Business Law Collection

John Wood, *Editor*

Light on Peacemaking

A Guide to Appropriate Dispute Resolution and Mediating Family Conflict

Thomas DiGrazia

BUSINESS EXPERT PRESS

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To All My Relations, to those, both nearby, and in distant galaxies,
mi profondo grazie e amore *for all your support and gifts.*
You well know who you are, especially my LuLu.
Aloha Tom.

Abstract

Many books have been written about the practice of *peacemaking*, and few, if any, contribute to the non-violent, spiritual side of this ancient science, discipline, practice and art form. This book speaks to that lack and explores the spiritual, non-violent element in *peacemaking* as it applies to appropriate dispute resolution and mediating family law disputes.

Universities will find the book helpful as a textbook in their *peacemaking* and mediation degree and certificate programs. This book is intended for the professional *peacemaker*, mediator, lawyer, law student, conciliator, and dispute neutral. Everyday people wishing to improve their own communication skills and strengthen their primary relationships will profit greatly from this book. Those in the family law field, will find much benefit from the *peacemaking* processes, family counseling psychology, Eastern philosophy and Yoga, collected wisdom, experience and practice pointers presented in *Light on Peacemaking*.

Mental health family practitioners, who are often called upon to act as default, if not, formal mediators and neutrals, will find useful the mediation and *peacemaking* experiences, techniques and literature related here. *Light on Peacemaking* also offers the Yoga practitioner a very practical avenue, through example in the legal field, for engaging in *seva* or service to humanity.

Keywords

ADR processes, adversarial, alimony, alternative dispute resolution, appropriate dispute resolution, B.K.S. Iyengar, brain science, child support, children, collaborative law, conflict, conscious uncoupling, counseling, courts, difficult conversations, divorce, Eastern philosophy, educated divorce, evaluative, facilitative, family counseling, family court, family law, interdisciplinary team, J. Krishnamurti, law, law student, lawyers, legal system, litigation, marital dissolution, mediation, mediation participants, mediation skills and techniques, mediator, mental health professional, mindfulness, Native Americans, negotiations, neutral, nonviolence, peacemaker, peacemaking, peacemaking algorithm,

post-traumatic stress disorder (PTSD), psychologists, psychology, *seva* (service to humanity) and *ahimsa* (do no harm), spiritual, students, *seva*, transformation, violence, yoga, *Yoga Sutra*

Reviews and Comments for *Light on Peacemaking*

"George Bernard Shaw wisely wrote that 'Perhaps the greatest social service that can be rendered by anybody to the country and to mankind is to bring up a family.' Yet family conflicts remain widespread, destructive, and unresolved. Would it not be a far greater social service than Shaw imagined to improve our skills in family peacemaking, in preventing and resolving chronic family conflicts, and in transforming them into sources of learning and heartfelt connection? *Light on Peacemaking: A Guide to Appropriate Dispute Resolution and Mediating Family Conflict* is an insightful contribution to this effort, bringing together neurophysiology and mediation, nonviolent communication and parenting skills, spirituality, and common sense."

Kenneth Cloke, author of *The Dance of Opposites: Explorations in Mediation, Dialogue and Conflict Resolution Systems Design*.

"Someone once said that litigation is the nearest thing we have to eternal life on earth. Going through a painful conflict? Headed for breakup or divorce? Tom DiGrazia offers very sage advice on how to prevent, manage, or resolve contentious matters. His inventory of ideas, strategies, and tools will help you avoid or navigate your way out of the briar patch. Read what Tom says. Use it. Practice it. Cherish it."

Peter S Adler, PhD, author of *Eye of the Storm Leadership: 150 Ideas, Stories, Quotes and Exercises on the Art and Politics of Managing Conflicts* (2008)

"Finally someone has written an honest and enlightening book about the destruction of divorce and the value of peacemaking tools to resolve divorce cases. Thomas DiGrazia has given us all a gift—a clear, almost poetic description of how to address even the most challenging of family

disputes. This is a must read for all those involved in a divorce—the couple, the lawyers, the judges, and the peacemakers."

Michael Broderick, former Hawaii Family Court Judge and Mediator

"In the spirit of Ahimsa (nonviolence), Tom offers a bridge of connection for changing relationships. With clearly outlined steps and considerations, Tom offers to those involved in the conflict ways to connect with what's important in one another's world as a way to co-create an outcome acceptable to all. The book conveys a deep care for the preciousness of life, integrating skills and tools ranging from yogic concepts to contemporary communication approaches."

Chiara Guerrieri, Yoga and Non-Violent Communications Teacher, chiarayoga.com

"Author of *Light on Peacemaking: A Guide to Appropriate Dispute Resolution and Mediating Family Conflict*, Thomas DiGrazia, beautifully integrates the findings of neuroscience with tools and techniques of mediation and yoga, both of which Thomas has practiced and taught for many decades. Filled with wisdom, insight, and practical tips on managing relational disputes mindfully and holistically, *Light on Peacemaking* is a must-read for people who work with and within families to help transform couples' differences away from adversarial posturing and toward increased mutual understanding, hope, and healing. Thomas's discussions of peacemakers applying an innovative algorithm he created to evaluate the strengths and opportunities for growth for families considering mediation, and modeling with couples' nonviolent communication during difficult conversations, underscore his passion for bringing more mindfulness into the mediation room. *Light on Peacemaking* is truly inspiring."

Lisa Jacobs, Collaborative Attorney, Mediator and Founder, Better Way Divorce, also known as Pono Divorce, Kailua, O'ahu, Hawai'i

"In this book, *Light on Peacemaking*, Tom DiGrazia brings together family dispute resolution and traditional notions of spirituality. DiGrazia draws on his considerable experience as lawyer and mediator as well as

his extensive work as a yoga practitioner. Because of the interdisciplinary nature of his work this book is for a host of readers including professionals such as mediators, lawyers, psychologists, and counselors, applied sociologists, but also for those interested in the mind–body connection including those exploring the connection between traditional healing arts, such as yoga, and the practice of dispute resolution. DiGrazia keeps the reader's attention by presenting and analyzing case studies throughout the text to demonstrate these connections. While providing a hands-on approach the author also provides theoretical and historical explanations of conflict resolution including Indigenous Peace-Making. The book offers a holistic approach including discussions of brain science and trauma and its effects on conflict and conflict resolution. I therefore recommend this book to those wanting to gain a more interdisciplinary approach to family mediation and conflict resolution in general."

Brian Jarrett, JD, LLM, PhD, Department of Communication,
University of Alaska Fairbanks. Program on Dispute Resolution,
Peace-Building, and Restorative Practices, Editor-in-Chief,
Alaska Journal of Dispute Resolution,

"As a psychiatrist who works with adults and also specializes in child and adolescent psychiatry, I found the sections that recommended the use of both male and female co-mediators and a child specialist to be spot on! The recommendations for mental health counseling cannot be stressed enough. I deal with the aftermath of divorces and I found this book to be truly a spiritual model of assistance in the divorce proceedings that allows for the well being of all involved. Thomas DiGrazia's discussion on the use of yoga to counter the fight or flight response of the body encouraged me to push for the use of yoga on our child and adolescent inpatient psychiatric unit. Many of the troubled youth on the unit have been subjected to various traumas including the trauma of parental breakups. Thank you, Thomas for writing this thought provoking and enlightening book!"

Diane Zuniga, MD, Child and Adolescent Psychiatry,
Queen's Medical Center, Honolulu

Contents

Preface ... xv
Acknowledgments ... xix

Part I **Introduction ... 1**
Chapter 1 Thumbnail Sketch of Appropriate Dispute Resolution History ... 7
Chapter 2 ADR Processes ... 13
Chapter 3 Appropriateness of Process in Mediation ... 37
Chapter 4 Conflict and Brain Science ... 51
Part II **Methods ... 65**
Chapter 5 Some Peacemaking Tools for Dealing with Conflicted Divorce ... 67
Chapter 6 Mediation Skills and Techniques ... 89
Chapter 7 Negotiations ... 121
Part III **Advanced Issues ... 155**
Chapter 8 When People Are the Issues—A Further Word About Difficult Mediation Conversations ... 157
Chapter 9 Some Last Resort Options ... 171
Chapter 10 Conclusions ... 183

References ... 191
Index ... 197

Preface

I.

Although many books have been written about the practice of *peacemaking,* few, if any, deal with the nonviolent, spiritual side of this ancient science, discipline, practice, and art form. This book will speak about this and explore the spiritual, nonviolent element in *peacemaking* as it applies to mediating family law disputes.

As a point of clarification, throughout the course of compiling this book, I have used the terms *peacemaker* and *mediator* interchangeably, in spite of the fact that as a general rule, I prefer the term *peacemaker* to that of mediator. I do, however, continue to use the term mediator in certain contexts, as at this point, it remains the most widely recognized term associated with this type of activity within the realm of family law. The same can be said for the related terms, *mediation*, *mediation process*, and *mediation participants*.

I also prefer to use the terms, *peacemaking process* and *peacemaking participants*; as in my opinion, these designations offer a wider framework for assisting others to resolve conflict and to move on with their lives. The word *Peacemaking* more comfortably allows for the recognition and integration of skills used for thousands of years by indigenous and ancient cultures in the resolution of conflicted relationships. It will quickly become apparent to the reader that the field of psychology, along with Eastern philosophies and disciplines, in particular that of the practice of Yoga, are keys to the processes involved in *Peacemaking*. As such, they are to be seen as the ground upon which modern peacemaking and the mediation techniques outlined within this guide are based. A key point here is that *Peacemaking* is a much more inclusive and creative approach to resolving such human dilemmas as quarrels, disagreements, discord, tension, controversy, opposition, personality struggles, and disputes, than any form of litigation or other adversarial technique.

This book draws upon my more than four decades of experience as a lawyer and *peacemaker*, and, in particular, relies heavily on the

accumulation of a broad range of experience gathered during the last near 30 years in Hawai'i, as a practitioner of general law and as director of the *Mediation Center—Windward Oahu*. The interdisciplinary program, which I created while there, *Educated Divorce,* I consider being the hallmark of my professional mediation career, and been adopted as the framework for the Center's focus on family law mediation. This useful interdisciplinary tool will be explained in detail in later chapters. The Mediation Center is a direct descendent of its namesake in Santa Barbara, California, where up until the mid-1980s, I received my professional *peacemaking* training at the knee of my mentor and the Center's founder, Gail Rappaport. To this training, I added important understandings and skills picked up throughout my early childhood in the dysfunctional, conflict-plagued world of Little Italy, in lower New York City, during the 1950s. In addition, I was honored and lucky to have the chance to spend time observing and working with Native American community peacemaking practices, between 1970 and 1985, which furthered my passionate interest in resolving conflicts *without* adversarial violence, antagonism, or disputant destruction.

This background experience in professional *peacemaking* has been much enriched by my years as an adjunct professor at Hawaii Pacific University (HPU) in Honolulu, where I taught a course in Mediation and Conflict between 2010 and 2014. My professorial duties in the graduate *Certificate Program in Mediation and Conflict* at HPU caused me to reflect deeply on my professional *practice* in order to more effectively impart the benefits gained by this experience to my students, many of who come here to study from a host of countries around the world. The outline for this book, to a large degree, is derived from my extensive class lecture notes and the positive feedback and encouragement of my many American and international students.

II.

Finally, my practice as a *peacemaker* has been nourished and informed by over 40 years as a Yoga student, practitioner, and teacher. These years of dedication and love, brought to the study of Yoga, not only as a practitioner of its physical discipline, but also as a student of its philosophical and ethical base, have rewarded me with an deeper understanding of

Yoga's core definition, which is *Union* or to unite. In this context, we are speaking of the *union* of body, mind-heart, and spirit leading to the development of one's *meditative* mind, in contrast to the fragmented nature of the *thinking* mind. As will be explained in later chapters, it is my view that *one cannot effectively mediate without meditating*—that is, by using the meditative mind to observe conflict other than through the filter of linear thought. Thus, the views expressed in this book are heavily influenced by my parallel and continuing development as *peacemaker* and *yogi*, the two disciplines being synonymous in my mind.

This book is a hands-on, practically oriented attempt to impart what I have learned over these many years, in the hope that it may serve as a guide to the next generation of *peacemakers*. Universities and other places of learning will find the book helpful as a textbook in their *peacemaking* and mediation degree and certificate programs, most particularly, in those courses that stress a pragmatic, spiritual, eclectic approach to nonadversarial, *peaceful* conflict resolution.

The book is intended for the professional *peacemaker*, mediator, lawyer, law student, conciliator, and dispute neutral. These individuals, particularly those in the family law field, will find much benefit from the *peacemaking* processes, family counseling psychology, Eastern philosophy and Yoga, collected wisdom, experience and practice pointers presented. Mental health family practitioners, who are often called upon to act as default, if not, formal mediators and neutrals, will also find benefit from the mediation and *peacemaking* experiences, techniques, and literature related here.

Light on Peacemaking will also find relevance for practitioners of the science and art of Yoga. Many yogis have a strong desire to apply what they have learned in their Yoga classes regarding the Yogic way of life, which is a model for living based on the spiritual and philosophical knowledge imparted in an ancient book of collected wisdom, known as the *Yoga Sutra* by Patanjali. *Peacemaking* offers the yoga practitioner a very practical avenue for engaging in *seva* or service to humanity based on this ancient wisdom. (We believe the *Yoga Sutra* was an oral tradition for perhaps thousands of years before Patanjali wrote the sutras or aphorisms down in Sanskrit about 2,000 years ago.) In fact, I see the *Yoga Sutra* as an inclusive laboratory manual for living a harmonious life on Planet Earth.

The ancient knowledge and wisdom, drawn from the *Yoga Sutra* and included in this volume, has been augmented by the philosophical work of the deeply profound and highly original, thinker, and contemporary philosopher, *J. Krishnamurti,* whose directives for ending conflict within one's self, and between individuals, as well as his other contributions to *peacemaking,* are also included in this book.

Most importantly, my intention is that this work, through its examples, information, and guidance in the *peacemaking process*, will serve to offer encouragement to the *peacemaker* in all of us—laypeople, students, and professionals alike. My profound hope is that this book will help *peacemaking* to emerge from its dormancy so that it can be used as a vehicle to promote peace and well-being on our mother planet, Earth. The Earth being a planet in dire need of peacemakers.

Acknowledgments

This book could not have been written and published without the help of a wide range of family, friends, supporters, Native and Alaskan Native Americans, particularly, the Lakota of South Dakota, and, the Yupiit of Southwest Alaska, mediation participants who I have worked with over many years, and my graduate students at Hawaii Pacific University in Honolulu.

My best friend, spiritual guide, and, as the Yupiit would say, *Aipa,* or soul mate, my wife, Louisa, was and is my relational mirror and life reality check. She acted as my primary editor in writing *Light on Peacemaking*. A universe of thanks is owed to Lulu, my sweet LuLu, for all your encouragement, support, and assistance throughout my book writing and my living life processes.

I am thankful to my friend, Yoga student, and editor, Michael Glass, for his excellent editing and patience in seeing me through the book writing procedure.

For my dear friend, Robert Girling, my eternal gratitude for your unwavering support and encouragement in getting me to write this book, not to mention your help in putting me in touch with the publisher, Business Expert Press (BEP).

I must acknowledge the spiritual and peacemaking training given to me by the Yupiit and Lakota early on in my peacemaker's journey. They opened up their hearts, minds, and way of life to a young and idealistic lawyer, and, thus, helped put me on the peacemaker's life path.

I am forever thankful to the mediation participants throughout my career that afforded me the opportunity to serve as their peacemaker and guide during very troubled times in their lives. The experience I gained working with hundreds of mediation participants, especially during their divorces, is reflected throughout this book.

I also salute my graduate students at Hawaii Pacific University. They forced me to put my peacemaking ideas, research, and experience into lecture notes and study material for our course in Mediation and Conflict.

These notes and material then became, with their encouragement, the outline for this book.

I also acknowledge with respect and gratitude acquisitions editor at BEP, Scott Isenberg, for his assistance and expertise in making publication of this book possible. Recognition and thanks is also in order for my expert and patient text editors at BEP, especially Exeter team at the IGroup.

Finally, I bow in love and respect to my DiGrazia ancestors. I am the progeny of a long line of DiGrazia peacemakers, particularly, my grandfather, Gaetano, and, my father, Sebastiano. Through their example and practice, they taught a young boy, growing up in the often violent and conflicted world of New York City's Little Italy, that leading and helping others to lead a more peaceful life was possible regardless of the turmoil and circumstances surrounding you. *Ringraziamento, nonno e papa!*

PART I

Introduction

The concept of peacemaking emerging from its dormancy into our present culture is best related in an example from early in my legal career. I lived among and worked with the Lakota of South Dakota from 1970 to 1972. As part of my education in the culture and way of life of the Lakota, my elder Oglala Lakota mentor, Elizabeth Fast Horse, related the following to me:

> Prior to contact with Washishu or white people, the Lakota and other Plains Indigenous People developed a process for responding to exploitation by other tribes or bands. Their perception of exploitation included uninvited and hostile transgression of their hunting and fishing grounds, the kidnapping of their women and children, or the stealing of their horses, among other things. When these transgressions were brought to the attention of tribal elders, they would sit in council to ponder an appropriate response to a given grievance. The tribal elders would listen to the warrior chiefs, who by family heritage, training, and disposition always spoke for war and violence as a means to deal with revenging and preventing future incursions on the Lakota by transgressors. Then, the elders would invite the peace chiefs to speak, who, likewise by family history, training, and disposition, always spoke in favor of diplomacy and nonviolent means to curb wrongdoing by non-Lakota members.

