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## Symposium: Creative Problem Solving Conference – Therapeutic Jurisprudence and the Role of Counsel in Litigation

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## THERAPEUTIC JURISPRUDENCE AND THE ROLE OF COUNSEL IN LITIGATION\*

BRUCE WINICK

### I. INTRODUCTION: ADVOCACY AT THE AIRPORT

We were wait-listed on the flight to Suroui and came to the airport in Biak at 5:30 A.M., as the Air Merpati agent had suggested the day before. "Not possible today," said the man at the Merpati ticket counter who finally looked up after I had stood there waiting for what seemed like half an hour. He showed me the passenger list, which revealed that all 17 seats had been sold. "Is it possible some of them won't come?" I asked. "Possible," he replied, "come back at 10:00."

Mike, the Pentecostal missionary we had met three weeks before when we arrived at the Biak airport, passed by. He remembered me and I thought I would ask for his help. Mike looked more like a high school gym coach than a missionary. Stocky in build, about 60 years old, and almost completely bald, he was talkative and friendly. Mike seemed to be a fixture at the airport, where he functioned as a facilitator for travelers, most of whom were presumably church connected.

Mike was happy to help. He proceeded to engage the ticket agents in a long conversation in Bahasa Indonesian, which he spoke flawlessly, having spent about 35 years in Irian Jaya. His argument, as best I could follow it, was that the airline should give a preference to international travelers, and somehow make room for us on the flight. The ticket agent smiled gently, but persisted in his response that the flight was sold out and that he could do nothing. Mike was animated and forceful, but his argument ultimately seemed unconvincing, not only to the ticket agents, but to me as well. "Come back at 9:00 and we'll see if there are cancellations," was the conclusion.

I thought Mike's argument was like that often made by lawyers: full of

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\* Copyright 2000 by Bruce J. Winick, Professor of Law, University of Miami School of Law. I appreciate the helpful comments of Dennis Stolle and David Wexler on a previous draft of this article, and the research assistance of Carrie Anderson. This article will be reprinted as a chapter in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (Dennis P. Stolle, et al. eds., 2000).

sound and fury, but signifying nothing; a show for the client more than serious persuasion. But there is an element of persuasion in a show itself, sometimes even if the content of the argument lacks substance. After all, the Merpati ticket agents knew Mike, in the same way judges often know the lawyers appearing before them. Mike's presence and the argument he made, even if unconvincing, functioned as a reminder that the airline personnel should exercise whatever discretion they may have had in our favor, and that a knowledgeable observer would be aware and might complain if they failed to do so. As such, perhaps Mike's intervention would be helpful. Much of what lawyers do may be helpful to their clients in precisely this way.

Moreover, Mike's efforts on our behalf reflected another important function played by lawyers. Even if his argument did not materially contribute to the result, Mike's efforts gave us a sense of having participated in the decision-making process. People like the opportunity to participate in a process that affects them; they dislike being excluded from participating. This participatory or dignitary value of process produces litigant satisfaction and a greater degree of acceptance of and compliance with the ultimate decision reached.<sup>1</sup> This value is usually served by counsel selected by the parties to represent their interest in the proceedings.<sup>2</sup> The parties participate through a counsel they have themselves selected, generally one they regard as a trusted professional who they can count on to seek their interest zealously, free of conflicting loyalties. Moreover, just as Mike spoke the language (Bahasa Indonesian) of the Merpati agents, a language we could speak and understand only in part, the lawyer speaks the specialized language of the court (or administrative body), a language that often is largely beyond the full comprehension of the litigants.

Hence we were happy to have Mike's assistance and advocacy, whatever the result. We felt that the ultimate decision would be made with a fair and proper consideration of our interests. Even though his argument appeared to be a make-weight—which to us lacked both substance and persuasive force—we felt that the mere fact of his advocacy was helpful. Indeed, it worked to satisfy our psychological interest in participating. We could accept whatever the outcome might be because with Mike's help we had taken our best shot.

We ultimately got on the flight; two of the ticketed passengers did not show up. We were lucky and we attributed our success to luck rather than to Mike's efforts. Nonetheless, during the advocacy phase of the process—

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1. See David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a new Research Tool*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 303, 307 (David B. Wexler & Bruce J. Winick eds., 1991). An important developing body of social psychology research examines these issues. See *infra* note 44 and accompanying text.

2. See Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 801-06 (1989) (analyzing the participatory value of the right to counsel of choice).

when the extent of psychological unease and anxiety are at their highest—and during the interval that followed we felt better as a result of his advocacy. Moreover, we felt better for reasons that I think apply more generally to advocacy by counsel in a variety of legal contexts.

