she held against him, recognizing that “the only way we can be whole, healthy, happy persons is to learn to forgive.” *Id.* at 155–56. She then spoke to the transformational nature of true forgiveness: “Though I would never have chosen it so, *the first person to receive a gift of life from the death of my daughter . . . was me.*” *Id.* at 156–57 (emphasis added); see also Williams, *supra* note 123, at 48 n.134. Williams refers to the change of heart that results from helping parties “heal from the trauma of the underlying conflict” as having a “transcendental aspect; it has the potential to take people beyond ordinary or common experience; in dealing with the pain of conflict and conflict resolution, they are approaching a more sacred realm.” *Id.*

214. See Maldonado, *supra* note 13, at 481.

215. See, e.g., Enright & Kittle, *supra* note 115, at 1628. In their studies of people in different settings, Enright and Kittle found, “[i]n most cases” those who experienced forgiveness had reduced anger and anxiety and an increase in self-esteem and hope. *Id.* They concluded: “We have yet to see even one case in which a person became measurably worse in an emotional sense when freely

after completing forgiveness training, subjects in several studies reported “a significant decrease in the symptoms of stress,” such as a racing heart, an upset stomach, and dizziness.<sup>216</sup> Other studies reflect that the release of resentment can significantly improve healthy functioning in the cardiovascular and nervous systems.<sup>217</sup> One physician concludes that releasing anger through forgiveness “can literally be life-saving.”<sup>218</sup>

#### 4. Using Narrative and Metaphor

When discussing the price of anger and resentment, and the freedom that comes from releasing these emotions, the use of narrative and metaphor can make the discussion come alive for the client in a way that a detached commentary cannot.<sup>219</sup> Moreover, the use of narrative allows the lawyer to educate the client while minimizing the risk of defensiveness. For example, the parable of the disciple carrying the sack of heavy, odorous potatoes makes vivid the cost of holding onto anger and resentment.<sup>220</sup> The lawyer might enhance the impact of narrative by asking rhetorical questions that personalize the theme of the narrative.<sup>221</sup> Thus, in response to a client who believes that his transgressor doesn’t “deserve” to be forgiven, the lawyer might help the client shift his perspective by asking: “[The *transgressor*] may not deserve to be forgiven. However, the real question is—do *you* deserve to let this go?” By juxtaposing the client’s belief that the other party does not deserve to be forgiven with the question “do *you* deserve to let this go?” the lawyer highlights the fallacy underlying the client’s refusal to let go of the anger and resentment that is causing him such unhappiness.

The lawyer might also use metaphor to paint a visual picture of how the client has become a victim to his anger: “Isn’t it time for [the other party] to stop renting space in your head?”<sup>222</sup> Metaphor can also appeal to the client’s

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choosing to forgive . . . .” *Id.*

216. LUSKIN, *supra* note 21, at 79.

217. *Id.*; McCraty et al., *supra* note 51, at 1089–93; William A. Tiller et al., *Cardiac Coherence: A New Noninvasive Measure of Autonomic Nervous System Order*, 2 ALTERNATIVE THERAPIES 52, 52–65 (1996); *see also* WALSH, *supra* note 39, at 80. Walsh notes that even people who have had a heart attack and learn to release their anger through forgiveness, relaxation, and open communication are “much less likely to suffer a recurrence than people who continue to wallow in their old aggressive ways.” WALSH, *supra* note 39, at 80.

218. WALSH, *supra* note 39, at 80.

219. *See, e.g.*, Dinerstein et al., *supra* note 3, at 799–800. Dinerstein describes the persuasive appeal of narrative in moral dialogue between a family law lawyer and client. *Id.*; *see also* SHAFFER & COCHRAN, *supra* note 120, at 132.

220. *See supra* notes 204–09 and accompanying text.

221. *See, e.g.*, Dinerstein et al., *supra* note 3, at 799 (suggesting the use of metaphor and rhetorical questions in moral dialogue).

222. *See* LUSKIN, *supra* note 21, at 112.

highest vision of himself, with the lawyer asking the client whether he is “willing to be the hero in this war.”

The use of narrative can also illuminate the lessons from neuroscience and medicine. The metaphor of the brain as a hill of virgin snow, with each thought deepening a pathway that either invites greater anger or, alternatively, inner peace, can be a powerful visual image of the choices the client faces and their consequences.