Debate between these different viewpoints was often heated and went on long into the night and sometimes following days. After this often-arduous process was completed, a decision as to an appropriate response to the transgressors binding the entire tribe would be made. All who chose to remain in the tribal circle, figuratively and metaphorically,

would support the tribal council's decision. Those who could not abide by the council's decision would often remove themselves from the tribal community and start their own tribal circle.

In this manner, the precontact Lakota flourished and survived. Reflecting the nature around them, they had found a balance between yin and yang, between peace and violence, between life affirming and life destructive forces. Peacemaking was not a dormant condition among precontact Lakota and other Plains Indigenous People. Support for Elizabeth's culturally enlightening peacemaking story can be found in *Seven Arrows*, by *Hyemeyohsts* ("Wolf" in the Cheyenne Native language) *Storm*.

Peacemaking has many faces. So, let us be clear about some language utilized throughout this book and journey together. At the outset, let us review an important operational definition. For the purposes of this book, I define *peacemaking* very broadly. Peacemaking can be defined as assisting those in conflict, including one's self to find a nonviolent resolution to differences and conflicts. Violence takes many forms. It includes physicality toward another. It is more often manifested in anger, arrogance, anxiety, jealousy, rage, disgust, fear, negative verbiage, rejection, passive or aggressive behavior, undue control, insecurity, and lawsuits. In its most virulent form, it results in warfare, destruction, and death. I will focus on peacemaking as it applies to the family law arena, more particularly to mediation of family disputes, a most important form of peacemaking.

From a *spiritual* and *nonviolent* point of view, peacemaking starts with finding peace within one's self. This view is consistent with modern day spirituality. As Grace Bullock states in *Yoga online*:

> Modern day spirituality is characterized by a search for personal development and well-being; a quest to reach one's essence or true self …. Thus, one's true self is being in a state of personal contentment, and harmonious and peaceful interaction with others. (*see* http://yogauonline.com/yogatherapy/news/yoga-news/1382100113-catholic-university-launches-first-yoga-masters-degree-us)

Our use of the word spiritual centers on the union of the small, skin encapsulated ego-self with the larger *self*, or, alternatively, *cosmic*

intelligence, *all that is* or one's conception of a deity or *God*. This union, when found in a peacemaker, is what yogis call a *self-realized* person. This is a person who has gone from the personal to the fully conscious and universal in awareness. It is this union that produces a more conscious peacemaker who will be better able to assist those in conflict to find creative dispute resolutions and avoid the *legal violence found in adversarial divorce*.

As we will explore, a peacemaker's role as a medium for helping the conflicted to heal and get on with their lives consists of being a bridge for reconciliation and forgiveness. One needs to be ever conscious of the fact that when there are children from a marital relationship, a family will still be operating, albeit in a reconstituted form, after the dissolution of a marriage. This realization that family continues postdivorce should be the primary motivator and role for the peacemaker in advocating a nonviolent marital dissolution. This role is not often initially successful and is difficult at best, as personified in the life and work of the late and great *Nelson Mandela*. (Mandela, who could have easily and justifiably been bitter and vengeful toward white South Africans over his quarter century of unjustifiable imprisonment, instead chose nonviolence, forgiveness, and reconciliation as his medium for peaceful revolution in South Africa.) Yet this role is worth the effort even if it often falls short. This is so because it will help lay the future groundwork for disputants to achieve this goal on their own, as their lives evolve and, if children are present, the needs of their children become more paramount over time than their own.

A nonviolent and spiritual perspective in the peacemaking process begins with the premise that we *are violent and that conflict is not something separate from it*. Generally, the roots of our internal conflict—as manifested in physical and nonphysical forms of violent behavior— are located in our memories, which represent past experiences. These roots have little or nothing to do with the other marital partner to whom these past and dead images are attributed. As soon as we observe and take responsibility for the fact that our conflict arises from our own ego or *I-self,* the conflict can end in a transformative and proverbial *New York moment*. This instantaneous, transformative movement of consciousness from inner conflict to neutral observation of our inner conflict and its transcendence applies equally to the peacemaker and peacemaking participants.

Once again, the peacemaker must be ever vigilant for whatever conflict exists within one's self and its *transference* into the conflict that one is mediating. The mediation participants must be educated from the outset of the dispute resolution process that their conflict with another is rooted in one's individual self. It is also reflected in the tangible issues and needs the participants bring to the negotiation table. The root is generally an emotional one reflecting attachment to fears, anxieties, depression, rejection, and insecurity that is revealed in the divorce or family conflict process. As *Abraham Lincoln*, himself a family law lawyer, said, in 1850 regarding lawyers (and which applies equally to all peacemakers), to minimize the use of litigation and seek settlement of differences whenever possible:

> Point out to (clients) how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation. (Baer 2012)

In this book, we will review together some of the different components of mediation and peacemaking from a spiritual, nonviolent, and interdisciplinary outlook. After a brief overview of the *Historical Perspective of Appropriate Dispute Resolution (ADR)* and *ADR Processes*, we will address the subjects of *Appropriateness of Process in Mediation*; *Conflict and Brain Science*; *Some Peacemaking Tools for Dealing with Conflict in Divorce*; *Mediation Skills and Techniques*; *Negotiations*; *When People Are The Issues; A Word About Difficult Mediation Conversations;* and *Last Resort Options.* Our interdisciplinary viewpoint—which is where 21st-century third-party conflict resolution in the marital dissolution process is heading—will add a new dimension to the discussion, future practice of peacemaking, and family law mediation. We will also draw upon the dynamic world of psychology, particularly the work of family counselors who work with divorcing couples, individual patient-spouses, and families going through the heavily emotional divorce or family transition process.

American society—with its emphasis on greed, competition, worship of individuality, and raw ambition—has turned its back to the ancient

Sanskrit wisdom of *ahimsa* or "do no harm," which, as we will see, is the first and highest principle of Yoga spiritual practice. This principle was expressed in the *Yoga Sutra*, some 2,000 years ago, and is as relevant now as it was then for conducting our lives in a conscious, spiritual, and nonviolent manner. It is now long past the time to turn to *ahimsa* in family law practice. It is time to call a truce in the divorce wars and instead seek nonviolent resolution of family law disputes.

CHAPTER 1

Thumbnail Sketch of Appropriate Dispute Resolution History

Introduction

Throughout this book, I will use the term *appropriate dispute resolution* (*ADR*) to describe the various forms of peacemaking currently utilized in the American legal system. The usual term for these forms is called alternative dispute resolution, and also utilizes the abbreviation ADR.

For a long time, I have been uncomfortable with the term *alternative* before dispute resolution and have instead utilized the word *appropriate.* My concern is based on the limitations imposed on disputants and their legal advisers in choosing an alternative to litigation. I prefer the more creative possibilities inherent in the word *appropriate*. To me, *alternative* implies second-class citizenship for ADR, given the American legal system's obsession with litigation.

It has been my experience that far too many disputants and their lawyers almost always look first to litigating a dispute rather than exploring more creative approaches to settling their conflicts. The choice of litigation as the primary means for settling disputes is instinctive in American culture—a *cultural reflex*. As Baer, family lawyer and peacemaker, relates regarding this cultural reflex, it is rare that a friend or family member will suggest to a divorcing individual that they seek mental health coaching in response to the often overwhelming emotional onslaught of divorce—particularly the loss and grief occasioned by the *death of their marriage*.

> Instead, we encourage people going through such losses to handle their loss and grief in destructive ways by going to war with each other in … the family law court.

For most lawyers and their clients, finding an *alternative* to litigation only becomes operative as a fallback from litigation and is generally suggested only when the disputants have become financially and psychologically exhausted.

The word *alternative* immediately raises the question: alternative to what? The word implies that the golden bar for settling disputes is to kneejerk and default into the adversarial legal system first. And, then, usually for economic (the disputants have financially exhausted themselves in prolonged litigation) and strategic reasons (one or both of the disputants lawyers are seeking to discover damaging information about the other they might ordinarily have difficulty in obtaining otherwise), explore *alternatives* to litigation. The term *appropriate*, however, puts one in a headset of seeking the most efficacious, and least financially and psychologically expensive, litigant hurtful, and time-consuming approach to settling a dispute first, and only turning to a lawsuit when there is no other reasonable choice.

I believe it is time for the legal world to move away from litigation by default, which is often only a more civilized form of violent warfare, toward first exploring the many forms of consensual (that is, by agreement of the disputants and their advocates) peacemaking available—some of which we will briefly review next.

The term *Appropriate Dispute Resolution* implies a more conscious and spiritual approach to resolving conflict less violently. It is more compatible with the spiritual admonition to do no harm, which is regularly forsaken in the trial by combat or *le tournament* approach (*note* that the word *attorney* is derived from the French word for *at tournament/trial by combat*) of the Anglo-American legal system. One does not look for an alternative to legal violence and warfare. Instead, it is better to avoid the violent litigation minefield in the first place, if at all possible, by choosing a more appropriate way to settle conflicts with *ahimsa*, that is, in the least adversarial, nonviolent, less destructive way for disputants and their families—one that is cooperative and often spiritual in nature.

The spirit and philosophy of *ahimsa* should guide all of us—disputants, lawyers, mediators, and peacemakers—toward appropriate rather than alternative forms of dispute resolution. The divorce field is a profit driven enterprise and a multibillion dollar industry, which is all too often

motivated by aggression—just keep people in conflict and watch the billable hours soar.

Divorce, however, is a profoundly emotional human experience. In fact, most knowledgeable family lawyers, peacemakers, and psychologists will tell you that the divorce process is 90 percent emotional. In the author's opinion, the overwhelming experience for the vast majority of divorcing couples, especially if they have been married for over five years and have produced children of their marriage, is psychological and emotional.

The challenge for most people detaching from a marital relationship is to be able to peacefully process the *divorce emotional rollercoaster.* This rollercoaster consists of often extremes of up and down feelings of abandonment, worthlessness, rejection, anger, fear, sorrow, insecurity, and anxiety, which collide with the positive feelings of freedom from emotional bondage. One discovers that one *can* find happiness in new directions in one's life. And one *can* self-discover and experience long delayed self-realization and individuation.

Many decades ago, landmark psychological testing was done on over 5,000 medical patients to determine the relationship between stress and illness. The results of this testing by psychiatrists Homes and Rahe were recorded in a *Stress Assessment Scale* ranking 43 different life causing factors that produce stress and consequent medical illness. Ranked number 1 was the death of a spouse or child. Ranked numbers 2 and 3 were divorce and marital separation. The findings of Holmes and Rahe, first published in 1967—subsequently validated by mental health professionals—have gone largely unheeded in the often-violent legal world of divorce. Death of a marriage is still overwhelmingly treated as a declaration of war rather than a time for grieving, healing, and cooperative problem solving! (Holmes and Rahe 1967, 213–8)

The legal side of divorce is straightforward in its complexity and yet emotionally complicated. It consists of a framework of statutes, legal precedents, and established court procedures and practices, which gives it a seemingly one, two, three *done* mythology. Of course, many family lawyers have the skills and cunning to play the game of controlling and manipulating the emotional flow of their clients. Within this framework, their clients are led unconsciously or not through opaque and expensive

legal processes until a settlement is reached. The settlement often (and miraculously!) occurs just days prior to a looming trial and after tens of thousands of dollars have been needlessly expended. This often corrupted-by-money art form is extremely financially rewarding for many divorce lawyers as underwritten by litigants.

Yes, it is true that Hawaii and other state bar associations and court rules of ethics and procedure for divorce lawyers *prescribe* or suggest, yet do not require, that ADR modalities, chiefly *mediation*, be discussed with clients and their lawyers prior to filing a divorce lawsuit and before a case can move forward. However, this ethical prescription is mostly perfunctory and mechanical. It often only requires checking a box on a required court form in a pro forma manner after an uninformed and limp effort—perhaps one phone call or letter to opposing counsel regarding the possibility of utilizing mediation for their clients at *peacemaking*. What is overlooked, underutilized, or half-heartedly endorsed by most divorce lawyers is *peacemaking*.

The exception to this disregard for using ADR from the beginning of a case is when the mediation process is totally directed by the lawyers and only when the fees charged by the mediator and participating lawyers—often in excess of a combined $1,000 an hour in Hawaii—can be paid by wealthy and emotionally distraught clients. This approach to mediation is utilized primarily toward the end of a case, just prior to going to trial after large billings have been paid to lawyers primarily in preparation for trial.

In the author's estimation, for most high-end lawyers, the remuneration generated by the use of mediation just prior to trial—and after most of the emotional damage has been done to a family through the various stages of litigation leading up to the mediation—generates large fees for the lawyers, sometimes nearly commensurate with what they would earn had they gone to trial. Thus, even under limited circumstances when family law mediation is sought, the primary motivation is profit driven and not by a spiritual sense of *ahimsa—to do no harm.*

For the earlier reasons, in my mind and experience, the word *appropriate* in front of *dispute resolution* is more than a mere choice of wording. The word *appropriate* is a reflection of one's conscious commitment to peace in all forms. In the divorce quagmire, which is arguably the most

challenging of life's transitions, finding peace is more vital than in almost any other legal or life situation. The *Sanskrit* term and gesture from Yoga practice is appropriate here: *Namaste.* The *Namaste* gesture—hands and palms brought together at the heart—indicates that the soul-spirit, divine spark of life and humanity residing in oneself is acknowledged in another. This acknowledgment applies even with someone whom we are having a challenging disagreement, legal or otherwise. The gesture symbolizes our shared humanity. Peacemaking with *ahimsa* or doing no harm at its core should be our first and most *appropriate* response to conflicted divorce.

ADR History

It should be noted from the outset that the historical information contained in this section's narrative has been taken in large part from one of the family law practitioner's ADR sourcebooks, *The Alternative Dispute Resolution Practice Guide*, by Roth, Wulff, and Cooper, Chapter I (2004). I have augmented the information from the *Practice Guide* with my own experience, particularly with indigenous people, including mediation, arbitration, dispute review boards, and the hybrid, med/arb (or mediation and then arbitration) modalities.

ADR is an extremely old concept. Commercial arbitration agreements were in effect between Phoenician and Greek traders and among desert caravans during the time of Marco Polo. In the sixth century BC, the Greek city-state of Athens designated what today we would call arbitrators to settle trade disputes throughout the Athenian Empire.

In the United States, ADR predates the formation of our nation. For instance, arbitration panels were maintained in New York City as early as 1768, as well as in New Haven (1794) and Philadelphia (1801). These panels were seen as a grand advance over the practice of dueling as a means of settling business disputes!

An important ADR historical moment occurred in 1854 when the U.S. Supreme Court upheld in the case of *Burchell v. Marsh* the right of an arbitrator to issue binding decisions having the force of law. For over six decades after the *Burchell* decision, U.S. courts repeatedly upheld the right under our Constitution for parties to privately settle their civil disputes outside of a courtroom. These decades-long reaffirmations of the

arbitration process preceded by many years the establishment of the first official ADR organizations.

In 1922, ADR became officially institutionalized in the fabric of American legal culture when corporate leaders created the *Arbitration Society of America.* The *Society* was a principle political force in pressing for the passage of the *Federal Arbitration Act (FAA)* of 1925. The *Act* was instrumental in establishing the foundation upon which all modern business arbitration agreements are constructed. It did this by sanctioning the enforcement of arbitration clauses in all interstate contracts, which was a revolutionary step in that era.

Following the passage of the *FAA,* the standard for commercial arbitration in America in time unfolded to include:

- Standardized training and competency standards for arbitrators
- Absence of written opinions by arbitrators (unless agreed to in their arbitration contract and prior to the commencement of the arbitration process) by the parties
- Arbitrator immunity from legal liability regarding their arbitration awards.

In the 1930s and 1940s, the arbitration field continued to expand. The expansion included labor, international, insurance, and construction arbitration cases. As the number of court cases began to expand exponentially in the 1950s and 1960s, and the costs of arbitration skyrocketed, often approaching costs associated with litigation of the same issues, the field of mediation slowly evolved and was added to the pantheon of ADR choices.

Commencing in the 1970s to the present, there has been an incredible increase in ADR modality choices. In no particular order of importance, we will now briefly outline some of these processes in Chapter 2.

CHAPTER 2

ADR Processes

The following ADR processes are by no means definitive of the peacemaking field. However, they do offer the reader a wide view of the field and give an idea of the wide range of the approaches taken to settle all kinds of conflicts in America.

Contractual Arbitration

Contractual arbitration is the oldest form of arbitration in America. Parties to a contract agree as part of their written agreement to resort to third-party neutral arbitration if a dispute arises between them under the terms of their agreement they cannot resolve themselves. George Washington had an arbitration clause in his will. Abraham Lincoln acted as an arbitrator during his legal career in Illinois. The majority of states support arbitration if it is written into a legal agreement or subsequently agreed to by disputants. It is the most utilized and popular form of ADR processes.

An arbitration clause is common in most consumer contracts such as credit cards, installment contracts, and computer carrier agreements, as well as contracts between individuals, businesses, and corporations. They provide for judicial enforcement of future arbitration awards. Parties utilize arbitration as a trade-off. They trade the possibility of an appeal of a trial judge's or jury's decision of a dispute for the speed, general legal cost savings, and finality of a binding decision. Increasingly, consumer contracts containing arbitration clauses have come under increased judicial scrutiny. Consumer advocates argue that the arbitration clauses amount to *adhesion* contracts, which overly restrict the legal rights of consumers, particularly in regard to class action lawsuits. Such contracts deter consumers from being able to protect their rights since very few aggrieved

individuals can match the legal and financial resources of large, international corporations with whom they contract.

Most business lawyers today include an arbitration clause in contracts they are drafting. When parties to a legal agreement fully understand their respective legal rights and responsibilities under an arbitration clause, the clause can be instrumental in avoiding many of the pitfalls involved in the adversarial legal process.