Whether or not intended—or even recognized by attorneys—the way attorneys act in the presence of their clients has an inevitable psychological or therapeutic impact. This psychological function of counsel is an important and under-examined part of the lawyering process.<sup>3</sup> This occurs in non-advocacy contexts, of course, and a developing literature discusses the psychological role of counsel in interviewing and counseling the client.<sup>4</sup> But it also occurs when lawyers play a litigation role, and the psychological or therapeutic impact of the lawyer on the client in litigation contexts has rarely been discussed.<sup>5</sup> This article examines these psychological or therapeutic effects, exploring the underexamined subject of the psychological role of counsel in litigation. My hope is to create a new awareness of this role, and in the process, to reframe lawyers' conceptions of the role of the trial attorney in ways that can have significant benefits for both their clients and themselves.

The approach of therapeutic jurisprudence<sup>6</sup> is used to examine counsel's

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3. The newly emerging literature on therapeutic jurisprudence and preventive law has begun to examine the psychological aspects of the attorney/client relationship. *E.g.*, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, et al. eds., 2000) [hereinafter PRACTICING THERAPEUTIC JURISPRUDENCE]; *Symposium, Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 793-1210 (1999). Prior to this work, very little legal scholarship has focused on this subject. For a summary of the prior literature on the topic and of early efforts to bring psychological insights into legal education, see Marjorie A. Silver, *Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* at 357, 384-91. A recent book suggesting a greater role for psychology in law and the lawyering process is J. THOMAS DALBY, APPLICATIONS OF PSYCHOLOGY IN THE LAW PRACTICE 1-2 (1997) (noting that psychology and law have become two intertwined disciplines, with law seeking guidance from psychological principles, but not nearly enough).

4. See generally ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991); ROBERT F. COCHRAN, JR., ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING (1999); Silver, *supra* note 3; Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997); Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901 (1998).

5. For a discussion of the psychological dimensions of criminal defense attorneys' conversations with clients concerning plea bargaining and sentencing, see Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1065-77 (1999).

6. See generally DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996) [hereinafter LAW IN A THERAPEUTIC KEY]; Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB.

role in the litigation process. Therapeutic jurisprudence is the study of law's healing potential. It is an interdisciplinary approach to legal scholarship that has a law reform agenda.<sup>7</sup> It seeks to examine the therapeutic and counter-therapeutic impact of law and how it is applied, and to effect legal change that will minimize antitherapeutic consequences, and when possible, maximize law's healing potential.<sup>8</sup>

The way lawyers' play their role in the litigation process has inevitable therapeutic consequences for the client. This article provides a preliminary analysis of these consequences and offers suggestions as to how lawyers playing this role can help to promote their clients' emotional wellbeing. The litigation process is riddled with "psycholegal soft spots," a therapeutic jurisprudence term for potential trouble points that can produce anger, anxiety, stress, hurt, hard feelings, or other strongly negative emotional reactions that diminish the client's psychological wellbeing.<sup>9</sup> The trial process may also present the attorney with what might be called "psycholegal opportunity spots"—points in the professional relationship in which the psychologically sensitive trial lawyer can act in ways that will achieve psychological benefits for the client. Trial lawyers need to identify these trouble spots and opportunity points occurring in the litigation process. They also need to devise and apply strategies for avoiding or minimizing the adverse impact that such trouble spots can impose on their clients. This article, while not a systematic analysis of the emotional aspects of the litigation process, seeks to alert counsel to the existence of a number of important trial-related psycholegal soft spots and opportunity points and to discuss strategies that may be used in dealing with them.

## II. THE STRESS OF LITIGATION AND HOW COUNSEL CAN HELP REDUCE IT

Being a party in litigation is an extremely stressful event. It ranks near the death of a loved one, the loss of a job, and the experience of a grave illness.<sup>10</sup> Indeed, Judge Learned Hand complained that "as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."<sup>11</sup>

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POL'Y & L. 184 (1997). For a comprehensive bibliography of therapeutic jurisprudence work, see <http://www.law.arizona.edu/upr-intj>.

7. See LAW IN A THERAPEUTIC KEY, *supra* note 6, at xvii; BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 3-4 (1997); Winick, *supra* note 6, at 185.

8. See LAW IN A THERAPEUTIC KEY, *supra* note 6, at xvii; WINICK, *supra* note 7, at 3-4; Winick, *supra* note 6, at 185.

9. See Mark W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439 (1998); Stolle et al., *supra* note 4; David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REVISTA JURIDICA U.P.R. 317 (1998); Winick, *supra* note 4.

10. See Barbara S. Dohrenwend et al., *Exemplification of a Method for Scaling Life Events: The PERI Life Events Scale*, 19 J. HEALTH & SOC. BEHAV. 205 (1978).

11. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address Before the Association of the Bar of the City of New York (Nov. 17, 1921), *quoted in*

There is little worse than being sued. Litigation requires the expenditure of huge sums of money and takes the litigant away from employment and personal endeavors. It is particularly difficult for the defendant, who is involuntarily made to play this role. However, it may be almost as stressful to be the plaintiff in a lawsuit. Plaintiffs have been harmed in some fashion, and rather than putting the pain and loss behind them and beginning the healing process, a lawsuit makes them relive the painful episode in ways that may prevent healing.