As other scholars have suggested, the lawyer can also use “war stories” from her own practice to paint a vivid picture of the harm that results when litigation escalates into war.<sup>223</sup> In addition to the emotional, psychological, and physiological harm that results when litigation is escalated into war, such war stories would also include stories of the adverse legal and economic consequences that can result.<sup>224</sup> Perhaps most persuasive, however, would be the lawyer’s disclosure of how anger, and the ultimate decision to let it go, has affected her own life.<sup>225</sup>

## 5. A Cognitive Inquiry for the Release of the Anger

### *a. Psychological Basis for the Cognitive Inquiry*

The cognitive inquiry described below in this Article stems from a premise central to cognitive and rational emotive therapeutic modalities. The premise is that we are not distressed by what is actually happening to us, but by our *thoughts* about what is happening to us<sup>226</sup>—a premise recognized by the Greek philosopher Epictetus<sup>227</sup> and now supported by recent studies in

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223. See, e.g., Dinerstein et al., *supra* note 3, at 800 (describing a dialogue in which the lawyer uses a “war story” of another client to illustrate the costs of vengeance in litigation). Of course, within such a dialogue, the lawyer must take care not to inadvertently reveal the identities of other clients but rather speak in hypotheticals. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 4 (2003) (“A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”).

224. See Dinerstein et al., *supra* note 3, at 799–800.

225. See SHAFFER & COCHRAN, *supra* note 120, at 133. Shaffer and Cochran point out the importance of the lawyer as a model for the client. *Id.* They argue, for example, that “[i]t will probably be difficult for a lawyer to invite a client to follow an ethic that involves sacrifice unless the lawyer is a person who makes sacrifices.” *Id.*

226. COREY, *supra* note 54, at 309–13. The idea that a client’s thoughts about reality are the source of suffering is also one of the central premises of Adlerian psychologists. *Id.* at 113–14; see also DANIEL GOLEMAN, DESTRUCTIVE EMOTIONS: HOW CAN WE OVERCOME THEM? 337 (2003). Goleman reports “amazingly little connection” between the circumstances in one’s life and one’s happiness. *Id.* For example, in one study, researchers found “negligible differences in satisfaction with life between paraplegics, ordinary people, and lottery winners.” *Id.*; see also KATIE, *supra* note 137, at 4 (“It is not our thoughts, but the *attachment* to our thoughts, that causes suffering.”).

227. KATIE, *supra* note 137, at x, 257 (citing EPICETUS, ENCHEIRIDION, V).

neuroscience.<sup>228</sup> This phenomenon explains why no two people experience the same event in quite the same way.<sup>229</sup> In the case of an angry client who is in the midst of a divorce, it is not the divorce itself that causes the client's anger but the client's *beliefs* about the divorce.<sup>230</sup> For example, the client might believe that the divorce means that he has been rejected as unworthy or unlovable.<sup>231</sup> In contrast, another client might believe that a divorce means freedom. The lawyer might introduce this concept to a client through the vehicle of narrative:

You know, there is a relationship between our thoughts and emotions.<sup>232</sup> Most people believe that it's what *happens* to us that makes us happy or unhappy. But in fact, that's not actually true. The most important driving force behind our emotions is *not* what happens to us, but our *thoughts* about what happens to us.<sup>233</sup>

To illustrate, let's say that I'm on the off-ramp of a freeway waiting in a long line of cars to exit the freeway. All of a sudden—BAM—someone hits me from behind! I get out of my car, angry, thinking: "What an *idiot*. That guy's a *complete imbecile!*" Just as I'm about to yell at the idiot who hit my car, I notice that someone crashed into *his* car, which caused him to hit me. Where did my anger go? My anger moved to the driver in the next car. But as I approach the next car, I notice that the driver is slumped over the steering wheel, having suffered what appears to be a heart attack. Where did my anger go? My anger seemed to disappear, as it quickly turned to concern for the driver and questions about whether it's possible to save her life.

Notice that this is the same incident, but the different thoughts I have about the incident create different emotions. The story illustrates that it wasn't the incident itself that made

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228. See, e.g., BEGLEY, *supra* note 44, at 9–10.

229. See COREY, *supra* note 54, at 309–13. I am reminded of an airplane flight I took a number of years ago, when the plane began to land at Lambert International Field in St. Louis at the same time as two different tornadoes touched down at Lambert Field. The plane began bucking dramatically and then dropped like a bomb through the air before the pilot could regain control of the plane and fly to another city for landing. As I struggled not to decompose on the plane while contemplating the terrifying likelihood that I would die on the plane that day, I heard a small child's voice from the back of the plane gleefully exclaiming: "roller coaster, roller coaster!"

230. *Id.* at 300.

231. See, e.g., Deutsch, *supra* note 158, at 234–35 (observing that, in a bitter divorce mediation, the couple might become entrapped in an escalating vicious power struggle in which each spouse feels that "his or her self-esteem or core identity [is] at stake").