Judicial Arbitration

Judicial arbitration is often called *court-annexed arbitration* and is an alternative to traditional litigation. It is not a true form of ADR like contractual arbitration. It is generally mandated by court rule or statute. It differs significantly from contractual arbitration.

- It is nonbinding unless the parties agree during or before the litigation to it (a *trial de novo* or new trial is always a possibility if one of the parties is dissatisfied with the arbitrator's decision).
- The party's come together accidentally with no prior contractual relationship requiring arbitration.
- The trial court's role is limited to compelling or enforcing the arbitration process since this form of ADR is voluntary.
- The rules of evidence are relaxed and discovery of information by the parties is more limited.
- There are often monetary caps on what can be recovered by a plaintiff in damages.

Mediation

Mediation, which is an assisted form of settlement negotiation, is the fastest growing ADR process. Unless written into a contract, parties to a dispute *voluntarily* retain the services of a neutral third-party mediator or *peacemaker* to resolve conflicted issues to their mutual satisfaction. Mediation involves the participants directly, although lawyers often participate at various stages of the mediation process. Where lawyers and not

participants initiate mediation, they tend, for better or worse, to dominate and control the mediation process. Almost by definition, mediation is a process of compromise in action. Participants must be ready to forego intractable positions and be willing to be flexible in negotiation. It is best used early on before positions harden in the adversarial process. However, where a court orders mediation, mediation tends to be at a much later stage of the litigation process. The process generally results in significant cost and time saving for participants. Importantly, it helps to preserve future personal, familial, and business relationships. It allows people to get on with their lives and economic interests without the angst, great expense, and often all-consuming nature of the adversarial process.

It should be noted that mediation, especially family law in general and child custody mediation in particular, has strong critics. Regarding family law mediation in general, some divorce lawyers, academicians, and women's empowerment groups have criticized the family law mediation process as tilted in favor of the participant with the greater verbal skills, aggressive and dominant behavior, and business world savvy and experience. In short, they claim the mediation negotiation process is unbalanced and favors men. They point to statistics that assert that a woman's standard of living falls by anywhere from 27 to 73 percent after a divorce and a man's rises 40 percent or more. It is uncertain whether these statistics stay relatively the same after mediated divorces (see https://www.google.com/search?q=mediation+and+decline+of+women%27s+income+post-divorce%3F&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=fflb).

Critics include:

1. Divorce lawyers
   - High fee divorce lawyers (who may see mediation as a threat to their lucrative practices) offer blistering critiques, especially for women using family law mediation.
   - They believe mediators are concerned with only one thing: getting an agreement between participants.
   - They contend that the mediator's sole purpose settlement agenda results in unduly pushing the person most likely to

settle marital differences, usually the wife, into unfavorable settlements.

- Further, they claim that mediators are not neutral and often gender biased, reflect current cultural norms toward joint custody of children even though this may not be in the best interest of the mom or children, and many times are inadequately trained to educate the participants on their respective rights and possibilities or to draft dissolution agreements.
- They state that if there are large financial settlement issues, women usually lose out in mediation negotiation.

2. Another criticism of family mediation is the role increasingly played by retired judges and trial lawyers. *Adler* points out that:

   In the United States, (we) … have many judges and retiring senior lawyers who are taking up the practice of mediation, who feel they are intrinsically qualified, who have little idea as to what they don't know, and who seem to find little value in in-depth training.

   These individuals come from the *trial settlement hearing school* of *hard knocks*. That is, their experience as trial advocates and judges dictates that they do all the talking and that the mediation participants are mere spectators and observers whose *heads* need to be *knocked* together for settlement to be reached. As *Adler* indicates, this head-knocking approach to family law mediation has potentially driven a stake into the historical promise of mediation. It removes the emotional, relational, spiritual, or transformative possibilities of family mediation from a process that is overtly aggressive and money oriented (Adler 2013, 4–6).
3. Critics also disapprove of mediation negotiation involving child custody and support. In an article published in the *Atlantic Journal of Communication*, in 2006, a Women's Studies professor, *Lynn Comerford*, stated that subjective mediator bias in private and unregulated mediation sessions toward joint custody of children creates *unequal custodial parenting* that is too often detrimental to a woman's interests (Comerford 2006).

> Unlike the adversarial process in open family court … mediators in private mediation sessions quash resistance, and, talk that does not count as serious in terms of the discourse of mediation is spoken into a void.

In summary, mediation critics believe that the mediation process is gender tilted against women. They believe there is undue mediator focus on getting agreements at all costs, mediators are not neutral, and mediators—including retired senior lawyers and judges—enforce their will and knowledge on participants through their nonscrutinized knowledge and control of the mediation process. Critics also see mediators as inadequately trained. And, they argue that the mediation practice does not alleviate inequality between the sexes as initially touted.

None of the preceding criticisms are new. With the exception of the critique of some retired lawyers and judges, they have little or no validity in the 21st century mediation field. Most professional and practicing mediators have had their consciousness raised regarding women's issues as they affect the peacemaking process. Mediators also tend to be better trained and know the limitations of their expertise and experience. No one, including peacemakers, is *neutral*. Yet, and most importantly, they *can* be *impartial*. In particular, the criticism by *Lynn Comerford* mentioned earlier was based on her study of the *facilitative* mediation model, which as we will discuss later on in this book is generally a more limited form of mediation favored by less experienced mediators and generally involving less complex cases.

Comerford also fails to account for the fact that litigation fails miserably to address the emotional impact of divorce. An experienced mediator—who can monitor the emotional suffering in a marital dissolution and suggest mental health coaching to address it—better serves most divorcing couples and their families than the legal machinations of a zealous advocate. As family court *Judge Michele Lowrance* states in her book, *The Good Karma Divorce*:

> The court system was not built to house these emotions, and attorneys are not trained to reduce this kind of suffering … and (divorcing spouses) often end up feeling like members of a powerless, unprotected class (As quoted in Baer 2012).

Comerford's concerns should not be dismissed. And, yet, her criticisms are dwarfed by the divorcing couple's *empowerment* to resolve their own divorce issues as well as set the stage for a more amicable future relationship. *Donald Saposnek*, clinical child psychologist and child custody mediator, in *The Psychology of Divorce* section in The Mediation Alternative, states that mediation allows divorcing couples to maintain control over their lives. Further, the respect often generated by a mediating couple's cooperative mode of negotiating can carry into their post-divorce relationship, particularly if that relationship entails the sharing of living time with their children. As he states:

> The benefits to any children of the marriage when their parents choose this type of conflict resolution process can only be seen as a positive … event … (Saposnek and Rose 2004)

As we will see in the following, the evaluative, collaborative, and multidisciplinary mediation models discussed later on in this chapter and book have eclipsed *Comerford's* concerns. There are different methods of mediation employed by mediators. These methods range from facilitative to multidisciplinary. We will have more to say about these methodologies and mediation in general in our section on Family Law Mediation.

Dispute Review Boards

Dispute Review Boards (DRBs) are generally used in the building construction field, although they can have wider commercial applicability. A DRB is a panel consisting of each disputant's (generally nonlegal) representative. The panel is chaired by an agreed upon neutral. The panel is charged with dealing with issues that arise during the life of the project. The DRB is formed prior to the commencement of a project pursuant to an agreed upon contract between the parties. The DRB keeps the participants focused on the preagreed goals of the undertaking. It is a problem solving process akin to mediation in its informality and expected flexibility of the parties in making necessary compromises in order to accomplish their endeavor. The DRB is very pragmatic. It confronts issues in the present moment as they arise or can be foreseen. It helps to facilitate

a dialog and understanding between members. It is a forum for communicating issues and concerns raised by participants, while probing their underlying interests. It is a conflict pressure valve that prevents disagreements from escalating into litigation, saving time and money. It allows the mutual business endeavor to continue while problems are addressed in a nonconflicted environment.

Mediation/Arbitration

Mediation/arbitration (med/arb) combines the advantages of both mediation and arbitration in one process, with mediation preceding arbitration. By prior written agreement, participants agree to use one neutral as a mediator, and, then, failing resolution through mediation, they allow the same neutral to decide all remaining issues. Depending upon the participants' desires, the mediator turned arbitrator's decision on outstanding issues can be advisory or final. Med/arb can be a great time and money saving device for participants. The arbitrator making a decision in their case has intimate knowledge of the facts of the dispute gained from his or her role as mediator during the mediation phase of the process. This saves the time and financial expense of having to bring in a new arbitrator to hear the case and be brought up to factual and legal speed. The mediator/arbiter's familiarity with the case, and the law and industrywide practices involved in deciding outstanding issues, can lead to an immediate decision on behalf of disputants. The speed, efficiency, and much lesser expense of this process also support one of mediation's primary goals, which is to help preserve long-term relations between participants. It is often used in business, family law, and employment disputes. It is a litigation preventative process. It can be built into any business or familial relationship that seeks to avoid courtroom disputes and provide finality in addressing disagreements.

Partnering

Partnering is used primarily in the construction industry, yet it has a wide application to other fields as well. The business assumption behind the concept of partnering is that people connected by their

interests—constructing a skyscraper, making a major movie, jointly developing a new electronic industry, and sharing the profits thereby—can be expected to act reasonably together and resolve their differences as they arise in the moment and not at the conclusion of the project undertaken. You can see this assumption played out in Japanese culture. In Japan, getting along and cooperating in any undertaking has high societal status and resort to a court to resolve problems are deemed shameful.

In America, partnered ventures bring together representatives of the major players in a business or corporate undertaking in an informal retreat setting away from the workplace. In this setting, mutually defined goals and objectives are defined by all coventurers. More importantly for our purposes, a process for dispute resolution is settled upon. If triggered by a future dispute, this process initially involves officers at the lowest levels of the corporate or business hierarchy. It is also usually agreed upon that if a dispute or problem remains unresolved at the lower levels, it will be brought to the highest levels of the organizations involved for resolution. Partnering reflects a high degree of conflict avoidance consciousness. It reflects a culture of advanced business practice. This practice recognizes the presence of conflict in human interaction while seeking a collaborative approach to problem solving.

Private Judging

Private judging or *rent a judge* is done with court approval and agreement of the parties. Usually, a court-appointed private judge is a retired judge or experienced legal practitioner who is given court permission to take evidence and report back to the court. A private judge may also be invested with authority to render a judgment subject to the appointing judge's review and approval. Sometimes, a court will appoint a referee or special master to gather evidence and control the flow of a lawsuit in complex cases, that is, involving highly technical Internet or patent infringement cases. The court-appointed referees or masters generally have in-depth subject matter knowledge into the evidence and industry that is the focus of the lawsuit. The use of a private judge is as formal as proceedings in a trial court regarding the rules of evidence, discovery, and lawyer behavior. It is a very expensive process used mostly by large

corporations and very wealthy individuals seeking more privacy and a speedier court process. Decisions rendered at the trial court level are subject to appellate or higher court review. Therefore, there is no certainty, as in other ADR processes such as arbitration, of a final decision on the validity of legal claims in a case at the trial court level.

Collaborative Law

The collaborative law ADR model is more of an interdisciplinary approach to settling lawsuits or potential lawsuits in a less adversarial, more cooperative manner. It is a fairly new legal pattern worthy of deeper exploration and analysis since lawyers and parties agree through a formal written contract to settle their conflict without resort to or threat of litigation. If either party seeks court intervention, their lawyers must withdraw from further representation in the case. It has been mostly used in the divorce field, yet it has applicability to all areas of legal practice.

As the name implies, for the collaborative law process to succeed, lawyers (and their respective clients) must be reasonable on every issue, cooperatively exchange information, and, most importantly, negotiate in good faith. As you can imagine, these principles of reasonability, cooperation, and good faith—given the adversarial training and inclinations of most lawyers and clients—can be a formidable bar for derailing the collaborative law process. Remember, lawyers are trained to act *zealously* on behalf of clients. This ingrained law school and professional training is an instinct that most conventionally trained lawyers will find difficult to overcome regardless of a stated collaborative intent.

The best collaborative lawyers have had both specialized training and experience in the collaborative process and as mediators. It helps if, in their prior lives as adversarial lawyers, they tended to negotiate more than litigate successful settlements. It particularly helps if they have become burned out on the destructive nature of the divorce litigation process for their clients and the personal price they have paid for participating in a generally spiritually bereft court process. Experience shows that if former divorce trial lawyers lack the attributes and commitments immediately afore-described, then lawyers—whose personalities, instincts, experience, and reflexes tend to be adversarial in nature and practice—will

consciously or unconsciously sabotage the collaborative process! This is especially problematic regarding lawyers seeking to break into the collaborative divorce field because it represents a relatively new and potentially lucrative marketplace, *and* it includes lawyers who lack the self-awareness to realize that their lawyering skills alone are not enough to insure competency in the field, and that further training and a cooperative approach to family problem solving is a collaborative law prerequisite.

The collaborative divorce process utilizes a team approach. The interdisciplinary collaborative team for each party consists of their coaches (family oriented psychologists and social workers), a child psychologist (if child custody is at all an issue), financial planner (used to help resolve division of marital property and alimony issues), and other specialists who may be needed and agreed upon, depending on issues and needs (business and home appraisers, realtors, retirement specialists, mediators, arbitrators, foreign language translators), by the parties and their lawyers. The lawyers are the key team members and usually coordinate use of all of these experts (Baer 2012).

Some difficulties can arise with the collaborative team. It can be extremely expensive for parties to pay for all of these experts, especially if each party has his or her own team, thus limiting the applicability of the collaborative law model only to the wealthy Even though many lawyers estimate the total cost of a collaborative divorce to be one-half to two-thirds the expense for a litigated divorce (Baer 2012), a collaborative divorce can still cost tens of thousands of dollars and is beyond the financial reach of most divorcing couples.

Lawyers, by training and disposition, are not necessarily the best team players. Unless properly trained in the collaborative law process, most lawyers will have difficulty detaching themselves from the financial lure and pitfalls of the adversarial process—the adversarial legal process being one that is based all too often on ego, power, control, and money. Until family lawyers through applied will and careful training have successfully reconstituted themselves in the new collaborative model of team member and cooperative partner with his or her counterpart case lawyer, the collaborative model will suffer and be limited to a small number of cases. A collaborative lawyer must seek the highest good for his or her clients and their respective family. The collaborative model can be set adrift into

an expensive, time-consuming, and frustrating experience for all participants if the lawyers involved are unable or willing to ascribe to the highest good for those they represent. Hopefully, as the collaborative model evolves and new generations of lawyers emerge, the inherent difficulties described can be overcome. There is at least one other less known ADR model that addresses some of these difficulties called *Educated Divorce (ED)*, which we will explore later in this chapter.

The ideal collaborative process consists of four-person (and possibly other team members), face-to-face negotiation meetings with parties and their lawyers. A process for handling the divorce is agreed upon at the outset. No litigation is allowed, including motions for predegree relief or formal discovery requests. And a divorce agreement is negotiated and fashioned by the lawyers. All information needed by either party is freely available and exchanged. Nonlawyer team members are integrated into the process and have access to the parties by the lawyers who remain in control of all proceedings. The mental health and financial professionals act as invaluable advisors and aids to the lawyers and parties. They help the entire team, which includes the divorcing couple, to stay focused on their needs and interests and not be distracted and sidetracked by emotional issues, which can especially be toxic for children.

The advantages to the collaborative process include that it is faster and more economical for complex and monetarily high-end divorces. When *litigated* in Hawai'i, these types of cases can take up to two years or more to resolve and often can cost the litigants $100,000 or more, just at the trial court level! By contrast, a *collaborative case* can take half to two-thirds the time and money.

In order to improve the personal relationship between soon to be former spouses, each participant is coached by his or her own mental health professional. This process can greatly reduce divorce-elicited emotions. Thus, the postdivorce, coparenting, and personal relationship between former spouses are also greatly enhanced. By conducting themselves with greater mutual respect and cooperation than in adversarial divorce cases, former spouses shorten the healing and recovery time from their divorce. They are better able to get on with their lives.

The lawyer's role is much more positive and spiritually uplifting for their clients (and they) in the positive feedback loop created through the

collaborative process. The lawyers have an opportunity to *midwife* their clients through the divorce transition by modeling decent, respectful, and cooperative behavior between them. In the collaborative process, the lawyers can help the couple avoid the brutal destruction of a family through opting out of the adversarial divorce process. Lawyers can meaningfully and soulfully assist their clients and their children through the challenges inherent in a major life change such as divorce.

Despite some of the limitations inherent in the current collaborative ADR model, the option it represents, when appropriate to the facts and circumstances of a particular divorce case, has been an evolutionary sea change in the family law arena. The collaborative law model is best utilized, assuming clients can afford it, in the murky realm of divorce cases that fall between mediation and litigation.

When a divorcing couple is in agreement that they want to avoid the adversarial system at all costs—usually based on their respective prior divorce experience, and for a variety of reasons mediation is not a tenable option—such as disparate negotiation skills, male and female power and dominance issues, unequal financial resources to afford a highly skilled and experienced litigator, domestic violence (usually of a psychological nature), and crippling fears from the past or anxiety about the future and other unprocessed emotions that can interfere with divorce negotiations—then the collaborative approach can be a good divorce process model.

Those of us in the peacemaking field look forward to the day when public nonprofit agencies *and* the courts will provide the trained interteam model approach inherent in the collaborative ADR model for appropriate divorce cases. Until such time, a model such as ED, which is discussed in the following section, offers a more sophisticated, helpful approach for appropriate divorcing couples.

Educated Divorce

The following summary is almost wholly taken from my *Mediation Center—Windward Oahu Educated Divorce*—website. This particular website deals with out-of-Hawai'i mediation participants and can be found at http://edihi.com/. It is an ADR approach that builds upon the

collaborative law model. It also addresses some of the collaborative model's weaknesses. More in-depth information about ED can be obtained by referring to the tabs provided in the edihi.com website.