The costs and burdens of being involved in legal proceedings with the government, and criminal proceedings in particular, are especially high. The legal fees involved in fighting such proceedings can often be astronomical. There are other serious costs as well. Being involved in governmental accusation and litigation can be a nasty and vexatious business. Complying with discovery requests, attending meetings with lawyers, making appearances in court, and responding to press inquiries all can drain away the resources of both the individual or the organizational client involved in defensive efforts.<sup>12</sup> Moreover, there are often serious emotional costs. Criminal and similar kinds of legal proceedings are intensely stressful and can create feelings of fear, anxiety, and depression. In short, they are highly antitherapeutic. In addition, being publicly charged by the government with unlawful activity can be highly damaging to the reputation of the individual or organization. Accusations of serious wrongdoing and criminal violation can produce a lasting stigma that may seriously diminish the client's business or other activities.<sup>13</sup>

A lawyer representing a person or organization in a lawsuit can significantly diffuse the stress and pain of the litigation process. The lawyer is an ally, perhaps the only one that the litigant has. Even if the entire world seems allied against him, the client has his lawyer at his side, his defender, champion, gladiator, and guardian. The lawyer is an experienced guide across treacherous terrain. At least where the client feels trust and confidence in the lawyer, the lawyer's helpful presence and assistance can enable the weathering of the storm. The trial lawyer should thus avoid any conduct likely to shatter the client's trust and confidence or the sense that counsel is the client's devoted ally.

In addition, to help the client with information control, the lawyer can provide information to the client about the meaning of the various stages of the litigation process. The social cognition literature shows that the provision of needed information plays a significant role in stress reduction.<sup>14</sup> The un-

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PLEADING AND PROCEDURE: STATE AND FEDERAL 36, 37 (David W. Louisell et al. eds., 6th ed. 1989).

12. See JAY G. FOONBERG, FINDING THE RIGHT LAWYER 14 (1995); Winick, *supra* note 5, at 1064.

13. See FOONBERG, *supra* note 12; Winick, *supra* note 5, at 1064.

14. See SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 122 (1984); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. L.

known often inspires great fear and anxiety. Information enables us to adjust our expectations in a realistic way and to prepare emotionally to meet the challenges ahead.<sup>15</sup>

Surely one of the most stressful emotional aspects of a lawsuit is when the client testifies at trial or has his or her deposition taken by the adverse party. The courtroom is a public place, and testimony is taken from the witness stand in the presence of a variety of strangers and enemies. Public speaking even in a friendly and supportive environment can produce great stress for those who are inexperienced in doing it. Playing such a key speaking role on center stage in the courtroom can thus be a nightmare for many clients. Even depositions, which typically are taken in a lawyer's office, will nonetheless be taken in front of strangers such as the court reporter and also the adversarial parties in the lawsuit and their attorneys.

How can trial lawyers deal with the intense stress and strong emotions that such testimony is likely to produce on the part of their clients? How can they deal with the intense stress that is likely to occur when the client is subjected to cross-examination by the adverse attorney, a process that explicitly attempts to impugn their honesty and credibility, sometimes in the most provocative and confrontational manner? Clients need to be able to think clearly and speak cogently during the taking of their testimony. They need to be calm and collected, to focus their attention, and to retrieve items from memory. These functions are associated with the prefrontal lobe portion of the brain, the brain area responsible for executive functioning.<sup>16</sup>

When an individual feels attacked, the portion of the brain known as the hippocampus takes over, producing a heightened sense of alertness that has been described as the "fight or flight" reaction, one that shuts off the executive functioning needed in testifying.<sup>17</sup> This "fight or flight" reaction, likely to be provoked by intense cross-examination, will produce extreme stress and anxiety<sup>18</sup> and diminish the individual's ability to function effectively as a witness. When the amygdala is stimulated in this way, it causes the release of various stress hormones, including cortisol, which heightens the senses, dulls the mind, and steals energy resources from working memory and the intellect so that such energy may be used to prepare the individual either to fight or to run.<sup>19</sup> High cortisol levels produce mental errors, distraction, and impairment in the ability to remember and to process information.<sup>20</sup>

Thus, when a witness is subjected to the attack of cross-examination, the resulting emotional reaction will diminish his or her ability to think and remember. How can counsel help the client to avoid this reaction, leaving his

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ISSUES 37, 46-47 (1999).