232. See COREY, *supra* note 54, at 300.

233. See *id.*

me angry, but my *thoughts* about it that made me angry. It's me making *myself* angry. While I can't control what other people do or don't do, or whether someone hits my car, the good news is that this is the one thing I actually *can* control—I have total control over how I choose to react to what happened.

Cognitive and rational emotive therapists believe that the most effective way to help relieve a client's distress is to engage in a cognitive inquiry, with the client identifying the underlying thoughts that are causing the distress, testing the veracity of the thoughts against reality and then replacing the distressing thoughts with healthier ones.<sup>234</sup> Again, this cognitive inquiry is supported by neuroscience—by training the mind to replace angry thoughts with understanding and compassion, the client develops and strengthens neuropathways in the brain that literally change the hardwiring of his brain.<sup>235</sup> Practiced more consistently, the healthier thoughts ultimately translate into a temperament of greater peace and satisfaction.<sup>236</sup>

*b. Setting the Stage for the Cognitive Inquiry*

Before moving into the inquiry that is designed to help the client reduce the level of anger and frustration he is experiencing, the lawyer will obviously need to ensure that the client is willing to proceed further. The lawyer might begin the discussion by reaffirming that the goal of the dialogue is to benefit the client and not necessarily the other party, and by giving the client a sense of hope that it is possible to alleviate some of the anger and frustration the client is bringing into the litigation process.<sup>237</sup> As an example, the lawyer might state:

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234. COREY, *supra* note 54, at 311–12. Rational emotive therapists contend that replacing unhealthy thoughts with healthy ones leads to a corresponding new set of feelings, as the former thoughts no longer hold power over the client. *Id.* at 301.

235. See, e.g., COZOLINO, *supra* note 29, at 159–62.

236. GOLEMAN, *supra* note 226, at 285. Goleman suggests that by focusing our thoughts on compassion we strengthen the neural pathways of the brain associated with compassion and, ultimately, “the actual feeling of compassion comes naturally and spontaneously, arising easily.” *Id.* at 286. As an analogy, Goleman compares the discipline of training our thoughts to a technique developed by sports coaches who train skiers. *Id.* at 285. During the summer months, the coaches ask the skiers to lie in bed and imagine skiing down the slopes. *Id.* After mentally envisioning their progress down the ski slopes, the students were “much better” skiers simply as a result of the mental practice of focusing their thoughts on skiing. *Id.* Focusing like this also improves the skill of developing compassion, gratitude, and any other emotion one might wish to develop and strengthen.

237. See Deutsch, *supra* note 158, at 234–35 (recognizing that in a bitter divorce mediation, the first step is to help each spouse recognize that “the present situation of a bitter, stalemated conflict no longer served his or her real interests”). Because the client must believe that it is not in his self-interest to continue feeding his anger, it is helpful to begin the dialogue with a reminder of the carrot (inner peace and fulfillment of a vision) and a stick (carrying the burden of anger). See *id.*

There's an exercise I've done with a number of my clients that has been of benefit to many of them. This process can be an antidote, or a balm, that can help ratchet down your frustration level. Working with this process is like going to the gym; the initial part may be awkward and bumpy, but it's like lifting weights to build muscle. [*Using metaphor*] This exercise can help build up your power in the world. Right now, Rebecca is a power leak—she's renting space in your head. The goal is to get to the point where she doesn't push your buttons so much, so that you and I can access all of your options and decide on a strategy that will optimize our chances of successfully getting you what you want in this litigation.

Again, while I can't guarantee the outcome, I *can* guarantee that if you gain some level of self-mastery with this process, you will experience less frustration and have a greater sense of well-being and satisfaction with this process regardless of the specifics of the outcome. Are you willing to try a short process that might be of benefit to you?

*c. Identifying the Source of the Client's Anger*

The lawyer should then ask the client to relay, in a sentence or two, what it is that most angers or frustrates the client about the other party, and what it is that the other party should not be doing or thinking.<sup>238</sup> The client should actually memorialize the sentences in writing rather than simply verbalizing the source of his frustration.<sup>239</sup> Reducing the source of anger to writing is important for several reasons. First, a verbal dialogue alone tempts the client to engage in a prolonged rant about the other party rather than succinctly describing the source of the client's anger. Second, without the clarity of the written word, the egoic mind will tend to move in circles during the discussion in an effort to obscure clarity and validate why the original laundry list of wrongs was justified.<sup>240</sup>

After the client writes down why he is angry and frustrated at the other party, the client should read the list aloud to the lawyer. Note that the client might have expressed anger about personal attributes of the other party (e.g., "She is selfish and abusive"), about what the other party should or should not

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238. See, e.g., KATIE, *supra* note 137, at 17 (identifying a more detailed set of questions designed to help identify the source of one's anger); see also COREY, *supra* note 54, at 301.