Your Family Deserves More

With a 40 to 50 percent plus divorce rate in America, divorce, like death and taxes, is a modern day fact of life. Divorce and separation from a loved one is arguably the most difficult of life transitions. Divorce and separation are often minefields of negativity, adversely impacting the emotional, physical, financial, and spiritual well-being of individuals and families.

The legal, social, health, and financial communities charged with assisting couples and families with divorce and separation do not offer viable solutions to the challenges faced by families and individuals dissolving marital or partnership relationships. This lack of a whole or integrated approach to helping individuals and families survive the trauma of relational dissolution leaves our society with a divorce industry that addresses only parts of this transformative process—primarily the legal and financial sides. It leaves unresolved issues for families wounded by the emotional trauma and financial devastation of litigation and conflict that include future coparenting, financial planning, and resolution of postdivorce disputes.

The following information is a summary of the EDI Program Curriculum in chronological order, with approximate times. It is designed to offer an alternative to the current adversarial divorce model. Our *required curriculum* is spread out over a minimum 21 to 30 day period. This period is a time away from your everyday distractions, commitments, and stress. It allows you the opportunity to focus on healing the hurt and emotional trauma generated by one of life's most challenging events: the personal and family transition fostered by the ending of your primary relationship.

This opportunity better prepares you to make the practical decisions regarding children, postmarital support, and finances. The process also leads to a less contentious, more cost-effective,

> less time consuming legal separation or divorce. In becoming a student of your own dissolution and applying this knowledge of one's own relational transition, you create the possibility for personal transformation. This transformation generates new insights into future relationships with significant others (and, most importantly, yourself). It also aids you in becoming the best postrelationship coparent possible. Your full participation in our curriculum has the potential for creating within yourself and your family members what psychologists call resilience, which is the positive capacity of people to cope with stress and bounce back after difficult events or circumstances.

There are some distinct differences between the ED and collaborative law ADR models. In the ED model, there is only one team of professional and expert assistance. The initial and recommended ED team consists of mental health coaches, a child custody professional, financial planner, and health and well-being coach. The team is participant neutral and dedicated to the peacemaking process. Its job is to provide counsel, support, expert advice, and experience to the divorcing couple through their divorce transition.

A health and well-being coach helps the couple be mindful of the first thing often sacrificed during a divorce: their health. Hatha Yoga (which includes *asana* or physical postures and *pranayama* or deep breathing/energy exercises) and meditation are high on the coach's list of recommended health and well-being activities. These activities help to release tension and stress, focus the mind, and open the heart. They can be invaluable tools for centering and psychologically preparing participants for mediation negotiations.

The financial planner, who has specialized training in assisting divorcing couples, helps to organize the family's finances in a way that brings clarity to the issues of marital property division and postmarital support. Additionally, the planner assists the family (and *not* either participant alone) in relieving anxiety about how—as former spouses—they will financially survive. Divorce is generally a financial disaster for a family, particularly women, whose postdivorce financial status notoriously drops—in my experience—from 40 to 70 percent or more. Such

issues as determining child support, the necessity and amount of alimony, paying for present and future education of children, the need for timing and appropriate division regarding the sale of the marital home and other jointly held assets, what the financial projections are for each spouse's retirement, and tax implications arising from divorce are all addressed. In the adversarial divorce model, each of these issues is often loaded with factual distortion by each side's experts and lawyers and further complicated by the volatile emotions generated by the divorce. By educating each of the spouses, a financial planner can bring greater nonemotional understanding and less conflict to these monetary minefield issues.

In the ED model, the child specialist, who is usually a child psychologist, is charged with monitoring the mental well-being of the child or children during the divorce process. Where the care and custody of the children is or may be of issue, the child specialist can also be an advocate for the children. Divorce being a rather self-interested preoccupation with many divorcing spouses, the interests of the children can be lost in an emotional storm.

The child specialist can be a professional friend and the confidant to the children. This professional friendship role gives the children a productive outlet to express their concerns, fears, sometimes ideas, and anxieties through their counselor directly into the mediation process. The specialist can put into adult verbiage what the children are experiencing and be able to offer suggestions for alleviating the children's concerns. The specialist can also address a parent's angst about such topics as the introduction of a child to the other parent's significant others, or a parent and children moving to another state (which, besides child custody, is often a huge emotional issue for coparents).

The role of the child specialist is crucial. It supports the heart of the ED approach: Focus first and foremost on the children; the rest of divorce is legal formulas and good faith negotiations as conducted by the peacemakers. It places parental focus where it should be: on children. As Jack Cornfield, Western Buddhist teacher and writer, has stated: *Our children are our meditation.*

The mediators, who are also trained and experienced family lawyers, coordinate the ED process. Coordination by peacemakers removes

or greatly lessens the possibilities of runaway lawyer egos undercutting the ED process, which can often arise in the collaborative approach. The comediators are male and female. This gender balanced mediator approach helps to balance the male and female energy present in every divorce, while deepening the understanding of gender-based perspectives.

An *example* of a male perspective often held is:

> Why should I pay child support or alimony when it will only support my ex-wife's new boyfriend? Or from a female perspective: That postmarital support at the greatest amount possible should be paid by a cheating husband even if it will make it impossible for an ex-husband to financially survive and take care of the children when they have living time with him.

Gender-balanced mediators can help better inform participants that such views are actually destructive of their own as well as their children's present and future interests. In the collaborative law model, there is no guarantee that lawyers will be male-female, and they are generally not professional peacemakers.

ED also helps to substantially reduce the time, energy, and costs involved in the divorce process. Most ED divorces take less than six months from start to the obtaining of a divorce decree. Costs range from $3,500 to $25,000, all services included, depending on the complexity of a case and emotional state of the participants, that is, the principle questions almost always being: have the participants engaged in mental health counseling prior to commencing the ED process, or has enough time and physical separation occurred to help heal the emotional hurts? Mediator fees for in-state ED cases are based on a sliding fee scale ranging from $75 to $225 an hour in order to contain runaway divorce expenses. Ideally, two comediators, male and female, conduct mediation sessions or handle the case flow and paperwork or both. The expense for mental health counseling for a family is generally covered by medical insurance. The spouses pay for all other needed and participant-approved services independently.

The most profound difference between the ED model and other ADR modalities is the ability in most instances to holistically take a family through the divorce experience in a mindful, conscious, soulful

manner. ED seeks to provide a reasoned and compassionate model for divorce.

ED is a model that sees divorce as a difficult yet *transformative moment* in one's life. It moves away from the shibboleth that divorce is always a great tragedy and destructive of a family. Instead, it aims to promote the idea that if a divorce is handled in an intelligent, reasoned, and compassionate manner, one's life and ability to be productive and happy will over time continue.

Through education on the two main issues in every divorce—children and money—it allows a divorcing family to have hope for the future. It provides a basis for believing that a couple or family or both will reconstitute itself in a new, possibly improved blended family of relationships based on blood and affinity.

The ED process is not for everyone. This is both its greatest strength and weakness. It requires an elevated level of maturity, consciousness, and compassion on the part of participants and peacemakers. Participants must have a degree of understanding about human nature that without a certain level of trust in each other and the peacemaking process, they are a part of, and primarily responsible for, unnecessary conflict within and between them will be the end result. For every 10 cases presented for the ED process, more than half will be rejected, mostly for unprocessed emotions on the part of perspective participants.

Careful screening of ED cases is a must, and peacemakers must be very centered and mature enough to know when they can and when they cannot be helpful to potential participants. However, for participants who seek the least violent way to divorce and have consciously evolved to a spiritual level that sees in the other the reflection of self, then the ED program can be a tool for individuation and self-realization.

ED as a concept assists a whole *family* through the treacherous shoals of divorce. Hopefully, the progeny it will spawn in the future—when courts, public and nonprofit agencies, and organizations offer similar and improved services—will prove to be the better, nonviolent way for dissolving a marital relationship and improving the divorce process in America. ED is an imperfect yet meaningful approach to manifesting *ahimsa* for divorcing families. Hopefully, future generations of peacemakers will build upon this model in assisting families through the challenging transformation that divorce represents.

Narrative Mediation

Narrative mediation is a relatively new approach to resolving conflict in the mediation field. It arises from the field of psychology. It is a mode of therapeutic assistance used by therapists and is generally referred to as systemic *family therapy*.

A narrative approach to mediation assumes that mediation participants are the experts on their own lives. Therefore, the role of the mediator is to assist the participants in finding a joint and new narrative or life story. Thus, a new collaborative story emerges from mediation that helps transform their dispute from being one of victimization to survivor. Here, we are speaking about changing the internal dialog of perceiving things as we are and not as they actually are. This internal human mode of perception causes an emotional reaction in our brain that, in turn, triggers conflict with another.

The primary tools utilized by the mediator are intense and active listening—that is, listening in a very deep and mindful manner to the participants' stories of how, why, and when they were harmed or victimized by the other participant. Of particular importance to the peacemaker is listening to the metaphors that participants use in telling their narrative stories and then helping each participant move to a new narrative story metaphor without seeing themselves as helpless victims.

For instance, a participant might use metaphors such as "I feel like I am being tortured by my husband or wife regarding my children's needs" or "Throughout our relationship, you have made me feel sexually unattractive." A narrative mediator upon hearing such metaphors might help a participant, probably in a private caucus, reframe their personal metaphors in the previous examples to "I will not allow anyone to torture me in the future regarding what I believe to be my children's needs" and "I am solely responsible for how I feel about my own sexual attractiveness to others." Thus, by helping participants to change the metaphors in their personal narratives, the role of the peacemaker becomes more therapeutic than merely assisting in negotiations between participants.

The other favored tool is *respectful inquiry,* with the mediator asking a series of probing questions—almost in Socratic fashion—in a curious manner and, certainly, without the intensity of the interrogating lawyer

or expert mediator. For instance, in the torture example arising over children's needs, the peacemaker might inquire as to: How a participant has dealt with the torture issue in the past? Who, if anyone, has helped you with this issue previously? Can you rely on these same individuals to help you postdivorce?

The mindful listening skills of the peacemaker, as well as the respectfully probative nature of the questions asked by the peacemaker, are aimed at assisting a disputant from a sense of powerlessness in their dispute to feeling empowered to overcome the hardship in their life drama or dispute with another. As mediator Barbara McCulloch puts it: *going from victim to hero.*

Narrative mediation emphasizes more of the therapeutic skills of the psychologist or mental health coach than do other forms of mediation. It is a form of mediation that can be described as a facilitative and transformative model. Narrative mediation opens the door to nonlawyer peacemakers who have an interest and training in psychology and social work. It also allows indigenous people—with their cultural history of narrative storytelling abilities and skills—a more comfortable place at the peacemaking round table (McCulloch 2015, Ch. 16).

Other Modes of ADR

A. *Mini-trials* involve senior executives in a *business-like* resolution of a dispute. Lawyers make truncated presentations of issues, witnesses, and evidences to a panel of executives not directly involved in the dispute for resolution. The panel can be aided by a neutral or mediator. It is a voluntary and nonbinding ADR model. It is dependent on the decision-making authority of the executives on the panel. In a variant of this approach, the author has used neutral lawyers to describe to participants their litigation experience, costs, and outcomes in similar conflicts that have gone to trial. This form of litigation reality check has the merit of pushing parties toward a negotiated settlement of their differences.

B. *Shadow mediation* entails having, by agreement of the parties, a separate mediator shadow or monitor the arbitration side of the med/arb process. This ADR model allows participants to opt into

a mediation mode from an arbitration proceeding at any time to mediate a particular issue or issues. This option is only used in very complex, multiparty conflicts due to its great expense.

C. *Internet mediation* through video-conferencing mediums like Skype is growing in popularity as computer technology becomes more dominant in our society. There are pioneering Internet projects already in place, which train mediators from all over the world and provide business and other forms of mediation online. In Hawai'i, ADR innovator Giuseppe Leone has a mediation business called *Mediation Plus,* which provides disputants with online, face-to-face business-oriented mediation services with a professional mediator in real time.

He has also experimented with a program called *Virtual Mediation Lab.* The Lab has done over a hundred mediation simulations with volunteer mediators and disputants from around the globe. All of the simulations are done in real time with the mediator being able to practice and test his or her mediation skills. The mediator in training receives valuable feedback from the volunteer disputants and Leone. Another innovating project by Leone is called *Mobile Mediation.* It allows conflicted mediation participants to use new technology such as iPods, iPhones, and Android devices in all manner of conflict situations. In an interactive manner, where mediator and disputants can see each other and the subject of the dispute, mobile mediation will allow for a much wider range of cases and at a lesser expense. It also will open the mediation profession to new sources of employment. As Leone states: "An online mediator can select niche markets and offer services for that market" (Leone 2013).

Video conferencing can connect people all over the world in real time and face-to-face. You can have a mediator in the UK providing mediation services to disputants in Hong Kong and Singapore. The savings in time, travel, and carbon footprint are substantial. One supposes a mediator can charge for services by the minute and get paid instantly through *PayPal* or other secure financial medium. Not being able to speak a common language can be a distinct video-conferencing limitation. However, English is an increasingly global language and computer technology is close to having instantaneous

translation of multiple languages, so these initial video-conferencing limitations can be overcome.

Internet ADR is definitely part of our global peacemaking future. It will bring people in dispute from varied geographical locations together to resolve the conflict, while spawning new ADR models and international personal and business relationships. Peacemakers around the world will become as ubiquitous as Yoga teachers.

D. *Technology enhanced dispute resolution (TeDR*) is a new trademarked name for a process developed by the *Rezoud Corporation.* Its developers claim that it is a dispute resolution process that offers disputants a full menu of online and in-person resources for resolving conflict. TeDR brings together a wide variety of peacemakers—lawyers, mediators, facilitators, arbitrators, and other professionals such as financial planners, and counseling or therapy practitioners. Modern Internet technology is then utilized to bring together these professional resources with disputants anywhere in the world. TeDR *appears* to be a technological enhancement of the collaborative, multidisciplinary, ED models for dispute resolution. Its progress in the dispute resolution world will be interesting to observe over time (Rezoud.com).

E. Other *ADR modalities.* There are many other forms of ADR, which include *Co-med-arb, Concilio-Arbitration, and Med-Recommendations.* All of these approaches seek to lower the cost and time involved in settling disputes and avoiding litigation. As ADR becomes ever more firmly entrenched in the legal galaxy, we will see further ADR models emerging.

These models will be handcrafted to the needs of the parties and subject matter of the instant dispute. More and more litigation will be limited and found appropriate only in the most intractable cases. Cases involving parties with deep emotional ties to the issues in dispute or where principles of law and constitutionality are at play will remain in the litigation orbit. More cases will be diverted from the legal system as future generations of lawyers and nonlawyers are trained in the art and discipline of peacemaking. More future lawyers will learn what Gandhi *came* to understand that the true practice of law is to be practiced outside of the

courtroom. In his cooperative approach to resolving his clients' disputes, he found great joy in his legal practice and developed an optimistic view of humanity. As he stated so long ago:

> I realized that the true function of a lawyer was to unite parties driven asunder … (T)he twenty years of my practice (in South Africa) was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul. (Gandhi 1962, 37)

The list of ADR services is quite expansive, as even the preceding cursory review reveals. In the future, ADR modalities will only be limited by our imagination for creating peacemaking in ever more specialized niche markets. To a large extent, market demands for more peaceful, less expensive, and time-consuming processes for resolving all manner of disputes will become the norm. Conflicted disputants will be able to search the Internet for an ADR process handcrafted for their specific peacemaking needs. ADR processes will not be restricted to a single modality. They will incorporate multiple ADR modalities and interdisciplinary teams. I believe, in time, this will be a normal part of our cultural reality as peacemaking becomes accepted and mainstream.

Let's look at a potential hypothetical example of how a tragedy could be handled within a less violent context. As a hypothetical example, take an automobile personal injury fact pattern in which driver negligence based on alcohol impairment is alleged to have killed a teenage girl. Participants to such a conflict will have a wide spectrum of ADR tools to choose from to settle their conflict.

The driver and the girl's family could utilize any number of ADR processes previously listed solely or in combination for determining culpability, appropriate damages, and for healing the emotional trauma suffered. Interdisciplinary teams chosen from a menu of ADR services and composed of insurance and actual specialists, PTSD mental health practitioners, medical experts, lawyers, arbitrators, mediators, conciliators, private judges, traffic engineers, financial planners, health and well-being coaches, and others as needed and chosen by participants would be available for coordinated assistance.

The Beatles long ago popularized the mantra "Give peace a chance." By handcrafting ADR processes and implementing them in our culture as the *appropriate* 21st century way to minimize conflict and avoid legal warfare, we are giving *ahimsa—do no harm*—and *peace a chance* to flourish and help to create a more peaceful society. See: Roth, Wulff, and Cooper, Chapter 1, Part II to augment the information in this chapter.

CHAPTER 3

Appropriateness of Process in Mediation

In this chapter and those that follow, our focus will be primarily on one ADR modality: *mediation*. The *appropriateness of process in mediation* cannot be overstated. It is most important to those seeking mediation as a means of minimizing conflict and avoiding the adversarial process in the family law context. In ADR circles, it is often said that if a peacemaker can handle the heat generated in the emotional furnace of the marriage dissolution process, he or she is a good candidate for successfully mediating all types of disputes, from labor and business to international relations conflicts.

When choosing a style or approach to mediation, lawyers, peacemakers, and mediation participants need to understand the appropriateness *and* the differences in the procedures and potential outcomes of that style or approach. Experience often indicates that if those in real or potential conflict, particularly in family law matters, can find a mediation approach that best fits their needs and objectives, they greatly increase the likelihood of peacefully resolving their conflict. On the other hand, lack of knowledge or concern for the differing types of mediation by lawyers, peacemakers, and participants can lead to unsuccessful outcomes and even sabotage of the family mediation process. This experience will become clearer as we delve more deeply into this subject.