15. See FISKE & TAYLOR, *supra* note 14, at 122; Winick, *supra* note 14, at 37, 46-47.

16. See DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* 73 (1998).

17. See *id.* at 74.

18. See *id.* at 73-78.

19. See *id.*

20. See *id.* at 76.

or her executive functioning relatively free of the kinds of impairment that testifying or undergoing cross-examination may produce? Counsel needs to prepare the client for a deposition or court testimony by explaining what will probably occur, including the likely challenges that will come with cross-examination.<sup>21</sup> Coaching the client on the process of examination and cross-examination will help to alleviate some degree of stress. Counsel can engage in a role-play exercise with the client in which the client has the opportunity to rehearse his or her testimony, perhaps in front of a small audience. In addition, counsel can play the role of the adverse attorney and cross-examine the client vigorously, attempting to raise various questions likely to come up during the real examination. Such role playing provides clients opportunities to: prepare to meet the worst that an adversary can throw at them; formulate responses to predictable questions; avoid the anxiety of facing unanticipated challenges; and control their emotional reactions to the often offensive conduct of their interrogators. These attorney-client discussions and role-play exercises can provide clients with a significant degree of information control<sup>22</sup> over the often highly stressful event of providing testimony. It allows them to adjust their expectations and emotional responsiveness in ways that can help to avoid the anger and fear that can seriously diminish their effectiveness as witnesses.

When the opposing counsel asks an improper question at trial or deposition, the attorney will raise an objection. Such questions are not unusual, and may stray beyond the scope of relevance or may be repetitive, badgering, or otherwise inappropriate. Questions such as these can provoke extreme stress in the client, and to minimize such stress, the attorney should discuss with the client beforehand the possibility that such questions may arise and how the attorney will attempt to shield the client from them. The client should be instructed to slow things down in the event of such a question so as to give the lawyer an opportunity to raise an objection, and look to the attorney to see whether such an objection will be raised. The largest percentage of a client's live testimony will typically occur during deposition, making the process extremely stressful even to an experienced client. Counsel should arrange to sit right next to the client, at a closeness that ordinarily would be a bit uncomfortable. Counsel should explain to the client that this arrangement is so that the opposing counsel, sitting across the table, never gets the sense of talking only to the witness, but rather, always has the attorney clearly in view or at least within peripheral vision. This is also done so that the client can see the attorney's hand movements or facial expressions. This can prevent the client from blurting something out before the attorney has the opportunity to make an objection and instruct the client not to answer the question. This technique is reassuring to clients, making them feel that they are

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21. See STEVEN LUBET, MODERN TRIAL ADVOCACY 79-80 (1997) (stressing the importance of lawyers' preparing their clients for trial).

22. See *id.* at 79; see *supra* note 14 and accompanying text (describing information control).



never alone, unrepresented, or unprotected during the stressful questioning that occurs at the deposition.

When the case goes to trial, there often is a gap between the completion of the presentation of the evidence and the final decision of the tribunal. The stress on the client can be particularly high during the period when the jury (or judge) is out. The lawyer and client have lived through the stress of the trial together, and this shared experience can produce an emotional bond that can be extremely comforting to the client during this period of uncertainty. It may therefore be comforting to the client for the lawyer to spend this period or much of it with the client, helping to deflect and dissipate the strong emotions that may arise while awaiting the decision.

It also is particularly important for the lawyer to be with the client when the decision is reached. What the decision may mean and what will happen next are themselves questions that can produce much stress and emotion. The lawyer can be of significant help in providing information control at this point and in helping the client to frame the decision in as positive a way as is possible. When the decision is unfavorable, sharing the loss with a trusted ally who has fought the battle with the client can help the client to survive the bitter experience and the difficult emotions it may produce far better than would facing it alone.<sup>23</sup>

### III. HELPING THE CLIENT TO DEAL WITH SETTLEMENT POSSIBILITIES

An extremely high percentage of both civil and criminal cases are resolved through settlement rather than full dress trial.<sup>24</sup> Even after a lawsuit has been filed, negotiation and settlement are likely to occur during the pre-trial phase or even during the trial itself. In the criminal context, this occurs through plea-bargaining in which the prosecutor and defense attorney discuss the possibility of: a reduction or dismissal of charges; a specified sentence; or sentence recommendation—all as a condition for the defendant's agreement to plead guilty or *nolo contendere*.

In addition to avoiding the stress, delay, and expense of trial, settlement may pose a number of psychological advantages for the client. Negotiation can itself be a healing process, bringing together disputants to discuss and iron out their differences, and helping them to resolve their conflicts and to achieve reconciliation.<sup>25</sup> In general, people feel better about making their

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23. See ROBERT A. WENKE, *THE ART OF NEGOTIATION FOR LAWYERS* 8, 10 (1985) ("Some clients are objective and cope with disappointment; others react emotionally, even irrationally.").

24. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *FELONY DEFENDANTS IN LARGE URBAN COUNTRIES* 29 (1992) (92% of state court criminal convictions resulted from guilty pleas); JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION* 218 (2d ed. 1996) ("Almost 95% of civil cases filed in court are terminated before a full trial and judgment."); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525 (1980-1981).