239. See KATIE, *supra* note 137, at 17. Alternatively, the lawyer could transcribe the client's language, being careful to use the client's exact words.

240. *Id.* at 11.

be doing (e.g., “She should treat me with respect,” or “She shouldn’t be so selfish”), or both. Both kinds of angry thoughts are appropriate sources for inquiry.

However, if the client identifies a specific *act* that angers him (e.g., “My wife had an affair”), the lawyer should encourage the client to delve deeper to discover the underlying belief that is causing the client pain.<sup>241</sup> Thus, the lawyer might add the additional phrase “and it means that . . .” to flesh out the underlying belief that is causing the pain.<sup>242</sup> For example, the lawyer might ask the client: “You are angry at your wife because she had an affair, and it means that . . . [Pausing to allow the client to complete the statement].” The client might respond by recognizing that “it means that she doesn’t love me” or “doesn’t respect me.” Although the fact that the client’s wife had an affair would not be an appropriate topic for inquiry, the client’s belief that his wife doesn’t love or respect him would be an appropriate topic.

i. Allaying Potential Concerns

Before proceeding any further, the lawyer may wish to allay any potential concerns that the client might be manipulated or pushed into conceding that the other party’s conduct or actions were somehow “okay.” Such a concern would obviously impede the ability of the lawyer and client to work effectively through the process. The lawyer can reassure the client that she is not suggesting the client doesn’t have the right to be angry about what happened. Nor does the process require that the client condone the original conduct itself. Rather, the inquiry asks the client only to investigate the thoughts he has been perpetuating about the other party’s conduct that are exacerbating the original source of pain. In other words, it is not what *happens* to us that shapes our lives, but what we *do* about what happens to us that shapes our lives.

To help illustrate the distinction, the lawyer might use the metaphor of a black box.<sup>243</sup> The lawyer could ask the client to visually place the other party’s behavior in the black box. The lawyer might reassure the client as follows:

Before we begin the process, I want to emphasize that we  
will in no way be condoning the affair that Rebecca had. We

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241. It is not the act itself that is causing the client’s suffering but the client’s beliefs about the act. See *supra* notes 226–36 and accompanying text. Thus, pursuing an inquiry about the act itself would not be productive.

242. See KATIE, *supra* note 137, at 69.

243. The lawyer can refer figuratively to a black box or can literally use a small box for this purpose.

can even visually put the affair in a black box, and we're going to leave that black box alone, because I will in no way be suggesting that you don't have a right to be angry about the affair. Instead, we're merely going to investigate one of the *thoughts* you have about the affair that is frustrating you to see whether we can help reduce the frustration you have around that thought—the thought that Rebecca doesn't respect you.

ii. The Importance of Emotional Detachment

It is important that the client attain some degree of emotional detachment while working through this process.<sup>244</sup> If the lawyer observes the client becoming angry at any point, the lawyer can help the client regain a more balanced emotional state by asking the client to take a deep breath and to visualize himself as an impartial observer on a balcony looking down on himself.<sup>245</sup> It can help to achieve this “witness” state of awareness by reminding oneself: “I can watch this thought come and go without having to respond to it.”<sup>246</sup> If appropriate, the lawyer can suggest that the client might find it helpful to close his eyes as he engages in the visualization, so that he can figuratively ground himself for the inquiry to follow.

If the client has difficulty achieving a more neutral witness state, the lawyer might suggest that the client think about something for which he is grateful in his life. Refocusing the mind's attention on a topic that produces feelings of gratitude will help the client move out of anger into a more open and expansive state.<sup>247</sup>

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244. Should the client become angry at any point during the discussion, biochemical responses in the brain would impede the client's ability to respond to the lawyer's questions with an open mind. See CAINE & CAINE, *supra* note 31, at 76; SIEGEL & HARTZELL, *supra* note 28, at 154–56.

245. See WILLIAM URY, GETTING PAST NO: NEGOTIATING IN DIFFICULT SITUATIONS 11 (rev. ed. 1993) (suggesting this technique during any negotiation that has become stressful). Buddhists, mystics, and practitioners of mindfulness meditation advocate a similar practice of entering into the “witness” state by cultivating a “meta-awareness” of awareness. ANDREW HARVEY, THE DIRECT PATH: CREATING A JOURNEY TO THE DIVINE USING THE WORLD'S MYSTICAL TRADITIONS 113–14 (2000); SIEGEL, THE MINDFUL BRAIN, *supra* note 45, at 8–13; VISHNU-DEVANANDA, MEDITATION AND MANTRAS 120–21 (2d ed. 1995). Buddhists teach that “by detaching ourselves from our thoughts, by observing our thinking dispassionately and with clarity, we have the ability to think thoughts that allow us to overcome afflictions such as being chronically angry.” BEGLEY, *supra* note 44, at 14; see also Ellinghausen, *supra* note 52, at 71–72 (describing this mindfulness practice in Buddhism).