A review of differing *mediation styles*, especially as they apply to family mediation, *reveals* the following:

Facilitative

A facilitative style of mediating generally involves one or two male and female mediators, mostly nonlawyers often lacking in experience, yet

helpful to participants through their enthusiasm and commitment to peacemaking. It is often conducted through public or voluntary mediation services such as *The Mediation Center of the Pacific*, Honolulu. In the family law arena, it is most effective with short-term marriages, where child custody and support is the primary issue and the division of marital property is simple—that is, no real property, complex business, alimony, debt, and tax issues, and especially cases having a low emotional charge.

The term *facilitation* comes to us from Latin through the modern Italian language. The root in Italian is *facile* or easy with the verb *facilitare* meaning to make easy. For our purposes, a mediator utilizing a facilitative style sees his or her role managing and directing the flow of the negotiation conversation being pursued by participants. The facilitative mediator seeks to insure that participants are heard and their respective issues addressed. And that husband and wife engage to the greatest extent possible in an *easy* dialog and not a shouting match.

The facilitative model assumes at its core that participants are the experts regarding their own conflict and have the intelligence if guided by the mediators to resolve and frame solutions to their differences on their own without interference from third parties, neutral or otherwise. This assumption is a very optimistic view of humanity. Scientific studies have shown that when human beings are under highly stressful situations—with divorce ranking number 2 as a life stressor for adults—IQ and EQ (emotional intelligence) levels can decrease by over 20 percent (Thompson 2007). Thompson studied the effects of high stress levels on corporate leaders, which have implications for divorce participants. He found that overstressed leaders develop a substantial lowering of both IQ and EQ, which causes inappropriate leadership decisions and behaviors. These poor choices and behaviors include the inability to listen, and emotion-driven, angry, and fear-determined decisions and actions.

The *deleterious behaviors* cited previously are strikingly similar to behaviors exhibited by divorcing spouses in emotionally charged marital dissolutions. Most strictly facilitative divorce peacemakers are ill equipped or lack the supportive mediation tools such as mental health coaches to deal effectively with these challenging conducts.

Unless cases are carefully screened for suitability—which very few public mediation services have the time and resources to do—the

opportunities for successful mediations become limited under the facilitative model, especially if conciliation and long-term blended family harmony are peacemaking goals.

More pointed, facilitative mediators lack subject matter experience and expertise. They generally refrain from offering opinions or evaluations regarding mediation issues. They are reluctant to do so because they are concerned that in doing so they would jeopardize the participants' perception of their impartiality and take away from participant self-determination to resolve their differences on their own. Also, if the issues they are being asked to comment on are of a legalistic nature—and most divorce issues have a legal component—and they are not divorce lawyers, they lack the necessary expertise and are constrained by professional barriers as nonlawyers in offering legal opinions and evaluations.

Despite the preceding limitations, facilitative mediators perform a vital function. Like all peacemakers, they hold the ground of the mediation process sacred. They facilitate an often very difficult conversation between disputants in divorce cases, which could very easily spill into the courts and the ever potentially damaging adversarial process. For this role alone, *facilitative peacemakers* need to be recognized and applauded (Roth, Wulff, and Cooper 2004, Ch. 23, Pt. II).

Evaluative Mediation

In *evaluative mediation*, at the outset of the peacemaking process, the mediator—based on his or her expertise and training—will provide at least minimal direction in assisting participants to settle. This assumption supposes that such direction will be of a neutral nature. Here, participants are depending to varying degrees on the subject matter expertise of the neutral—in our family law context, the divorce law and practice experience of the mediator-lawyer—regarding family law or the counseling wisdom of the mental health professional mediator. The evaluative peacemaking professionals are being retained to make predictions of future events, whether these scenarios play out in court or intrafamily relationships.

For instance, when a participant's intransigent and mistaken viewpoint of his or her legal rights and responsibilities can be clarified by an

experienced divorce-lawyer mediator, then such successful clarification will help participants to avoid going before a family court judge. The professional can also evaluate what the financial and time costs will be for pursuing a particular viewpoint. Likewise, a mental health professional mediator can assess what the impact of such an erroneous viewpoint will be on the children and postdivorce relations of the divorcing family. The evaluative mediator often functions as a *wake-up call* for participants who have not fully processed the strong emotions associated with the dissolution of a marital relationship.

This evaluative role can be crucial in defusing nonrealistic and emotionally laden participant viewpoints from destroying the peacemaking process *and* the opportunities for a nonadversarial divorce settlement. It is a role based on participant's or lawyer's trust, experience, and reputation of the evaluative neutral. Professionals, who are well compensated, almost always perform this role. When the evaluative role is wedded to facilitative experience on the part of the peacemaker, the possibilities for successful peacemaking is, thus, greatly enhanced.

At this point, it is instructive to consider an academic question that often arises in the family law mediation field: *Which is more important or preferred in the mediation negotiation process, a skilled facilitative or evaluative mediator?* Ideally, mediators who possess both facilitative and expert sensibilities have the best peacemaking skills. Alternatively, if you have two mediators on a divorce case—which is recommended, especially if the mediators are male and female—one can be the expert and the other the facilitator, assuming each possess the requisite skills.

It is most important to have a good facilitator holding the mediation ground for participants. It is even better to have a peacemaker fully committed to a nonviolent peacemaking process than a subject matter expert lacking this commitment. With the consent of participants, one can always, when needed, bring in a neutral expert to make an educational *wake-up call.* In fact, one has found that the *wake-up call* can be even more dramatic and effective when an outside expert is called into the peacemaking process.

For instance, an outside and neutral expert whose services are jointly approved by participants can speak to the time, effort, and financial and emotional costs involved in pursuing an adversarial approach in family

court. When participants realize what the true costs to them will be—including expending up to a minimum of $50,000 each and more for their *day-in-trial court,* not to mention the costs of a potential appeal to an appellate court by one or both of them—the experience can be quite sobering and educational for avoiding litigation.

I have found that legal expertise alone, when devoid of a peacemaking spirit or soul, is less effective and potentially dangerous to the well-being and health of divorcing families, particularly children. Lawyers as mediators often struggle with their authority as the expert. The need to provide a compassionate dissolution forum for a difficult life transition doesn't always need a legal expert. Too much evaluation can also take away from the often most important creative solution source—the participants themselves, who are the experts regarding their own lives. As the old song says, *you got to have heart; all you really need is heart.* Well, maybe heart and compassion alone are not enough, yet heart and spirit are preferable to the lifeless drone of authority.

It should be briefly noted that the late Harvard Professor *Roger Fisher* popularized a variant of evaluative mediation. He called it the *single negotiating text* method. The mediation process methodology consists of having the mediator create written solutions to disputed issues. Disputants then review the proposed solutions in a back-and-forth review and critique process until reaching accord. This process is often used in international disputes such as the agreement between Egypt and Israel, as mediated by President Carter in 1978. It has applicability to marital dissolution mediations as well. Divorce lawyers often favor it where they have a high degree of respect for and experience with the chosen mediator (Fisher 2012).

A criticism of evaluative mediation is worth discussing. There is often a fine and dangerous line that can be crossed when a *neutral* is asked to evaluate the strengths and weaknesses of each disputant's case, especially in divorce cases.

> In essence, the "mediator" is putting on a Judge's robe because the "mediator" is helping the parties to resolve the case by pointing out what they believe will happen if the matter were to proceed to court (Baer 2012).

Thus, an evaluative mediator runs the risk of placing participants in the zero-sum adversarial game. Unless such a mediator is careful, he or she may foster *winners and losers*, similar to what we would find in a contested divorce court hearing. Baer argues that it is nearly impossible for a mediator to accurately predict how a family court judge would rule. Judges viewpoints will vary significantly and often unpredictably based on differing views of credibility findings, factual determinations, and the exercise of judicial discretion.

Predictions by evaluative mediators are based on their respective training, experience, temperament, and personal backgrounds. A judge's experience, training, temperament, and personal background will often differ from the mediator's. Plus, different judges will decide the same cases in different ways. Baer posits that it is near impossible for a mediator to evaluate a judicial outcome beyond an educated guess.

Baer impliedly suggests that evaluative family law mediators do a disservice to the mediation process. That is, they undermine the self-determination of participants to decide what is best for themselves and their families by offering their *educated guess* as to who will prevail on what issues. Evaluative divorce mediation, like the adversarial process, is concerned with legal rights and duties. Whereas, the *family peacemaking process* is concerned with problem solving primarily regarding children and finances, encouraging participants to get on with their and their children's lives in the least destructive manner possible.

Transformative

As our operational definition, *transformative* means to change one's behavior, thoughts, and perspectives completely and dramatically in the moment and to convert one's understanding and consciousness to a different energy. Transformative mediation focuses on hope and optimism for a better, more peaceful future. Transformative mediation's lifeblood is to create an atmosphere in which conflict can be transformed into something positive, a preferred future for the participants. A divorce mediation process centered on transforming participant energy to one

of individuation and exploration of the self is an exercise in finding the *highest good* for all members of the divorcing family. It offers an envisioning and creative overview of the postdivorce state as a substitute for the culturally negative picture of divorce. (See the controversial 2014 documentary called *Divorce Corp., directed by Joseph Sorge,* which puts forth the view that lawyers and judges conspire to create a $50 billion divorce industry through delay and legal obscuration.) In this process, peacemakers' frame questions for participants such as:

1. What would you like to have instead of conflict (vision)?
2. What would be the positive consequences of reaching agreement (positive outcome orientation)?
3. How would you feel if this dispute were settled in a way you can live with (hope for the future)?

An example of a transformative marital dissolution approach is summed up in the following essay I wrote and taken from my Educated Divorce Website, called *Light and Forgiveness*.

Divorce

From her personal collection Visual Image by Lu DiGrazia

What is divorce?

1. Is it the legal dissolution of a marital contract?
2. Is it the destruction of a relationship between two individuals formerly bonded in a complex set of mutual rights and responsibilities?
3. Is it the death of a dream, an image of what our parents, religion, community, or culture expected of us?
4. Is it the loss of a reciprocal system of support, designed over the eons between women and men, to produce and raise children?
5. Is it something more or less? Most likely, it is a combination of all of these things.

In an ongoing educated conversation about divorce and all of its myriad implications, we need to appreciate the divorce process on its most basic level.

We humans are light beings. That is, we exist as entities of energy or light waves. We are fields of energy no different than the fundamental stuff of the cosmos—light. Hawaiians called this energy *mana*. The Japanese have named it *ki*. In Chinese, chi. Among Yogis, it has been designated as *prana.* Western science prefers the term *electro-magnetic energy.* Whatever the name, the definition is the same: it is the life force of the universe.

On an electro-magnetic level, when two people fall in love and consequently form a marital union, it can be said that their life forces or light waves are generally vibrating in the same electro-magnetic field. As with musical instruments that are tuned and playing the same chords, this synchronicity tends to produce more harmony and balance than discord and conflict. The same is true of marital partners—particularly at the outset of their relationship, and memorialized in the expression: two hearts beating as one. The marital partners often enjoy extended periods of harmony and balance, like two musical instruments in accord.

As marital relationship time and experience evolve, approximately one out of two of these relationships will dissolve. The partners to these relationships may have different needs and unfulfilled expectations that are not being met. Or one of the partners

will have grown or failed to grow in ways unacceptable to the other partner. Maybe unresolved insecurities, anxieties and fears which were overlooked or marginalized during the initial stages of sexual attraction and passion become predominate to the extent that one of the partners feels unable to carry on the relationship.

At the point that one of the partners to a marriage becomes emotionally divorced from the other—which usually proceeds the legal dissolution of the relationship by some time, the cultural image of divorce, sometimes called the "Big D," all too often comes into play. This is the image projected in popular movies like, *Kramer v. Kramer* and *Santa Claus One.* These movies and the Divorce Industry as a whole—as well as those unfortunate people who get caught up in its legal, financial and emotional claws, project the divorce process, particularly when it involves children and significant financial resources, as a death trap, full of mean spirited people and events. For far too many people, this image becomes their reality.

In dealing with this image, it is recommended that you remember that you are a creature of light *energy*. If you reduce, even to a small extent, your dissolving marital relationship to a core issue of light and energy, you have a window of opportunity to realize that just because you and your departing mate are no longer in the same vibratory field, this does not mean that your marital dissolution and future coparenting relationship needs to be a disastrous experience.

You may come to realize that due to changing expectations, needs, concerns and karmic soul evolution; the two of you are now in different vibratory fields and without enough harmonic convergence to meaningfully continue your marital relationship.

Such a realization is extremely important and potentially devastating for you, especially if you have children of the marriage. This realization allows you the opportunity and gift of forgiveness—forgiveness for yourself and forgiveness for your marital partner. All of a sudden you realize that there really is no blame, no fault for your marital relationship ending. The ending is, on a very simplistic level, two people who formed a marital bond at a

time when their respective vibratory patterns created a harmonious relationship; and now, circumstances and events have evolved to where their respective energy fields are in disharmony, and their life forces call for them to seek harmony anew, both within themselves and with others.

This in light view of marital dissolution is at the core of an EDUCATED DIVORCE. If you can see the wisdom that we are vibratory creatures of light energy, forgiveness can become possible at a very early stage, rather than at the end of a very long, expensive and tiring multiyear divorce process that will deplete your creative, emotional and financial resources, and, worst of all, endanger your health and well-being and that of your children.

The challenges and issues you face as a no blame understanding toward yourself and your marital partner will lessen dissolving couple angst considerably. This is an understanding that follows a chain from forgiveness to cooperation with and compassion for your soon to be former mate and coparent. For those of you with children, this core understanding will lay the groundwork for a successful post divorce coparenting relationship and future blended family. A blended family in which new significant and marital partners, as well as new children, stepchildren and family members of all sorts have a healthier and harmonious relationship.

Let us be clear. We, at Educated Divorce, are not suggesting that the road to dissolution of your marriage is paved solely with energetic light. We are also emotional beings. Dissolution of a marriage, by definition and experience, is an emotional roller coaster; a roller coaster with the emotional ups and downs of denial, anger, grief, depression, and, ultimately, acceptance and forgiveness. What we are suggesting to you is that the emotional roller coaster can be mitigated and shortened by understanding through a disciplined educational process and consequent acceptance and manifestation of forgiveness attitude and philosophy. Such an attitude and philosophy of forgiveness will greatly assist you in navigating the shoals of the often-challenging key issues in almost any marital dissolution: children and money.

> The sages from all philosophies and religions inform us that in forgiveness there is new awareness and rebirth. These sages suggest that we forgive, not only as an act of compassion, yet also as an act of survival.
>
> In forgiving both another and ourselves from blame for the inability of our marital relationship to meet our desires, images and needs, we open up space in our lives, and where children are involved, in the lives of our children. This space provides an opening of the heart-mind for a new partnering relationship that builds upon the lessons learned from the present one and allows for the possibility of trust, the most important component of love, to unfold with another. The rebirth that flowers from this renewed sense of understanding and trust will provide the reassurance and sustenance that you and your children need to sustain present and future relationships with yourselves as individuals, significant others, family members, employers, and community.
>
> Our services are not for everybody. The Educated Divorce process only works well when both partners to a marital dissolution agree that their best interests and that of their children, if any, must be based on transparency, fairness, cooperation and trust; trust being the result of forgiveness, as we have discussed it in this introduction. ("http://educateddivorce.org/")

As one gleans from the preceding section, transformative mediation is not for everyone. It sets a very high standard for participants and peacemakers. Yet it comes closest to living up to the goal of *ahimsa*—to do no harm. Ahimsa is one's ethical commitment to not harm another in word, deed, or thought. It takes participants and peacemakers on a journey of mindfulness and greater awareness of the consequences of one's actions and inactions in life. It is the spirit of *namaste* in action: *In my heart I see the humanity in your heart*.

The next, more recent, peacemaking divorce mediation style takes the transformative process to a yet more efficient and humane level. It is called a *multidisciplinary team approach.*

Multidisciplinary Team Approach

In Chapter 2, under the sections "Collaborative Law" and "Educated Divorce," we discussed at length the multidisciplinary team approach found in the collaborative law and educated divorce (ED) ADR models. Here, we will expand our discussion by adding some philosophical and professional thoughts to encourage and improve the use of the multidisciplinary approach in the family law arena.

For a multidisciplinary (also sometimes referred to as an integrative or holistic) model to be truly effective, the following minimum protocols need to be addressed.

First, continuous and frequent communication between team members must be maintained. Each team member must be up to speed on the work and progress of other team members. A high level of communication allows for a more coordinated, efficient, and unified approach to assisting participants through the minefield of divorce. Effective communication between team members also allows for appropriate, effective, and timely referrals to nonteam professionals and resources.

Second, a sense and attitude of mutual respect and education between peacemakers, lawyers, mental and well-being coaches, and other team professionals is necessary. Respect among and between team members supports the crucial collaboration required to properly and effectively assist participants through the divorce process. Team members' openness to being educated and learning from each other supports mutual respect and professional growth as well, which allows for greater possibilities for serving participants. It also fosters respect and support for the process by participants who will mirror the behavior of the professionals serving them.

Third, as mentioned in Chapter 2, team coordination by an integrative leader is essential in the team approach. Contrary to traditional divorce practice, where lawyers totally predominate, in a holistic team modality, any of the professionals can take on the role of group coordinator. In my experience, it is usually the mediator who acts as the coordinator. This is because most of the team divorce cases are manifested through the mediator, although a significant number of cases are referred through the mental health professionals who often have pre-existing individual

and family counseling relationships with participants. Administratively mediators may in most instances be better set up to handle the team's coordination needs. In the future, the coordination role may be shared or rotated among the professionals through a single team member provider as they become more comfortable working together.