25. See Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DIS. RESOL. 1

own decisions rather than having them imposed upon them by another.<sup>26</sup> Exercising a degree of control and self-determination in significant aspects of one's life may be an important ingredient of psychological wellbeing.<sup>27</sup> If the parties can come to their own solution to the controversy, they will likely feel better about it than when the judge does it for them.<sup>28</sup> Moreover, settlement puts an end to the controversy. It allows the parties to get on with their lives rather than being mired in the conflict for the several year period that trial and appellate litigation might take. It is unhealthy for the client to hold on to hatred, anger, and resentment during this several year period; giving it up can allow the client to experience a degree of peace, relaxation, and joy in life that might otherwise be impossible.<sup>29</sup> Helping clients to understand the emotional value of settlement and to achieve it can thus be an enormous contribution by lawyers to their clients' psychological well being.

For a variety of reasons, settlement therefore can have significant advantages over trial. Yet settlement often is difficult when emotions run high between the parties. Indeed, strong emotions provoked by the controversy or its antecedents or by the lawsuit itself may make it impossible for the parties even to meet in the same room to discuss their differences.<sup>30</sup> In such cases, counsel can represent the client in settlement discussions conducted with opposing counsel. In addition, the services of a third-party mediator may be used. Counsel should be aware of the various modes of alternative dispute resolution<sup>31</sup> – negotiation, mediation, arbitration, and collaborative law<sup>32</sup> – and their benefits and disadvantages, and should

(1996).

26. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 166 (2d ed. 1991); see also generally GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS* 140-56 (1978).

27. See WINICK, *supra* note 7, at 68-83; Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1755-68 (1992).

28. See FISHER & URY, *supra* note 26, at 166. In general, people feel better about making choices for themselves, and less well when others make choices for them that they experience as coercion. See Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENVER U. L. REV. 1145, 1155-67 (1997) (discussing voluntariness and coercion in the context of civil commitment of those with mental illness); Winick, *supra* note 27, at 1755-68 (discussing the psychological value of choice in a wide variety of matters).

29. See PHILLIP C. MCGRAW, *LIFE STRATEGIES: DOING WHAT WORKS, DOING WHAT MATTERS* 201 (1999).

30. See WENKE, *supra* note 23, at 10-11.

31. See generally STEVEN GOLDBERG, ET AL., *DISPUTE RESOLUTION* (3d ed. 2000); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (1994); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (2d ed. 1997); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211 (1995); Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996).

32. See generally Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967 (1999); Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. L. 215 (1999).

and their benefits and disadvantages, and should counsel the client on these potential methods of avoiding trial.<sup>33</sup>

The possibility of engaging in settlement discussions or of using the differing techniques of alternative dispute resolution should be fully explored with the client in conversations in which the attorney seeks to ascertain the client's interests and needs and what he or she will find minimally acceptable.<sup>34</sup> In this connection, attorneys should be alert to the fact that clients often want more than merely financial compensation when they feel they have been wronged.<sup>35</sup> For some, an acknowledgement of wrongdoing and an apology might be more important.<sup>36</sup>

Successful settlement discussions will produce some form of compromise, perhaps resulting in the client receiving less than was sought or paying more than contemplated. Even so, such compromise results are often far better than the results of a full trial—discounted by the emotional and financial wear and tear on the client that such trials produce. Helping the client to understand this and to evaluate the settlement proposal is an important role for counsel and one that requires a high degree of psychological sensitivity.

Notwithstanding the many advantages of settlement over trial, many clients will be too angry to deal effectively with the settlement process or will otherwise be unable even to consider the possibility as a result of various psychological problems. For example, many defendants in both civil and criminal cases are in denial concerning the existence or extent of their wrongdoing.<sup>37</sup> Many will display other psychological defense mechanisms such as minimization and rationalization that, like denial, might make it hard

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33. See Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOTIATION L. REV. 113 (2000) (discussing how the framework of therapeutic jurisprudence and preventive law can help lawyers counsel their clients in choosing between ADR methods and in designing dispute resolution systems); Andrea Kupfer Schneider, *The Intersection of Therapeutic Jurisprudence, Preventive Law and Alternate Dispute Resolution*, 5 PSYCHOL. PUB. POL'Y & L. 1084 (1999).

34. See FISHER & URY, *supra* note 26, at 40-55 (distinguishing interest from position negotiation).

35. E.g., Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, in LAW IN A THERAPEUTIC KEY, *supra* note 6, at 433; Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000) [hereinafter *Apology*].