246. BEGLEY, *supra* note 44, at 146. Begley recounts that a researcher at Cambridge found this type of self-talk to be successful when treating depressed patients. *Id.*

247. See LUSKIN, *supra* note 21, at 111–17; SIEGEL, THE MINDFUL BRAIN, *supra* note 45, at 32.

d. *Four Powerful Questions*

i. Question 1: Is It True? Can You Really Know that It's True?

After the source of the client's anger has been reduced to writing and the client is in a relatively detached mental state, the lawyer should select one part of the client's statement that appears to be at the heart of the client's anger and use that aspect of the statement as the subject of the dialogue between the lawyer and client.<sup>248</sup> The lawyer should then challenge the reality of that aspect of the client's statement by asking the client: "Is it true?"<sup>249</sup> The client is likely to quickly respond: "Yes, of course it's true."

If the client does respond affirmatively to the first question, the lawyer should then ask the client to think more deeply about the veracity of his thought by asking the client: "Can you *really know* that it's true?"<sup>250</sup> This question is designed to help the client begin to break down the perceptual distortions that have fueled the anger. Blanket statements about the transgressor's personal flaws reflect polarized thinking.<sup>251</sup> For example, no one is entirely selfless or entirely selfish—we are, each of us, selfish at times and more selfless at other times.<sup>252</sup> Due to perceptual distortions, however, the angry client who has labeled his spouse as "selfish" is stuck in polarized thinking that is fueling the anger.<sup>253</sup>

Similarly, statements about how the transgressor "should," "must," "should not," or "must not" behave are the result of unrealistic expectations that cause anger and frustration.<sup>254</sup> We all, of course, have preferences about how we would like to be treated. However, a preference that becomes an unrealistic demand causes only blame and unhappiness.<sup>255</sup> For example, the thought that "my spouse should treat me with respect" is a good aspiration for a perfect universe. However, when the aspiration becomes a demand, the

248. For example, the client might have listed ten qualities of his spouse that anger him. However, to avoid confusion and a potentially circular discussion, it is important to focus on only one complaint at a time during the inquiry.

249. KATIE, *supra* note 137, at 15; *see also* COREY, *supra* note 54, at 305 (describing how cognitive therapists help clients dispute irrational beliefs by asking questions designed to help the client see that the belief isn't necessarily true).

250. KATIE, *supra* note 137, at 15.

251. *See* COREY, *supra* note 54, at 311.

252. *See id.*

253. *See id.*

254. *See id.* at 299–300.

255. *Id.* Blame is at the core of most unhappiness, and results from escalating one's "desires and preferences into dogmatic 'shoulds,' 'musts,' 'oughts,' demands, and commands." *Id.* at 299. These broad, absolutist demands are too unrealistic to lead to happiness. *Id.* at 313. Thus, in order to maintain good emotional health, it is necessary to question and, ultimately, relinquish such unrealistic dogmatic and absolutist demands. *Id.* at 299–300, 311–12.

client has given his power away to his spouse.<sup>256</sup> The client has, in effect, decided that he can be happy only when his spouse treats him with respect, as defined by his secret, internal rule book. The locus of the client's happiness, then, is "out there" rather than from within.

The process of deconstructing this type of angry, frustrating thought involves substituting aspirations, or preferences, for dogmatic, absolutist demands.<sup>257</sup> The lawyer might help the client begin to deconstruct such thinking by asking the client to consider a two-part litmus test to question his beliefs: (1) Is the request reasonable?, and (2) Is the request enforceable?<sup>258</sup> This test reflects the reality that dogmatic, absolutist demands are only sometimes reasonable and are never enforceable.<sup>259</sup> Although it may be reasonable to prefer that a spouse treat one with respect, it is not possible to enforce that preference 100% of the time.

With that discussion as a backdrop, consider a client going through a divorce who complains that his wife should treat him with more respect. Upon being asked whether he can *really know* that such a statement is true, a client with an open mind is likely to concede that because the demand is unenforceable, he cannot really know for sure that his demand is true. The client may have a strong *preference* that his spouse treat him with more respect, but can the client really know that his spouse *should*, or *must*, treat him with more respect? However, at this point, it is not essential that the client open his mind to this possibility, and the lawyer should not attempt to dissuade the client from his point of view. The important point is that the client has identified a thought that is at the source of his anger and the lawyer has planted a seed of doubt as to the validity of the thought.

ii. Question 2: How Do You React When You Believe that Thought?