Whoever ultimately coordinates the team must be able to keep the information and communication flow running smoothly throughout the case. It is important that each professional have regular, timely, and full information regarding all aspects of the subject case. This will prevent duplication of services and having to constantly update team members as to how a case is or is not progressing and why. In this regard, it is essential that participants execute confidentiality and information releases at the outset of a case so that team members can freely share all necessary information.

Finally, team members must be able to be *available* for written and oral briefings on a regular basis. No matter how talented a team member may be, if he or she is difficult to reach or substantially unavailable for team consultation purposes, he or she is of limited use to an integrative model. This is especially of concern in highly emotionally charged cases, where emergency interventions and strategies are likely.

In the future, as we move away from lawyer-centered divorce work toward the collaborative, integrated models posited previously and in Chapter 2, we may reach a point where a divorce lawyer's failure to not work holistically or refer a case for assistance to a multidisciplinary team may have ethical and malpractice implications for him or her (Baer 2012). As a society, we may evolve to a point where we realize that the all too often negative effects of our current adversarial, mega, and multibillion-dollar divorce industry is too heavy to bear, especially for our children. *Please note* that on the *Holmes and Rahe Stress Scale,* children rate divorce and physical separation of parents as life stressors numbers 4 and 8, respectively.

We know from longitudinal studies on the children of divorce that the more adversarial a divorce, the more the likelihood of serious and negative physical and psychological impacts on children, well into their adult lives. These impacts include poor physical and mental health and adult relationship issues, both personal and in employment. Adult

children of contentious divorces are more likely to have difficulty in making commitments to significant others and employers than will children of nonvolatile and nonadversarial divorce.

Dr. Peter A. Levine, a pioneering expert in the field of psychotherapy and trauma, informs that individuals who have suffered traumatic events—such as the children of conflicted divorces—exhibit symptoms of post-traumatic stress disorder (PTSD) during their lifetimes. He relates that many people experience PTSD indirectly. Very high stress life occurrences like death of a child, loss of employment, severe illness, and divorce can create PTSD-type symptoms. PTSD symptoms include reliving the trauma of divorce and the breakup of one's family, anxiety, depression, and relationship avoidance. All of these post-traumatic symptoms can interfere over a lifetime with the quality of one's life, particularly the children of divorce (Bullock 2014).

The modern day reluctance of many adult children who are products of the adversarial divorce industry to commit to anything or anyone other than their own narcissistic desires has become legendary in our culture. This reluctance is, at least in substantial part, a by-product of adversarial divorce. Moving away from the often contentious, family-destroying divorces spawned in our current family courts will be greatly enhanced by the more humane and family-centered approach found in the multidisciplinary team modality. As the Spanish proverb reminds us: *Arrows pierce the body, but harsh words pierce the soul* (Davis 1992, 39).

In our next chapter, we will look at the root of all disputes, which is *conflict*, and how it is and can be dealt with in the divorce field.

CHAPTER 4

Conflict and Brain Science

> *It is the motivation behind an act that determines whether it is violent or non-violent. Non-violent behavior is a physical act or speech motivated by the wish to be useful or helpful.*
>
> —The 14th Dalai Lama

Conflict

Over two decades ago, Barbara Ehrenreich wrote a provocative essay entitled "The Warrior Culture" in the October 15, 1990, edition of *Time Magazine*. In her essay, Ehrenreich posits that American culture reflects images of turmoil, inhumanity to others, and death through violent means. As she states:

> Our preference is for warrior themes: the lone fighting man, bandoliers across his naked chest, mowing down lesser men in gusts of automatic-weapon fire.

In America, we live in a warrior culture—a society that thrives on conflict. If you have any doubts about this, a casual look around contemporary America should dispel these doubts.

We live in a nation where the financial elite will spend $2,600 or more for a ticket to see a professional football game, where young men, acting as warrior substitutes, engage in mock warfare for their fans, often with the result of having their brains smashed and irreparably damaged, leaving them to an early retirement lost in the fog of dementia. Until very recently, our country did little or nothing to stop or even discuss sexual violence against women. Statistics tell us that at least 1 in 10 women on college campuses, military bases, and civilian life have suffered violent assaults by men. We are also a society that has not yet clearly defined date

rape against women, although it has become as much a part of campus life as collegiate athletics.

Our country is in a constant state of serial warfare. Our position as the only remaining superpower allows us to distribute retribution and revenge with impunity, creating pretexts such as *weapons of mass destruction* and terrorism (rather than what we are really dealing with, plain old criminality) to justify our military interventions around the world.

We are a nation filled with fear, anxiety, and insecurity and obsessed with our right to possess and use firearms (*think*: stand your ground laws), designed for only one purpose: the killing and maiming of other human beings. President Obama scurries from one dramatically televised funeral to another, giving speeches intended to help assuage the grief of family and nation and lay to rest the dead victims of the 19 mass shootings in the last five years (2008–13). And yet, the carnage continues without abatement, without any progress on the passage of meaningful gun legislation that limits the right of deranged people to purchase, carry, and use weapons of personal mass destruction.

In the name of fighting terrorism, old men in political power send our youth to die on the battlefield, along with tens of thousands of innocent civilians written off as *collateral damage* in the nations we invade—this litany of warfare intended as little more than a means of diverting our attention from the political impotence of our government in the face of the real issues that face our country: Economic and gender inequality, racism, poverty, immigration, a disease-care system mired in the treatment of symptoms and motivated by profit, overpopulation, and spiritual disaffection. We seem to define political leadership as a willingness to kill other people, whose accident of birth, skin color, religion, political beliefs, or geography makes them justifiable targets for our warrior nature.

And, for our immediate discussion purposes, an adversarial divorce industry and legal system based on 19th-century precepts of *zealous* legal advocacy and a zero sum game has been and is the current norm. We are talking about an adversarial game, where winning is everything. Our zero sum game is often reflected in our popular movies through the years such as *Kramer vs. Kramer, The Santa Clause, and War of the Roses,* where Hollywood reflects back to us in dark comedy the nature and effects of this war on families. The results of the game help create the relationship

ruins of families and individuals. The ruins are strewn in a spiritual killing field, affecting the moral fiber of our culture, and, most importantly, of our children.

Brain Science

So, what is at the root of this warrior culture that so profoundly affects the field of divorce in America? At the root of our warrior culture is conflict. Here, once again, we are talking about the conflict that takes place both within and between individuals.

Yoga philosophy is most instructive on this subject. It holds that conflict is based on a concept called *avidya. Avidya* is translated as ignorance of self. *Lu DiGrazia*, founder of the *Yoga School of Kailua* and a yoga teacher with more than 40 years of experience, states that *avidya* "is simply the lack or absence of awareness; a limited or inhibited awareness of sensitivity; (and) the absence of vision of one's self." As Yoga philosopher-sage, Patanjali (as referenced in Book II, 4) informed us centuries ago, *avidya* is ignorance of one's true self. This is expressed when the individual ego identifies itself as a separate independent self, unconnected to all sentient things, most importantly in relationship to other people. *Avidya* is in contradiction to what philosopher Krishnamurti (1992, Volume XV, 1964–65, 52) has said and I paraphrase: *You are the world, and the world is you. Your problems are the world's problems.*

In the divorce realm, current brain science teaches that conflict (which also according to Krishnamurti 1992, 54 arises from ignorance of self) may be triggered from one or more of any number of real or imagined events. However, the primary source of all conflict is the genetically triggered freeze, flight, or fight response. When unprocessed emotions such as fear, anxiety, or insecurity—all expressions of self-ignorance—hit the pavement of an adversarial divorce system, legal warfare is the most likely result. The only real limitation on legal warfare is the emotional and financial exhaustion of the parties.

The emotional disturbance within divorcing disputants is prey to the endless legal arsenal of motions, discovery procedures, hearings, appeals, and other stratagems. In the zero sum, take no prisoners, legal game of divorce—there is little room for vision. The parties to conflicted divorce

are usually stuck in a past filled with perceived broken promises and unrealized dreams. This is a past in which they are imprisoned in the emotional bondage of a marriage that is not working for either marital partner.

The adversarial divorce approach spends most of its time, sometimes inadvertently and sometimes not, roaming in the dead past of marital memory and discord, and not in a transformative life vision of the future. Divorcing parties and their lawyers spend most of their time preparing to defend or offend each other through the arcane and myriad channels of divorce law.

Lawyers add further fuel to the fires of conflict, in that, as advocates for their clients, they are the mercenary warriors in the adversarial divorce process. Their role in our culture of divorce, as first established early in their law school ethics training, is to be *zealous* in representing the perceived family and financial interests of their clients. As a *zealot,* defined as one who acts zealously, especially excessively so; a fanatically committed person, (Guralnil, Webster's New World Dictionary 1984), lawyers by disposition and training are not predisposed to a spiritual, nonviolent approach to contested divorce. Their motivation is not nonviolent, as defined by the *Dali Lama* at the outset of this chapter. That is, their behavior as a zealot is not, according to the *Dali Lama* normally "… motivated by the wish to be useful or helpful." Rather, their primary motivation is quite narrow. Their concern is only to successfully represent the perceived individual interests of their client (as well as their own financial interests) at the consequential expense of the other party, family, and society.

At least in their legal work, most divorce lawyers are not inclined to cultivate a meditative mind—a mind that remains in the present moment, observant and nonjudgmental. They neither hold to this state of mind themselves nor do they encourage it in their clients. The failure to develop and utilize a meditative mind or *mindfulness* on the part of most lawyers contributes both to their failure to find peace within themselves and to help clients and others end conflict.

However, it should be noted that the legal profession's failure to cultivate a meditative mind or mindfulness shows some sign of willingness to change. Professor Charles Halpern of UC Berkeley Law School teaches a course in law and meditation, whose goal is to promote empathy

and mindfulness in the practice of law. He reports slow yet steady progress in utilizing mindfulness in the legal field. For instance, he reports more judges using meditation and silent moments of introspection prior to commencing their daily court calendars. Lawyers facing challenging divorce negotiations and proceedings are relying on the mindfulness skills of detached observation and nonjudgment to help them successfully navigate these cases. Halpern also relates that there are 12 law schools throughout the country providing law students with mindfulness training. As he states:

> All these steps are part of a bigger effort to help these budding and established professionals cope with the stresses of law practice—a field that, regrettably, tops all American professions in instances of depression, substance abuse, and suicide. (Halpern 2011)

Zen and meditation scholar, Jon Kabit-Zinn, defines a mindfulness approach to life as having two basic parts. One is the development of an observing attitude toward one's emotions and life experience. The second is the growth of a nonjudgmental receptivity of what is being experienced without feeling a need to do anything about it (Kabit-Zinn 1996).

Adversarial lawyers by disposition, training, and practice as zealous advocates, in general, do not exercise mindfulness as defined previously by *Kabit-Zinn* in their professional life. Perceiving themselves as warriors, their brain chemical of choice is *adrenalin*, leading too often to unneeded aggressiveness. This contrasts sharply with the more *mindful* state of the peacemaker, whose brain chemical of choice is *oxytocin*, which allows for a more observant, more receptive, and less judgmental attitude in their interactions toward mediation participants and cases. Oxytocin is also known as the *bonding hormone*, promoting trust and empathy in relationships—in short, a nonviolent approach to conflict resolution (Cloke 2009).

As Lao Tzu, Chinese philosopher and author of the ancient book of Chinese wisdom, *Tao Te Ching*, stated, by way of paraphrasing: the greatest revelation is stillness (or the meditative mind). (Tzu 2015 *Daily celebrations website*.) This stillness begets an environment where peaceful solutions to conflict can occur.

Rather than cultivating stillness, the existing adversarial system appeals to the primordial, instinct driven part of our brain known as the limbic brain. The limbic brain is where issues of daily survival are processed. In the early years of human existence, when we were more likely to be the hunted rather than the hunter, the limbic brain was called upon to make instantaneous life-saving judgments. For instance, when confronted with danger—such as threats posed by aggressive animals or humans—we had to decide whether we would freeze in place, flee, or stand and fight.

We *Homo sapiens* survived on the ability of the limbic brain to process potential death threats in the wild. Over the eons, however, the human brain has evolved. Our thinking intelligence now dominates in the neo-cortex or frontal lobe of the brain. This part of the brain uses past knowledge and sensory information to learn how to drive an automobile, use a computer, and learn a new language. It is a much more deliberative and intellectual part of the brain and capable of abstract thought.

The raw, often unprocessed emotions generated in a conflicted divorce trigger a direct response from the less highly developed limbic brain. Fears, anxieties, and insecurities abound in highly charged divorces. Separating couples and families are particularly vulnerable to a divorce system predicated on warfare and violence. The conflict within and between the husbands, wives, and children of divorce is highly susceptible to manipulation by a spiritually bereft dissolution process. As Baer points out, the stress generated by divorce and similar experiences can cause a 20-percent drop in IQ and EQ levels, thus making conflicted disputants more susceptible to often-ruinous decision making. He goes on to state bluntly the obvious ethical question for divorce lawyers, who either know or should know that their emotionally distraught clients' effective decision-making abilities are impaired during the divorce process—a process fraught with far more emotion and stress than in other legal fields.

Do we have an obligation to our clients to make sure that they really want what they are telling us they want?

Baer posits that family law advocates cannot be sure that the decisions a divorcing client is making are not *significantly impaired* by the emotional trauma of the adversarial marital dissolution process.

Baer goes on to state that matrimonial lawyers may very well have an extra ethical duty to warn their clients than lawyers in other fields

of law. How deep should the ethical probe be in determining the emotional fitness of a legal client to make life-changing decisions about children and money over the course of legal client's lifetime and that of the children of the marriage? He concludes by asking whether family law lawyers need to ask themselves whether they are in it for the money or to best serve the interests of their dissolution clients and their families (Baer 2012).

With the limited capacity of the limbic brain, its instinctive response to conflict is to go into freeze (do nothing), flight (ignore reality), or fight (hire the most aggressive and expensive lawyer you can, even if it means agreeing to place a lien on your home to pay exorbitant legal fees to your chosen warrior) mode. When choosing some of the ADR models summarized previously, such as mediation, collaborative law, ED, and the multidisciplinary team approach, participants are able to consider solutions with the more reasoned, and more highly developed, neocortical or frontal lobe of their brains. This type of brain residency allows for a much more nuanced observational, intuitive, and skillful response to the transformative marital dissolution challenge posed for individuals and families. To put it most simply, the difference between a limbic and frontal lobe response is akin to the difference between holding your breath and breathing deeply and fully through the divorce experience.

According to Dr. Daniel J. Siegel, a neurological and child psychiatrist, in his book *Mindsight: The New Science of Personal Transformation,* from a physiological perspective, when the nervous system is *receptive* and an individual is centered in the prefrontal lobe, facial muscles and vocal chords relax, and normal blood pressure and heart rate are enjoyed. We are more creative and open to hearing what the other person is stating or proposing.

By contrast, when the nervous system is *reactive,* we are in a limbic or survival mode, physically and emotionally. By way of paraphrasing, according to Siegel, in a reactive state we too often twist and bend what we hear to match the things we fear. This causes us to *hear* (which is a physical act) *without listening* (which is a neocortical, cognitive event). Hearing without listening, by both the divorcing parties and their lawyers, is at the heart of the spiritual morass known as the adversarial divorce process (Siegel 2010).

One of the principle roles of the peacemaker, who (to use the title of Dr. Peter Adler's book) occupies a place in the *eye of the storm*, is to first recognize his or her own reaction or receptivity tendencies (which is much easier to do with the help of other multidisciplinary team members) and then to recognize the reaction or receptivity patterns in the mediation participant's behavior and statements. This recognition can enable the peacemaker or peacemaking team to help move participants from a reactive to a more receptive state. In the zero sum game of a typical contested divorce, such movement is almost impossible, and, even if possible, would be interpreted as a weakness, which would undermine negotiation and trial strategies.

The spiritual corruption of the divorce process also extends between the once honored relationship between lawyer and client, which was traditionally a relationship based on mutual respect and trust. However, it is not uncommon today for high-end divorce lawyers to be sued by their own client for malpractice or reported to their local bar association's disciplinary counsel for ethics violations, often for allegedly and unethically charging a client excessive fees. This relatively new phenomenon is divorce practice's *dirty little secret*. It is also why lawyers suffer the highest suicide, substance abuse, and depression rates of all professions in America. Tyger Latham, Psy.D., in an article in *Psychology Today*, shares the following information concerning lawyers:

- Lawyers lead the nation with the highest incidence of depression.
- Forty-one percent of female attorneys were unhappy with their jobs.
- Lawyers have the highest rate of suicide.
- Up to 20 percent of all U.S. lawyers experience alcoholism or substance abuse.
- Up to 1 in 10 lawyers polled said they would change careers if the opportunity arose.

Add to the afore-mentioned information the fact that, by nature, lawyers are generally different from other professionals. The demands of their profession are so competitive and exacting that the stressors they are

subject to are far more demanding than almost any other type of work. An often-cited example is that while getting a grade of 90 on a university exam is universally accepted as more than satisfactory, for a practicing lawyer, the same grade of 90 on a case would subject the lawyer to a malpractice claim.

On this point, Randall B. Christison, J.D., relates that from a psychopathological perspective, beginning first-year law students were no different from their colleagues in other graduate study programs. However, there are some marked psychological differences from other nonlaw school students. Those who comprise the legal profession—judges, lawyers, and law students—in Christison's thinking are *detached thinkers* and *abstract intuitive thinkers*. They are not empathic, emotional sensors of others' feelings and emotions. Christison, in citing lawyer Susan Daicoff, indicates the personality characteristics of successful lawyering. Lawyers:

1. Need achievement;
2. Are extroverted and sociable;
3. Are competitive, argumentative, aggressive, dominant, and cold;
4. Show low interest in people, emotional concerns, and interpersonal matters;
5. Have disproportionate preference for Myers-Briggs thinking versus feeling;
6. Focus on economic bottom line and material concerns; and
7. Have a markedly higher incidence of psychological distress and substance abuse (Christison 2014).