36. There has been increasing recent interest in apology in various legal contexts. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Steven Keeva, *Does Law Mean Never Having to Say You're Sorry?*, 85 A.B.A.J. 64 (Dec. 1999); Shuman, *Apology*, *supra* note 35; Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000); Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 19 BEHAV. SCI. & L. (forthcoming 2001). See also NICHOLAS TAVUCHIS, *MEA CULPA* (1991) (sociological analysis); Jeffrie G. Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 14 (1988) (philosophical analysis); Steven J. Scher & John M. Darley, *How Effective Are the Things People Say To Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127 (1997) (psychological analysis).

37. See Winick, *supra* note 5, at 1066-67; see Winick, *supra* note 4, at 904-06 (discussing denial in the attorney/client relationship).

for them effectively to evaluate and decide about settlement issues as well as trial strategies generally.<sup>38</sup> Some clients in divorce proceedings will be in denial concerning the fact that the relationship is over, and as a result may not be able to engage in settlement discussions or pretrial proceedings. Attorneys therefore need to be able to identify and deal with denial and other defense mechanisms that might prevent the reaching of a sensible and advantageous settlement of a civil lawsuit or plea bargain in a criminal case.<sup>39</sup>

In order to deal effectively with these psychological mechanisms, the attorney needs to establish a relationship of trust and confidence with the client. In the initial client interview and in subsequent meetings, the attorney needs to be sensitive to the client's psychological state, to be supportive and non-judgmental, and to convey empathy.<sup>40</sup> The attorney needs to create a climate in which the client can feel comfortable in discussing highly personal and sensitive matters that produce intense emotional reactions. The attorney should explain the attorney-client privilege and the cloak of confidentiality that covers communications occurring within the professional relationship. The attorney should encourage the client to express his or her feelings about being sued or about the conduct of the other parties or their lawyers. Clients need to be made to feel that their attorneys are their allies and confidants, and that they should be free to share their thoughts and feelings with counsel, no matter what they are. To be successful in these conversations, attorneys need to develop their interpersonal skills. They need to be able to listen attentively to their clients and to pay attention not only to their verbal responses, but to their non-verbal forms of communication as well.<sup>41</sup> They need to develop their emotional intelligence<sup>42</sup> and be affective lawyers.<sup>43</sup> Lawyers need to convince their clients that they have the client's best interests at heart, and to suggest that they consider various issues that might provoke intense anxiety and denial and other forms of resistance in order that the client's interests may be achieved. They need to respect their clients'

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38. See Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. (forthcoming 2000) (discussing the representation of defendants charged with domestic violence).

39. See Winick, *supra* note 4, at 906-17 (discussing strategies for attorneys to use in dealing with denial and other forms of resistance on the part of the client).

40. See *id.* at 906-17.

41. See *id.* at 912-13.

42. See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1997); GOLEMAN, *supra* note 16; Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173 (1999).

43. See Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law in Search of Access, Connection and Voice*, 63 GEO. WASH. L. REV. 1071 (1995); Carrie J. Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacGrate Report—Of Skill, Human Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996); Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 3, at 419.

autonomy, persuading rather than coercing them to accept the advice the attorney thinks would be advantageous. Attorneys who successfully develop and use these techniques can enable their clients to deal effectively and straightforwardly with the issues that arise in settlement discussions and the development of trial strategy, and to effect an advantageous settlement of the dispute or a course of action for the trial that can be enormously beneficial.

#### IV. THE PSYCHOLOGY OF PROCEDURAL JUSTICE

Empirical studies of how litigants experience judicial and administrative hearings have led to the development of a literature on the psychology of procedural justice.<sup>44</sup> The process or dignitary value of a hearing is important to litigants.<sup>45</sup> People who feel they have been treated fairly at a hearing—dealt with in good faith and with respect and dignity—experience greater litigant satisfaction than those who feel treated unfairly, with disrespect, and in bad faith.<sup>46</sup> People highly value “voice,” the ability to tell their story, and “validation,” the feeling that what they have had to say was taken seriously by the judge or other decision-maker.<sup>47</sup> Even when the result of a hearing is adverse, people treated fairly, in good faith and with respect are more satisfied with the result and comply more readily with the outcome of the hearing.<sup>48</sup> Moreover, they perceive the result as less coercive than when these conditions are violated, and even feel that they have voluntarily chosen the course that is judicially imposed.<sup>49</sup> Such feelings of voluntariness rather than

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44. See generally EDGAR ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 83-84, 94-95, 118 (1975); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Edgar Allen Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOLOGY 952 (1990). For applications of these principles to the civil commitment hearing, see Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 6, at 3, 5-12; Winick, *supra* note 14 (discussing role of counsel in civil commitment).

45. See Tyler, *supra* note 44, at 6-9; Winick, *supra* note 2, at 801-06; Winick, *supra* note 14, at 44.

46. See Tyler, *supra* note 44, at 6-9 (reviewing studies in civil and criminal contexts); see Winick, *supra* note 14, at 44-45 (discussing this effect in the context of the civil commitment hearing).