The next question is designed to help the client recognize that the angry belief does not benefit him in any way—in fact, the belief causes only pain.<sup>260</sup> Thus, the lawyer should next ask the client: "How do you react when you

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256. *See id.* at 313 (noting that these broad, absolutist demands are too unrealistic to lead to happiness).

257. *See id.* at 305. Cognitive therapists teach clients how to deal with such dogmatic demands by tracking down these "internalized self-messages" and recognizing that they not only do not serve the client but that they are, in fact, irrational because they do not reflect reality. *Id.* The client then substitutes a reality-based preference for the irrational demand. *Id.*; *see also* LUSKIN, *supra* note 21, at 132.

258. *See* LUSKIN, *supra* note 21, at 128–36.

259. *See id.*

260. Both cognitive therapists and rational emotive therapists use a similar technique to help clients perceive how their negative thoughts are affecting them. COREY, *supra* note 54, at 307, 311–12; *see also* LUSKIN, *supra* note 21, at 181.

believe the thought [that your wife should treat you with more respect]?”<sup>261</sup> It is important to encourage the client to spend a few moments thinking about how that belief actually affects his life.

If the client has difficulty articulating how the troubling thought affects his life, the lawyer might ask several directed questions to help the client consider how his angry thoughts affect his relationship with other people and himself. For example, the dialogue might unfold as follows:

*Lawyer:* As you think this over, consider this: How do you treat *other people* when you believe the thought that Rebecca doesn't respect you?<sup>262</sup>

*Client:* Well, it makes me angry, so I can be short on patience with the children. And I guess I'm no picnic at work either; I can be a little short-tempered at times. [*Laughing self-consciously*] And whenever I think about her when I'm driving, sometimes I feel like killing the S.O.B. who cuts me off in traffic . . . .

*Lawyer:* Most of us can probably identify with that. [*Chuckling to normalize the client's response*] You're doing well. [*Recognition response*] So, let's take this in a slightly different direction. When you believe the thought that Rebecca doesn't respect you, how does that affect you *physically*? For example, some people get headaches, others get short of breath, while some get a racing pulse . . . [*Pausing for client to respond*].

*Client:* Okay, let me think for a minute.

*Lawyer:* Take your time.

*Client:* Well, maybe all of the above, depending on how angry I get. I can be pretty prone to headaches, and sometimes the very thought of her and this whole nightmare makes me so angry that I literally feel sick to my stomach. I've probably lost fifteen pounds through this whole mess.

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261. KATIE, *supra* note 137, at 15. For greater clarity, it is helpful for the lawyer to incorporate the crux of the client's angry thought into the question itself. *See also* COREY, *supra* note 54, at 307 (describing this practice as “a form of intense mental practice designed to establish new emotional patterns”).

262. *See* KATIE, *supra* note 137, at 19.

*Lawyer:* It sounds like this has really been eating away at you. [Pausing to show empathy] Before we move on, though, I want to ask you one more question about how your thoughts about Rebecca affect you. You've identified how it affects your dealings with other people, including your children, and also how it affects you physically. But how do you treat *yourself* with your own thoughts when you believe the thought that Rebecca doesn't respect you?<sup>263</sup>

*Client:* Well, I'm not really sure what you mean by that . . . .

*Lawyer:* Well, when I'm angry about something, sometimes I second-guess myself, and I might even privately berate myself.

*Client:* Yeah, I guess I can relate to that. I keep replaying in my mind how I could have done things differently with Rebecca, how I should have stood up to her and not been such a doormat.

*Lawyer:* It's amazing, isn't it, how hurtful we can be to ourselves. I think sometimes that I hurt myself with my own thoughts far more than other people hurt me.

*Client:* I hadn't really ever thought about it that way, but yeah, you may be onto something there.

### iii. Question 3: What Would You Be Experiencing Without that Thought?

The next question is designed to help the client recognize that it would benefit the client to release the angry thought.<sup>264</sup> Thus, the lawyer should segue into the next question: "So, we've just established that this thought is causing you a lot of pain, both physically and emotionally. So, let's look at this from a different angle. Using your imagination for a moment, what do you think you would be experiencing without the thought [that your wife should treat you with more respect]?"<sup>265</sup> The client might respond by observing that he would experience feelings of freedom and inner peace and

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263. *Id.*

264. See COREY, *supra* note 54, at 307. Rational emotive therapists use a similar technique, called "rational-emotive imagery." *Id.* Once clients are able to imagine themselves responding to an experience with a more appropriate feeling, they ultimately reach the point where they are no longer upset about the experience. *Id.*

265. See KATIE, *supra* note 137, at 16 (asking "who would you be without the thought?").

that he would experience the sense that all is well in the world. The client should be encouraged to take a few moments to visualize what his life would be like if it were not possible for him to entertain the unsettling thought. The lawyer might encourage the client to close his eyes so that the client can resonate more deeply with the experience of freedom.