The preceding factors recounted by Latham and Christison generally preclude lawyer receptivity and observational capacity and instead foster reactivity and defensiveness. Such factors generally make lawyers poor listeners, often impatient, angry, less empathetic, dominant, and, in general—absent divine intervention or dramatic and life-changing experiences—not the best candidates for peacemakers and nonviolent dispute resolution.

Additionally, divorce lawyers, particularly those of the adversarial warrior class, must be prepared to defend themselves against their own clients at the end of a case. It is a cost of doing adversarial law. Experienced

divorce lawyers, who are recognized as very high insurance risks by legal malpractice insurance companies, practice defensive law, always preparing for a disgruntled client to turn on them. High-end lawyers often retain their own debt collection lawyers to pressure or sue clients into paying their full legal fees, sometimes garnishing wages or foreclosing on homes. Regardless of the merits of client or lawyer complaints, the source of these complaints comes from a conflicted adversarial system in which clients and lawyers have both become victims.

This conflicted system encompasses the lawyer-warrior's bravado at the outset of a case, often and preliminarily encased in an overly aggressive *motion for predecree relief*. A motion for predecree relief is generally the opening salvo in a divorce case, often filed with the original divorce complaint. In nonlegal parlance, this motion is the immediate list of grievances enumerated by either party seeking temporary relief while divorce proceedings are pending finalization, raising issues such as temporary child custody and support, spousal maintenance, freezing of financial assets, sole possession of the marital home (in divorce court parlance, violently referred to as a *kick-out* order), and restraining orders.

The motion is usually supported by an affidavit that paints the party from whom relief is sought as a close relative of Attila the Hun. The affidavit, which is a sworn statement signed by one of the parties to the divorce, presents factual allegations describing what a terrible person the other party is—a person not to be trusted with children or marital finances. The motivation behind the motion and affidavit, when stripped of legal niceties, is violent and adversarial in the extreme. It is a direct appeal to the most primitive of human defensive instincts and is almost guaranteed to bring a violent—that is, nonhelpful in promoting a civilized divorce—response from the other spouse via his or her lawyer.

This bravado with its one-sided and hyperbolic assertions can act as a *limbic slap* in the face to the opposing party and to his or her lawyer, challenging them to a court dual. Often, when the aggressiveness of this document is compared with the final judgment obtained from the court, the resulting disappointment can lead to a deeply antagonistic relationship between client and lawyer. This part of the process, consciously or unconsciously encouraged by their lawyer, can lead to a client's belief that he or she is absolutely in the right and that the other party is absolutely in

the wrong, and the expectation that the law will support their respective viewpoints. Then, when reality sets in and these often-unrealistic expectations are not met in family court, or even worse, their *victory* is pyrrhic since the *winning* client is now emotionally and financially bankrupt, and in spite of their having emerged victorious in the court of law, remain both inwardly and outwardly conflicted toward their former spouse (and often toward their lawyer), often for the remainder of their life.

In an article entitled, "Bringing Oxytocin Into the Room: Notes On the Physiology of Conflict," well-known peacemaker, Kenneth Cloke, sums up the important interplay between brain science and conflict. He offers that there has been an incredible upsurge in scientific exploration of the inner workings of the human brain. This research upsurge has also provided us with an ability to translate scientific information into practical skills aiding those whom we work with in the divorce and related social fields. He worries that:

> Without an … increase in our ability to use that knowledge openly, ethically, and constructively, and turn it into successful conflict resolution experiences, our species may not be able to collaborate in solving its most urgent problems, or indeed, survive them.

Cloke goes on to state that all of the increase in violence—in all of its manifested forms of terrorism, environmental destruction, gridlocked governments—can be traced to the eons old human brain reflexive response to conflict. Cloke offers hope that brain science can help us to comprehend the neurological and biological roots of violence, whether in word, deed, or thought. That is, using brain science to help inform our response to legal aggression motivated by fear, insecurity, and anxiety arising from adversarial divorce practice (Cloke 2009).

An additional source of helpful brain and neurological information comes from the experience of Yoga therapists. Many Yoga therapists combine the knowledge, talent, and resources of an experienced Yoga teacher and mental health coach in working with patients. Yoga therapists make use of the burgeoning scientific information on the Vagus nerve (VN) to treat patients with mental health challenges. The experience of Yoga

therapists with the VN and its effects on their patients is useful information for the peacemaker to put to use, especially in highly conflicted marital dissolution mediation.

The VN complex is the 10th cranial nerve. It originates in the brainstem and cerebellum and then branches out extensively throughout the torso, making contact with the major organs, the digestive system, and the sex glands. It will come as no surprise to learn that *Vagus* means wanderer in Latin. Yoga therapists make use of stimulation of the VN to increase Vagus tone for such symptoms as PTSD and depression. Low Vagus tone is linked to heart attacks, immune inflammation, loneliness, and negative moods.

The VN is energized mechanically through the application of direct pressure or by stretching the torso. Various Hatha Yoga *Asanas* can be most helpful as a stimulant to the VN, particularly Pranayama exercises such as *Ujjayi* breathing, backward bending *Asanas* such as camel pose, chakrasana, upward and downward bow, and the bridge poses, all of which serve to help stimulate increased Vagus tone. These chest-opening exercises, among their other benefits, also help to lower the heart and metabolic rates and restore a feeling of peace and well-being (Bergland 2013).

Stimulating the VN produces a calmative effect on the parasympathetic nervous system through the production of the neurotransmitter *acetylcholine* (*ACh*), and for this reason, the VN is known as *command central* for the functioning of the parasympathetic nervous system. Production of *ACh* has the capacity to have the effect of slowing things down and balancing the *freeze, flight, fright* responses of the sympathetic nervous system. Conscious stimulation of the VN through Hatha Yoga practice can literally allow access to *inner calm on demand.*

So, why is the previous VN information important for yogis and peacemakers? As Yoga instructors and peacemakers, we often find ourselves in close personal contact with students or disputants who are experiencing feelings of *grief* or loss. Not only can close proximity to these kinds of feelings manifest in our own bodies, but it is also useful and necessary for us to be familiar with their effect on students and disputants, who may present in the class or mediation environment with symptoms of anger, depression, or anxiety. Among these symptoms may be tightness

in the chest, a feeling of heaviness in the heart, or difficulty in breathing. If we only see grief as a purely emotional experience, without realizing the holistic body-mind implications, our ability to help others or ourselves will be limited and perhaps misdirected.

Physical symptoms such as alterations in breathing, eating, sexual and sleeping patterns, endocrine and immune function, rapid heart rate, as well as physical pain in the chest area often accompany the grieving process. It should be noted that grieving is not restricted to its usual association with the death of a loved one. Grief also arises from the interruption or ending of a social relationship, including divorce, which as we know ranks number 2 as a stress producing experience on the scale of emotional trauma. Grief can also be a response to nonphysical loss such as the loss of a job, home, hope, or cherished image. Grief symptomology can also be triggered by recognition of the loss of ability or competence in a given field of endeavor.

As individuals, teachers, and peacemakers, we may also limit our ability to appropriately react to the broad emotional implications of grief. That is, recognition of grief goes far beyond viewing sorrow as the only emotional symptom of grieving. Additional symptoms may include anxiety, anger, PTSD, and depression. Yoga therapists recommend that instead of treating grief as something to be gotten over or offering advice to the grieving, our focus needs to be on *deep listening.* Listening that assures the griever they are being heard on a compassionate human level, that they are not going insane, that their feeling of a dissolute sense of self is normal and an involuntary mind-body-heart response to loss and attachment.

Through compassionate and attentive listening, educative counseling, and Vagus tonal stimulation, we peacemakers can help others and ourselves to cross the body-mind bridge and detach from the causes of grief (Sausys 2014). As peacemakers, when presented with the symptoms of grief in the context of a separation or divorce, we can listen wholeheartedly and reassure mediation participants that they are being heard. We can call a temporary halt to mediation proceedings and direct participants to trained mental health coaches, including Yoga therapists, for counseling and support. We can insure that an impaired, grief-stricken participant is protected with appropriate guidance and legal support during the mediation process.

As peacemakers, we can educate our mediation participants in *grief self-care*, which would include VN and parasympathetic edification, as well as helpful *asana* and *pranayama* exercises, and we can share information about the fifth *Yama*, *Aparigraha*, one of the philosophical precepts found in the *Yoga Sutras*, for living a balanced and harmonious life. *Aparigraha* teaches us nonattachment to things, people, and events. It helps us to detach from restrictive memories, toxic relationships, and unhealthy ways of living. *Aparigraha* teaches us to be content in the present, eternal moment, and situation, sometimes called the *Eternal Now* (*Iyengar*); this Yoga teaching, as well as the other grief recovery tools outlined previously, can go a long way toward helping both ourselves and others in dealing with loss, grief, and attachment in our lives.

In our next chapter, we look at some peacemaker tools for dealing with conflict in divorce mediation.

PART II

Methods

CHAPTER 5

Some Peacemaking Tools for Dealing with Conflicted Divorce

So, how do we peacemakers react to new brain science information presented to us regarding conflict? There are some tools and philosophical underpinnings we can turn to for assistance. The range of these different tools is stunning. The range includes:

- The Myers–Briggs test
- Communications theory and practice—the Keirsey Temperament Test
- The field of nonviolent communication (NVC)
- The *Yamas* from Yoga philosophy
- Relationship psychology
- Indigenous approaches
- Peacemaking experience to name a few to draw upon

A brief discussion of each of these tools is as follows.

Myers–Briggs Type Indicator

The *Myers-Briggs Type Indicator* (MBTI) is a psychological profile test designed to reveal personality traits of individuals and how they differ from each other. For peacemakers, it is a tool to recognize inherent personality differences between disputants and how to lessen conflict potential by conducting negotiations sensitive to these differences. In the family law and relational fields, mental health professionals often use it in assessing negotiation styles and attitudes.

MBTI is a method for describing the perceptions and attitudes of people and how these perceptions and attitudes affect their individual behaviors. It reveals 16 specific types of personality that are the result of an individual's preferences and attitudes. Individuals are broken down into *extraversion* or *introversion* personality types. The extravert draws strength from the external world of action, other people, and events. Extraverts tend to be focused on facts they absorb from the world outside them, while the introvert is more nuanced in approach to new information, preferring to evaluate and add their own thoughts to the information received. The introvert personality operates in the realm of ideas and observations and tends to observe people and environment, while the extravert is drawn to facts and cold reason. The introvert will remain fluid and welcoming of new data and life conditions, while the extravert is focused on goal accomplishment or getting things done. The extraverts draw energy from interaction with others, and the introverts would rather reinvigorate themselves through alone time (MBTI Basics 2014; Barkai 2014a).

The MBTI is not the last word in negotiation predictors; nothing is—except the "on the ground" relationship between peacemaker and divorce participants that presents a true indicator of predictability or at least a substantial likelihood of participant consistency. A certain score on the MBTI cannot and should not cement your view, as a peacemaker, of a participant's personality or ability to negotiate.

The MBTI is only an indicator of how people process and react to information and situations. It recognizes tendencies and not skill levels or capabilities of individuals. For peacemakers, it is a screening device for how participants will react in negotiation. Its value lies in its descriptive nature; it is not a formula for absolute predictability of participant values and reactions in the relational setting of family law mediation negotiation.

However, the MBTI does have a 50+ year track record of being a helpful tool in relational treatment settings like divorce counseling. Professor John Barkai of William S. Richardson Law School, University of Hawai'i, who has taught mediation to law students for years, has stated that "People with recognizable personality traits are more likely to have certain needs and interests" (Barkai 2014a). Identifying *needs and interests* is at the heart of family law or any other mediated negotiation.

Mental health professionals in a multidisciplinary team effort can provide invaluable assistance by administering and interpreting an MBTI for other team members, especially the mediators. Equipped with this information, mediators can shorten the time it takes to find an appropriate *negotiation groove* for participants. Finding the right groove helps to get the whole peacemaking process properly off the ground and increases confidence and trust by participants. The peacemaking process is therefore responding to participant needs and interests. An example is as follows.

Example of Use of MBTI

A recent ED case is presented here with marital partners who exhibited divergent personality traits. The wife was very artistically oriented and was exploring the creative writing world as an author. She was quite open emotionally with strong extrovert and self-described spiritual tendencies. She was friendly and easy to converse with about all divorce-related matters. The husband was much more reserved and introverted. He was a numbers guy; everything had to be factual and "add up correctly." His predominant persona was that of a highly successful, executive businessman. In referring the case, their marital counselor provided the preceding introductory descriptions. The counselor could also have described them in MBTI terminology. MBTI utilizes the following dichotomy for personality traits:

- Extraversion (E)—(I) Introversion
- Sensing (S)—(N) Intuition
- Thinking (T)—(F) Feeling
- Judging (J)—(P) Perception

Using the preceding dichotomy, the husband is predominantly an IJTP person**.** And the wife is mostly an ESNF individual.

During the initial stages of negotiation, the husband appeared to be stalling the mediation process from the wife's perspective by constantly asking for additional time to check financial resources and numbers on his own or with his accountant. The time delays involved were significant given the husband's business travel commitments, and far-flung

and considerable financial interests, which made scheduling mediation sessions difficult. Husband kept using an expression over and over again to describe his thinking. He would state: "I need time to wrap my head around these facts and numbers." The wife, who was the initiator of the divorce process, was anxious to get on with negotiations, and, verbally and nonverbally, expressed her dismay to the mediators for delays caused by her husband to process information.

In checking with their family mental health counselors, we found that the husband's MBTI results were consistent with his mediation negotiation approach. Husband was a classic MBTI IJTP. He was not intentionally causing unnecessary delay to the mediation process. He was merely being consistent with his personality tendencies. These personality tendencies were further highlighted by the stress of the divorce process and the fact that he was way behind his wife in emotionally processing the divorce. The husband's IJTP tendencies were openly discussed with both participants by their mental health coaches, the issue was resolved, and the wife was much more patient with the mediation process. She was educated to understand that her husband was not using a stratagem to manipulate the mediation process. He was merely being himself—an IJTP.

Over time, the husband's personality characteristics would have been revealed to the mediators without an MBTI. However, given the wife's initial impatience, the whole mediation process might have been destroyed or seriously undermined had a viable explanation acceptable to all for delays not been addressed at the outset rather than later in the process. Aided by the science behind the MBTI and interpretive support of the mental health counselors, we were able to successfully assist the couple in obtaining a very conscious and civilized divorce. If not overly depended upon, we humans are more than the sum of any test's generalizations about us—the MBTI is an effective tool to have in the peacemaker's tool chest.

Keirsey Temperament Theory

In a related psychometric test vein helpful to peacemakers, mention should be made of the Keirsey Temperament Theory (KTT). Professor Keirsey first introduced his four temperaments theory in the 1970s. The

KTT helps to balance some shortcomings of the MBTI by adding a social, biological, and environmental context to understanding participant behavior in mediation negotiations. Keirsey's theory is premised on the observation that the actions of people are based on the temperament they were born with. He maintains that to understand another, one must look to that person's character and mode of behavior as determined from the comingling of their environment and temperament.

Keirsey's theory is talking about presidential temperaments. However, his theory applies equally to all other individuals. In 1996, Keirsey began using the *Keirsey Temperament Sorter* to assist educational institutions, businesses, and individuals to better acquaint themselves with people's character and pattern of behavior. Keirsey posits that there are four fundamental human temperaments from which a person's character evolves. These temperaments, which are greatly different from each other, are: *artisan* (daring and charming), *guardian* (steadfast, sober, serious), *rational* (analytical, far-sighted, controversial), and *idealist.*

Keirsey uses the analogy of the seed and the tree to explain the deepest part of his theory. The seed is biological temperament or predispositions you are born with. The tree is what emerges from those predispositions as affected by the social, political, and environmental world you grow up and mature in. Thus, there is a delicate interplay between biology and environment that determines our lifelong patterns of behavior, with Keirsey choosing biology or temperament as the more important. As he states, these lifelong patterns of behavior are rooted in our DNA. They are not constrained by socioeconomic, race, nationality, religion, or geographical location. In summary, he posits that a person's temperament, in interaction with the circumstances of his or her life, gives rise to reliable predictions regarding that person's character (Keirsey Temperament Theory 2015).

So, what is the import of KTT for the peacemaker in the relational swirl of marital dissolution? In the real-life mediation example we looked at previously in our section on the MBTI, we could further describe the wife as an idealist and artisan. And we could describe the husband as rational and guardian. The additional context provided through KTT analysis helps to round out the personality picture you are initially confronted with as a divorce mediator. It establishes a foundation that will

nourish the mediation process, based on a person's temperament, character, and personality traits, upon which a peacemaker can build a working relationship with participants.

In reality, none of us are all one type of temperament or can be pigeonholed with only certain types of personality traits. And nothing really substitutes for the ultimate peacemaker tool—what you bring to the round peacemaker table from your life experience, education, training, and intuition.

Yet psychometric tests like KTT and MBTI can be a helpful *storyboard* for the peacemakers. That is, a storyboard or character sketch that helps one determine (especially during the premediation screening phase) an initial approach to a mediation case and personalities of its often unpredictable *dramatic participant stars.* Indeed, such a determination is necessary to see if the peacemaker's personality and mediation style are appropriate for disputants. We peacemakers—always on the lookout for tools to help us with the vagaries of human conduct and behavior—should embrace these helpful psychometric tools, while understanding their shortcomings, and the consideration of one's ability to fundamentally change or alter long-held beliefs and negative personality traits.