47. See *id.* at 44-46.

48. See Tyler, *supra* note 44, at 6-9 (reviewing studies from both civil and criminal contexts).

49. Recent research by the MacArthur Network on Mental Health and the Law on patient perceptions of coercion found that people feel non-coerced even in coercive situations like civil commitment when they perceive the intentions of state actors to be benevolent and when they are treated with dignity and respect, given voice and validation, and not treated in bad faith. See Nancy S. Bennett et al., *Inclusion, Motivation, and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295 (1993); William S. Gardner et al., *Two Scales for Measuring Patient Perceptions for Coercion During Mental Hospital Admission*, 11 BEHAV. SCI. & L. 307 (1993); Steven K. Hoge et al., *Perceptions of Coercion in the Admission of Voluntary and Involuntary Psychiatric Patients*, 20 INT'L J. L. &

coercion tend to produce more effective behavior on their part.<sup>50</sup> For many litigants, these process values are more important than winning.<sup>51</sup>

The trial lawyer can do much to help the client experience these process values. The lawyer typically functions as the instrument of the client's voice. The lawyer articulates the client's position in the tribunal and advances the client's story. Lawyers can enhance this role by making certain they understand their client's stories and what it is they wish to have conveyed. Clients will feel much better when they perceive that their lawyers understand them and their interests and values. It is important for the lawyer to spend time with the client at the early stages of the professional relationship, communicating with the client about these interests and listening to what the client has to say.

Many lawyers are not good listeners.<sup>52</sup> They are short on time and somewhat impatient, tending to jump quickly to conclusions at the early stages of the attorney/client dialogue, cutting the dialogue off because it is thought to be unnecessary to continue.<sup>53</sup> But when the client is cut off in this way, the feeling may be created that the lawyer doesn't truly care about the client or about hearing the client's full story. 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.<sup>54</sup> This is particularly important where the client has been the victim of a crime, accident or other traumatic event; there the need to talk about the event with a trusted, sympathetic and understanding confidant, if fulfilled, can do much to help the individual get past the event. By helping the client put the events into perspective, the lawyer can do much to assist the client in undergoing a positive reframing of the incident and dealing effectively with what can and should

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PSYCHIATRY 167 (1997); Charles W. Lidz et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCH. GEN. PSYCHIATRY 1034 (1995); John Monahan et al., *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT'L J. L. & PSYCHIATRY 249 (1995)[hereinafter *Coercion and Commitment*]; John Monahan et al., *Coercion to Inpatient Treatment: Initial Results and Implications for Assertive Treatment in the Community*, in COERCION AND AGGRESSIVE COMMUNITY TREATMENT: A NEW FRONTIER IN MENTAL HEALTH LAW 13 (Deborah L. Dennis & John Monahan eds., 1996). See, e.g., Winick, *supra* note 28, at 1158-59. Patients who are provided procedural justice in this sense, even if involuntarily committed or pressured by family members and clinicians to be hospitalized, reported experiencing considerably less coercion than patients who were not afforded procedural justice. See generally Hoge et al., *supra*; Monahan et al., *Coercion and Commitment, supra*.

50. See Winick, *supra* note 28, at 1155-59; *supra* note 27 and accompanying text.

51. See Tyler, *supra* note 44, at 6-9.

52. See Steven Keeva, *Beyond the Words: Understanding What Your Client Is Really Saying Makes for Successful Lawyering*, A.B.A.J. 60 (Jan. 1999).

53. See Keeva, *supra* note 52; cf. FOONBERG, *supra* note 12, at 130.

54. See JOHN PENNEBAKER, *OPENING UP: THE HEALING POWER OF CONFIDING IN OTHERS* (1990).

be done thereafter.

Most disputes that go to litigation are resolved through settlement, thereby avoiding the stress and expense of a full dress trial. An important role of counsel therefore is to attempt to secure settlement as favorable to the client's position as possible. The preceding section of this chapter discusses some of the psychological roadblocks on the part of the client that may interfere with settlement, and how counsel can deal with them. The settlement process itself is an important opportunity for the lawyer to help the client satisfy the psychological need for procedural justice. The client should play an important participatory role in settlement discussions. Lawyers often conduct such discussions with opposing attorneys in ways that make the client feel frozen out of the process. There should be frequent consultation and information exchange between attorney and client in the settlement process. Clients deciding whether to settle need to feel that the offer under consideration is fair and either approximates what can be expected if the trial goes forward—discounted, of course, by the amount saved by avoiding litigation—or reflects their interests or needs in the circumstances. Reassurance by an experienced and trusted lawyer that the proposed settlement, although not what the client had hoped for, is nonetheless reasonable in light of the client's interests and needs, can thus go a long way to making the client feel good about settling.