If the client has difficulty imagining what it would be like to release the angry thought, the lawyer might ask the client to imagine a world in which it would not even be *possible* for him to have the distressing thought. If the client still resists the visioning process, it might be because the client is stuck in thought patterns of anger and frustration, or despair.<sup>266</sup> To help the client move out of that mental space, the lawyer might ask the client to name at least three things in his life for which he is grateful and to share with the lawyer why he is grateful for those aspects of his life.<sup>267</sup> By directing the client's thoughts to those aspects of his life for which he is grateful, the client begins to utilize neural pathways that are associated with gratitude, beauty, and love.<sup>268</sup> By opening the neural pathways associated with gratitude, the client should be able to visualize the experience of releasing the angry thought.<sup>269</sup>

#### iv. Question 4: Can You Think of a Time When . . . ?

After the client has had an opportunity to recognize, on a conscious level, that his troubling thought does not serve him in any way, but only causes him distress, the client is ready to reconsider his response to the original question: "*Can you really know that it's true?*"<sup>270</sup> To date, the client's anger has caused perceptual distortions in the way he views the other party. Due to perceptual biases that view the world through a lens that proves he's "right," the client has blocked from his awareness those aspects of the other party's behavior that do not comport with his angry beliefs.<sup>271</sup>

Therefore, the lawyer might lay a foundation for the next question by reinforcing the idea that there is no logical benefit to holding onto the angry

266. See LUSKIN, *supra* note 21, at 112.

267. See *id.* at 111–17. Luskin uses the metaphor of reprogramming the remote control to a television set. *Id.* at 112. He notes that "a grievance can be seen as the remote control stuck on the grievance channel." *Id.* In order to move toward forgiveness, the person must "change the channel" to a frequency that is associated with forgiveness. *Id.*

268. See SIEGEL, *THE MINDFUL BRAIN*, *supra* note 45, at 32 (noting that where we direct our thoughts "will stimulate neural firing in specific areas, and they will become activated and change their connections within the integrated circuits of the brain").

269. See *id.*

270. See COREY, *supra* note 54, at 303 ("Once clients begin to accept that their beliefs are the primary cause of their emotions and behaviors, they are able to participate effectively in the cognitive restructuring process.")

271. COZOLINO, *supra* note 29, at 161–62.

thought.<sup>272</sup> The lawyer might summarize what the client has just relayed to the lawyer—that the angry thought the client has about the other party causes him pain and that, without the belief, he would be happier. The lawyer should then ask the client to think of a time when the other party acted in a manner that was the *opposite* of the client's angry thought (e.g., when the client's spouse was *respectful*). Thus, the lawyer might state:

*Lawyer:* So Bob, what I've heard you say is that your thought that Rebecca doesn't respect you causes you no small degree of pain. You feel it physically, with headaches and stomach pain. And it also makes you a bit more impatient with your children than you'd like to be, and with other drivers on the road. [*Smiling*] You also speculated that, if you let go of that thought, you would feel more at peace. Did I get that right? [*Summarizing the client's story and verifying the accuracy of the lawyer's understanding*]

*Client:* Yeah, that's about it. Doesn't really make any sense when you put it that way, does it?

*Lawyer:* No, it really doesn't, and yet we all tend to do it, don't we—to hold onto thoughts that don't really serve us. [*Normalizing the client's response*] So, let's circle back to the original question and see whether we can untether you from a thought that doesn't serve any good purpose. I want you to think back for a moment and think of a time when Rebecca *did* treat you with respect.

*Client:* Oh . . . . Wow . . . . Well, that's hard to do. I just don't think she's a respectful person.

*Lawyer:* I know. It's hard sometimes to see things differently when we've looked at it only one way for so long. Perhaps it would help to think back to the beginning of your relationship, perhaps even before you were married. When was a time that she treated you with respect? [*Asking the question again, linked to an earlier time frame*]

*Client:* Okay. That helps. I remember that she used to make special dinners for me. She even called up my mom one time and asked her for a recipe she knew I loved. She then surprised me by making it for me that night.

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272. See *supra* notes 69–80, 260–63 and accompanying text.

*Lawyer:* Yes. That's exactly what I'm talking about. [Recognition statement] How about another time when she treated you with respect, with love . . . ?

*Client:* Okay. Yeah, I guess she has always been pretty good about . . .