It is particularly important for the lawyer to permit the client to play a meaningful role in the selection of the legal strategy to be pursued in the litigation. Frequently, the lawyer makes strategic determinations without consulting the client, leading the client to feel a loss of control over the lawsuit. The lawyer's superior experience certainly indicates that the lawyer play the major role in designing the litigation strategy, but allowing the client's full participation can enhance the client's sense that the lawsuit is telling his or her story, rather than one that does not entirely capture it.

For similar reasons, a client should be consulted and given the opportunity to participate in the design of the opening and closing statements.<sup>55</sup> The

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55. Attorneys should anticipate that some clients might be perplexed at being consulted concerning the design of the litigation strategy or the preparation of the opening and closing statement. They may feel that this is the lawyer's job, and being consulted by the lawyer might undermine their confidence in the lawyer's ability. To avoid this concern, lawyers can tell their clients that it is their practice to involve the client in the design of these strategies to insure that the client is certain that they are consistent with the client's wishes. They should feel free to present their views on these strategies to the client, and to relate how similar strategies have been successful in prior cases. A parallel exists here between the lawyer-client relationship and the doctor-patient relationship. In providing the disclosure necessary for informed consent to treatment, the doctor frequently will (and should) consult the patient on how the patient balances risks and benefits in the circumstances and what the patient thinks appropriate. The doctor, of course, will make recommendations concerning what he or she thinks is appropriate in the circumstances. Many patients may tell the doctor: "Whatever you think, Doc. You know best." In such circumstances, the patient in effect is waiving a greater participation in the decision making process. Similarly, clients may prefer to leave these matters entirely to the lawyer, but probably will feel better about being consulted than they would

opening statement frames the lawsuit; it conveys to the judge or jury the broad outlines of the story that will follow. The closing argument summarizes what the evidence has shown from a party's perspective; it seeks to have the trier of fact view the evidence through the lens provided by that party. The client's need for voice and validation—to tell the story and feel that it is listened to in earnest—can be significantly frustrated if the story heard by the client in opening and closing argument is not the client's own, but rather, reflects a contrivance by the lawyer that tells a different story.

## V. CONCLUSION

Many trial lawyers use psychology, implicitly if not explicitly, in their attempt to persuade judges and juries of the correctness of the positions they are advocating in court. The content of their arguments as well as the way in which they are presented and the credibility, appearance, communication skills, and the likeability of the lawyer all have an important impact on the ability to persuade.<sup>56</sup> However, many trial lawyers do not understand the psychology of dealing with their clients in the litigation process. How attorneys act and communicate with their clients prior to and during hearings or trials have important consequences for their clients' psychological functioning and emotional wellbeing during what is one of life's most stressful events. Lawyers therefore should be aware of the psychological impact of their role, and should attempt to play it in ways that reduce negative effects and produce positive results.

This article has conducted a preliminary analysis of the litigation process designed to sensitize trial lawyers to this rarely discussed aspect of how they play their roles. Litigators should be aware that how they relate to their clients and how they act in their presence during various aspects of the litigation process can have important psychological consequences for their clients. In this respect, whether they know it or not, trial lawyers function as therapeutic agents in regard to their clients. The trial process raises a variety of psycholegal trouble spots and opportunity points. This article has attempted to identify a number of these psychological soft spots and opportunity points. It also offers suggestions on how trial lawyers can act to help their clients to deal effectively with the stress of litigation and to increase a client's psychological functioning during and after the trial process.

I hope this article will provoke discussion in both the legal and psychological literature concerning these unexamined issues. Anecdotal accounts by lawyers of how they have dealt with these psychological issues can be in-

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if not consulted at all.

56. Some trial lawyers will be familiar with the literature on the social psychology of persuasion. See, e.g., DANIEL J. O'KEEFE, *PERSUASION: THEORY AND RESEARCH* (1990); R. E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986); Winick, *supra* note 4, at 914-15. Others will understand these principles intuitively and apply them in courtroom settings.



structive to the trial bar, heightening the awareness of lawyers and of effective strategies for dealing with them. Moreover, psychologists and social workers can offer helpful commentary on how trial lawyers can face the challenges of playing their psychological role. There is also a need for increased attention to these issues in trial advocacy instruction in law school and in continuing legal education programs designed for the trial bar.

Sensitizing lawyers to the psychological dimension of their role can itself improve attorney functioning and client satisfaction. In addition, it can spark a new and exciting form of interdisciplinary scholarship and legal and continuing legal education that can significantly improve the way lawyers function in the trial process and the ability of their clients to survive it.

Finally, it can help litigation attorneys to achieve a greater measure of professional and personal satisfaction in their work. Many trial attorneys experience professional burn-out, extreme stress, depression, and alcoholism and substance abuse. For trial lawyers who regard winning as everything, defeat may be emotionally unbearable. Helping their clients to adjust successfully to the litigation process and its results, whatever they may be, can bring immense satisfaction and emotional well being for client and attorney alike.