If possible, the lawyer should ask the client to relay two or three concrete examples of behavior that challenge the client's polarized thinking. By bringing to the client's awareness specific, concrete examples of when the polar opposite of the client's angry belief is also true, the client begins to see that his original angry thought is only partially true—it is only one version of reality. As the client begins to relinquish aspects of his polarized thinking, he sees the other party more accurately and completely. He begins to see, for example, a spouse who is respectful at times and disrespectful at other times. With these concrete examples filling out the client's memory bank, it is easier for the client to let the anger go.<sup>273</sup>

#### *D. Next Steps*

The dialogue described in this Article may be emotionally draining for the client. Therefore, the lawyer might well decide to schedule a follow-up meeting in which the lawyer and client can re-evaluate their litigation strategy. Scheduling a follow-up meeting has the additional advantage of providing the client with some time to assimilate the discussion and even to engage in follow-up work at home before the lawyer and client re-evaluate their legal strategy. However, for some clients, the clarity that comes from freeing the mind of anger and resentment might make the client's choice of options very easy, particularly if the option under consideration was a fairly clear-cut choice of whether to engage in an immoral or unethical strategy. In that case, the lawyer and client might decide on a litigation or settlement strategy before ending the meeting.

##### 1. Client's "Homework"

It is likely that the client will have additional complaints about the other party that would be helpful for the client to address and release. The lawyer might suggest that the client take home the rest of his written complaints

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273. See DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 151 (2008). Frenkel and Stark point out that, in mediation, acknowledging positive aspects of the other party "can sometimes help people stop from demonizing each other and reduce the tension of a difficult conflict." *Id.*

about the other party and subject each statement to the same inquiry.<sup>274</sup> Because the release of angry thoughts will facilitate a richer, more open dialogue about the client's legal options, the lawyer might also wish to make the homework a required next step before the next meeting.<sup>275</sup>

## 2. Re-evaluating the Client's Options

Whether or not the lawyer schedules a follow-up meeting for this purpose, at some point the lawyer and client should re-evaluate the client's objectives and options, including their litigation strategy. Without the anger and resentment that has obscured the clarity of the client's thinking, the lawyer and client should now be positioned to have a more realistic and thoughtful discussion of the client's ultimate objectives and the potential litigation and settlement strategies that are most likely to achieve them.

In this phase of the counseling session, the lawyer and client should candidly reflect on the advantages and disadvantages of pursuing various alternatives and how those various alternatives might affect the client's economic and quality-of-life objectives. With greater clarity and diminished emotional reactivity, the client should be more receptive to the lawyer's assessment of the risks involved in escalating the conflict. Moreover, freed of some of the perceptual biases and distortions that were fueled by the client's anger, the client should be able to provide the lawyer with a more realistic assessment of how the other party might respond to different litigation tactics. Thus, the lawyer should be able to intelligently and effectively help the client come to a decision about the options that will best serve his short-term and long-term interests.

## V. CONCLUSION

This Article has suggested that adversarial litigation dictated by the demands of angry and vengeful clients becomes an escalating cycle of war that harms not only third parties but also the clients themselves. The litigation-as-war mentality inflicts psychological, emotional, and physiological harm on the vengeful client, negatively impacting not only the quality of the client's life but also the client's life expectancy.

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274. During the cognitive inquiry, the client is likely to find a number of other beliefs that are also causing him to suffer. Once the client understands how to work through this cognitive inquiry and has found some measure of relief from the process in the lawyer's office, the client can use the inquiry at home with respect to other painful thoughts not addressed in the lawyer's office.

275. At this stage of the process, because the client has been freed of some of the anger that has been holding him hostage, the client might also be open to a recommendation to see a mental health professional, who can help the client work through some of the other issues with which the client is presently struggling.

Building on studies from neuroscience and cognitive psychology, this Article has shed light on why angry clients are so resistant to rational appeals based on morality and even their own economic self-interest. Because such appeals do not address the underlying pain that is driving the client's quest for vengeance, lawyers are often unsuccessful in dissuading their clients from abusing the litigation process.

This Article has explored a more effective way for lawyers to counsel vengeful clients. Drawing on a rich body of scholarship from within the field of psychology, this Article has provided a prescriptive framework for lawyers to engage in a structured dialogue with vengeful clients aimed at helping them reduce the level of anger and resentment they have brought with them into the litigation process. With the clarity that comes from releasing anger and resentment, lawyers can more effectively help clients assess their ultimate objectives and the alternatives that will best help them attain such objectives.

This Article has also attempted to inspire lawyers to rise to their higher calling—that of counselors at law who facilitate the healing of conflict. In the words of Thich Nhat Hanh: “Each moment is a chance for us to make peace with the world, to make peace possible for the world, to make happiness possible for the world.”<sup>276</sup> There can be no higher calling for any lawyer than to facilitate the healing of an angry client's inner war.

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276. THICH NHAT HANH, TEACHINGS ON LOVE 99 (1998).