Let's turn to another very important peacemaking tool with wide implications for assisting people in conflict—*Nonviolent Communication.*

Nonviolent Communication

> *Behind intimidating messages are simply people appealing to us to meet their needs.*
>
> —Marshall Rosenberg

> *We don't see things as they are, we see things as we are.*
>
> —Marshall Rosenberg
> http://www.nonviolentcommunication.com/freeresources/nvc_social_media_quotes.htm

NVC is a conflict resolution model designed for relational disputes of all types. The model was developed by Marshall Rosenberg to help neutralize conflict in negotiations, and is particularly applicable to family law

mediation. NVC seeks dialog over argument between disputants. NVC is a word-conscious or sensitive approach to conflicted communication. It seeks to eliminate words and actions in communication that engender guilt, shame, blame, humiliation, force, and threats. NVC is grounded in the present moment. It encourages detachment from past memories, hurts, and grievances. It seeks mindfulness in human communication.

Mental health professionals and peacemakers primarily use NVC in order to facilitate negotiated conversations. At its best, it practices the language of Gandhi and *Ahimsa*: *do no harm in word, thought, and deed, especially when communicating with a conflicted other.* In utilizing NVC concepts, peacemakers help educate participants to avoid trigger words when communicating. Peacemakers modeling communication patterns throughout the peacemaking process also support dialog over argument. Rosenberg theorizes people verbally fight with each because of the way they have learned to *discuss issues, not the issue itself.*

A discussion of some primary NVC tenets is as follows.

Trigger Words

Trigger words—such as *why, should, never, always, but, or yes and but*—lead to assertions about another's motives. Trigger words are *moral imperatives* and, according to *Rosenberg*, are generally aimed at inducing guilt and remorse in another. They are words of manipulation and carry within their vibrational patterns negative images of disapproval, condemnation, and judgment. Fear of being manipulated and negative images place the recipient of such a vocal attack in the limbic brain of the receiver or victim of the intended slight. Only recipient defensiveness, confusion and mayhem can result from such an unconscious verbal onslaught.

So, from the NVC standpoint, conflict involves fighting over another's alleged motives rather than the unsettling behavior. You observe motive-oriented speech when you hear divorce disputants uttering with an emotional charge statements such as *you are going to court only for revenge* or *you want more time and money with the children because you want control over me, just like when we were living together*. Such statements place participants in the emotionally *dead past* and are not useful to solving present day problems. Trigger words are not helpful to real

day-to-day needs of divorcing spouses, which are centered on feelings of financial and relational insecurity, and their children.

NVC philosophy and training strives for having those in conflict verbally focusing on *factual observations* rather than judgments and evaluations_of other disputants. For instance, *I observe you and Fred are not getting along again* versus *Why is it that you and Fred can't ever get along?*

NVC encourages *naming the emotion* affecting you without a moral judgment. *As an example*, expressing what you are feeling rather than condemnation, an NVC statement might be:

> I see you are physically disciplining our dog again. It makes me angry. NVC stresses stating the need *involved for* yourself and others, as in: I have noticed that when I speak your attention seems to be focused elsewhere. This makes me feel insecure. My need right now is to feel that we understand each other.

Finally, NVC recommends that a disputant make a *request for action* to meet the need identified, and not a demand. NVC philosophy holds that each participant is responsible for meeting their own needs by creating voluntary alternatives, which would support a peaceful resolution to conflict.

For instance: In a recent case, wife was encouraged to express her need for expert assistance in educating her spouse that their children not be introduced to her husband's significant other until the family had adjusted to their parent's physical separation and divorce; husband agreed. Likewise, the husband stated his need for companionship and love from his significant other during the emotionally difficult divorce transition, which was discussed with the wife by her mental health coach and led eventually to acceptance of her spouse's need. It also fostered more conscious and delayed introduction of the children to husband's significant other.

Difficult Conversations

NVC philosophy is at its best when dealing with difficult or challenging conversations. These are the types of conversations with conflicted others that are dreaded and avoided by most of us. These conversations are ones

that spin our minds and keep us up during the night. According to Stone, Patton, and Heen in *Difficult Conversations: How To Discuss What Matters Most*, there are three components to challenging discussions. The components to these challenging conversations are as follows:

- *Multiple stories* or more views of the same set of facts than any one individual are conscious of;
- A *high emotional charge* with participant sensitivities and feelings involved;
- The subject matter is *psychologically menacing* to one or both parties.

For the peacemaker, dealing with difficult conversations calls for an understanding of the nonverbal discussion going on in the participants' minds. Keeping the participants in the present moment and finding ways to encourage mindfulness—ideally through encouraging *meditation* and *pranayama* (conscious breathing and energy movement work) that helps to still and focus the mind—allows conflicted individuals to be observers of their actions and inactions and not just actors in a self-created drama, and, thus, are very useful tools. These tools help us deal with the unspoken fear, insecurities, and anxieties of disputants. In these difficult conversations, the peacemaker's role is to observe what the *true facts* of the dispute are and recognize the specific *underlying, individual, human emotions* driving the dispute.

Assumptions

In relationships that are intimate and personal, how does the peacemaker accomplish the seemingly impossible task of defusing highly emotionally charged and difficult conversations? First, according to NVC philosophy, the peacemaker needs to deal with the underlying assumptions fueling the fire of the participants' discord. Regarding participant assumptions, Stone, Patton, and Heen point out the following assumptions as problematic:

> I know what happened. My story is the truth. I know who intended what and who is responsible.

> Feelings are irrelevant or inappropriate. Talking about them will only be messy and not accomplish anything.
>
> This has nothing to do with who I am (although it may have something to do with the kind of person the other is). This is mostly about the facts and what is the right thing to do about them.

Regarding assumptions, the well-known shamanic and spiritual teacher and healer, Don Miguel Ruiz, in his best-selling book, *The Four Agreements: A Practical Guide To Personal Freedom (A Toltec Wisdom Book)*, presents *four contracts or agreements* to make with one's self to foster harmony with others. Ruiz derives his agreements from the Mexican Toltecs, who constructed the incredible pyramids outside of Mexico City and were known as ancient people of wisdom. One of the agreements deals with assumptions. (We will discuss Ruiz's other three agreements later in this book.)

Ruiz teaches that we should never make assumptions about what another person is thinking or feeling. We must be mindful that our assumptions are grounded on our own individual *belief system and experience.* Our assumptions about another may have little or nothing to do with how others think and feel. The antidote to assumptions about another is to be brave and ask questions and to effectively and clearly communicate our desires.

Truth Trap

Ruiz's preceding precept of *don't make assumptions* goes to the core of NVC philosophy. For instance, there is what *Stone, Patton, and Heen,* the authors of *Difficult Conversations*, call the *truth trap*. The truth trap is where difficult conversations often wind up. When one or more participants are in the clutches of the truth trap, the oral exchanges have shifted from sorting out the facts to how one or both of the disputants *interpret the facts.* Participants become divided; the conversation becomes a *they are, we are* frustration dance, and attributions and images are foisted on each other, usually wholly or partially inaccurate.

There is no question establishing an accurate set of facts regarding the nature of the dispute is extremely important. We lawyers are trained

to cull from conflict all relevant and provable facts, while excluding the nonsupportable, such as hearsay evidence. We rely on firsthand observable facts, less so on circumstantial evidence, and generally exclude facts, which cannot be cross-examined carefully in a court of law.

However, of equal and often paramount importance to conflict resolution is the *emotional component* behind those facts, both for the speaker and listener. In relational conflict such as divorce, it remains of upmost importance to delve into participant emotions—such as fear and helplessness—the real meaning behind a disputant's actions and verbal reactions, and the needs that meaning serves.

This is where working with an interdisciplinary mediation team can really help disputants. Having a lawyer, financial planner fact-finders, and mental health emotion coaches can help avoid or release participants and peacemaking process from the unnecessarily dramatic and unfruitful conflict grasp of the truth trap. (Stone, Patton, and Heen 1999).

Intention Invention

Another NVC term and common occurrence one runs into in relational conflicts is the *intention invention*. In divorce conflictual situations, this practice can be explained by the often unconscious human tendency of being *aware* of the impact of others' conduct on oneself and one's own intentions, while simultaneously being *unaware* of another's intentions and the impact of one's actions on others. A peacemaker must hold the peacemaking ground sacred here. She must help the participants to separate attributions arising from the past, either with the other disputant or some distant person or experience unrelated to the instant conflict, from actual facts. The tool encourages disputants to actually talk about their intentions and the emotional impact of other's intentions on them in a factual manner, rather than ascribe images of what they think another's intentions are (Rosenberg 2009).

> Example: The wife, who primarily raised the couple's three minor children, seeks post-marital support for a period of three years. Husband resists and imputes to wife that her refusal to work during the marriage, even though she has a college degree, is now

> carrying over post-divorce since she wants continued support from him and does not want to work. He further argues that since he will be paying a large amount of child support to wife and will have to set up a separate household, he cannot afford to pay alimony, even if he wanted to do so—which he definitely does not want to do. They have been unable to positively communicate with each other directly since their physical separation.

The previous issue was resolved when wife revealed her intention that her postmarital support request was predicated on her being able to get additional education and training and gradually re-enter the job market in the nursing field over the three-year period. At the end of the three years, she would be able to independently support herself and her share of child expenses without husband's help. Her now explicit intention, buttressed by a written plan suggested by the peacemakers, elicited cooperation from her husband. Husband's stated intention in negotiation was to financially survive divorce and get on with his life. Wife understood his intention since in reality she had the same desire. Resolution occurred in this case when both spouses realized they had the same postdivorce connection, surviving financially and relieving their respective anxieties regarding this concern. This resolution was a transformative moment for them in moving on with their divorce.

Blame Frame

> *The only source of blame is the confusion in our minds, a chaos which Buddhism calls ignorance.*
>
> —Ricard, Matthieu as quoted in *Offerings*,
> Calendar page April 24

Another NVC aspect of difficult relational conversations is called the *blame frame*.

Nothing will cut short a difficult conversation faster, relational or otherwise, than attributing blame and the possibility of punishment to another. We all want to avoid the ball in the metaphorical *roulette* blame frame from falling on us. We humans resist being blamed for most

everything. We, thus, instinctively switch to our sympathetic nervous system and limbic brain roots to defend ourselves.

When blame and punishment are factors in relational conflict, we then begin *to hear without listening*. We become overly occupied with defending ourselves from real or imagined harm. Usually, we become intent on preparing our defense to the accusations made against us, while our counterpart is blaming and implying punishment rather than listening to the unspoken mental and emotional messages being conveyed to us.

Blame is driven by judgment. And when we perceive that we are being judged in the conflicted divorce world, we respond with our primordial freeze, flight, or fight response. The frame of mind called *blame* causes us to shut down our reasoning center, the prefrontal cortex, and, consequently, our conversations move beyond the purview of facts, logic, and reason.

A blame frame example: A U.S. blame-frame is heating in the current confrontation between the two main American political parties. Continuously confronting Congress and voting citizens is the raising of the U.S. debt ceiling (last raised in October 2013). Each party blames the other for the most current impasse and suggests that voters in the next election punish their opponents, a *classic blame frame*. What we citizens deserve is reasoned debate based on facts. Our elected officials are supposed to cooperate in our mutual interest in an effort to ascertain the truth about any particular issue. Instead, we have turned a normal everyday political issue into a vitriolic cacophony of accusations and propaganda that has recently shut or threatened to close our Federal government down!

Neither Republicans nor Democrats are listening to each other. They are each engaged in a mindless debate in a morally bankrupt, self-amusing, self-entertaining, *blame frame game*, while punishing each other for their unconscious violation of all the social observances set down for millennia by world philosophies, including, for example, the Yoga *Yamas**—*the disciplines for social harmony or how to get along with others in society*. (*The *Yamas* are at the spiritual heart of Yoga philosophy, practice, and way of life. They include the aforementioned *ahimsa* or to do nothing to harm another in word, thought or deed.)

The second Yama *satya*—or truthfulness in all matters—requires an impeccable level of honesty and lack of moral corruption in all of the body–mind's endeavors. Our nation's capitol is a place where truthfulness is a rare commodity—a commodity bought and sold like stock market shares.

The third Yama is *asteya*. Asteya directs us toward nonstealing and nonexploitation, and not to manipulate events and others for egoistic or other dishonest purposes. Can any reasonable observer of the prevalence of venality of DC politics argue that asteya's admonitions are not violated 24/7 by many of our representatives in our national elective government?

The fourth Yama is *brahmacharya***.** This fourth Yama relates to one's self-restraint and moderation in all things. One can safely say that actions of members of Congress, and the consequential damage they cause to third parties in our populace due to their actions or inaction, are *not* restrained and moderate.

The fifth and final Yama is *aparigraha***.** Aparigraha is the Sanskrit word for nonattachment and not living in the memory of the dead past. *For Example:* The more extreme Congressional members are attached to an 18th-century, agrarian, post-Civil War philosophy of a minimalist or even noncentral federal government. Their view is often obsessively religious in nature. It is so firmly attached to their sense of righteousness that they have created a *jihad* against our centralized national government. It calls for utilizing any method, no matter how destructive of other peoples' viewpoints and rights, to accomplish their agenda, including defunding federal agencies whose policies they disagree with and threatening to shut down the government through failure to pass a federal budget.

Their actions are immature, not unlike a child holding its breath to get its way. *If, for example*, every congressperson refused to support the continuation of government functions unless their view on a particular issue was adopted, that is, pass gun control legislation or the government shuts down, we will have a government continually ruled by blackmail and intimidation. The Washington **blame frame** game is attachment or *aparigraha* at its worst level of schizophrenic, nonconnectedness, and nonconsciousness (Iyengar 2002, 29–31).

It has been said that war can be defined as "… an act of force to compel an enemy to do our will" (Howard and Paret [1976] 1984,

75–89). The preceding example of the complete disregard of the *Yamas* by the disputants in DC, at least by the language of the previously quoted definition, looks and sounds like a war. This is a war with enemies, blame, judgment, retribution, and, at least for some, a *take no prisoners* philosophy. This ubiquitous dispute utilizes the language and metaphors of war: *dead on arrival*, *shot down*, *the enemy*, *Democrats versus Republicans*, *gun to the head*, *ransom*, *pull the nuclear trigger*, *terrorists*, *shoot the hostage*, and the like. These warlike references have insured that we will not get reasoned debate, only further hostilities regarding America's budget issues.

A quick comparison between the preceding warlike verbiage arising from the *blame game* in Washington and the language of divorce as used in most states is instructive. When one files for divorce, one files a *complaint* with a family court. The complaint highlights in a *bold* caption, a *plaintiff* and a *defendant*. So, right from the outset of a divorce proceeding, we have a legal division—reinforcing an *emotional* division. In this legal war, one person—the person complaining—the *plaintiff,* is figuratively attacking, and the other—the *defendant*—must defend him or herself against the attack. The *blame game*, as reflected in the example of the often arcane and violent verbiage of the law, is an overly frequent limitation on finding a peaceful marital dissolution. Our legal language has the effect of fanning the flames of fear and anxiety that most divorcing couples face, creating from the very outset of a divorce an adversarial, blame frame environment, just like the *macroconflict* manifested in our national Capitol.

Further, a plaintiff *alleges and complains* in the complaint and supporting affidavit, among other things, that he or she should have custody of and support for the children, temporary spousal support, possession of the marital home, the other party should pay for the services of their lawyer, a freeze be put on all marital assets, and credit cards surrendered. A complainant may also ask for a restraining order, limiting access to children and communication between spouses.

These allegations and complaints are declarations of legal warfare. Through intention, lack of consciousness, or negligence, the complaint puts another on notice that they need to defend against a legal attack that threatens the things they care most about: *their children* and *financial security*.

The lawyers for the divorcing parties spend much time and client money on the pretrial *discovery process*. Litigants, in order to discover evidence from each other regarding the issues raised in a case, use the discovery process in adversarial litigation. For example, in a custody contestation in which the mother-plaintiff seeks sole custody, she might be required to answer hundreds of written questions or *interrogatories* and submit to hours of intense questioning at a deposition in which her answers will be recorded by a stenographer regarding her *fitness as a parent*.

She will be required to provide bank and tax statements going back many years. Her medical and psychological records may be subpoenaed. Her grocery bills and credit card statements might be required to be furnished. Any evidence of any kind directly and indirectly related to her parental fitness is fair game in discovery. For family law and trial litigators, the discovery process is an indispensable tool for preparing for settlement or trial or both.

As part of the discovery process, lawyers and participants will spend sometimes hundreds of billable time amounting to tens of thousands of dollars or more, drafting and responding to *interrogatories,* taking and defending *depositions*, and preparing and responding to *requests for documents.* Family lawyers utilize their skills and legal cunning to provide the other side with the least amount of information and evidence they can get away with. The discovery process is a carefully choreographed and expensive pretrial game in terms of time, money, and litigant angst. It is often used as a legal bludgeon to mentally, physically, and financially force an unequal settlement of a case.

Parties will have their *depositions* taken by opposing counsel. A deposition is a recorded stenographic or oral statement taken pursuant to a subpoena and under oath by a party in which lawyers may ask almost any question remotely relevant to the court proceedings, and they can last for hours, occasionally days. Lawyers consider depositions indispensable trial preparation and courtroom tools.

The whole discovery process is akin to gathering information or intelligence about the other party—the legal enemy—to be used against that party at trial. It is a form of fact or intelligence gathering that military personnel pursue against an enemy they seek to defeat or destroy in a future battle or war.

By contrast, in family mediation cases, all information is openly and voluntarily shared with the participants and lawyers. Participants and their lawyers need not go through the time-consuming and expensive process of seeking court orders to force a recalcitrant litigant to produce information or answer questions. Litigants will invariably seek to limit the information sought by an opposing party through legal guile or court order. *Discovery* can be an adversarial art form and often an incredibly long and expensive process without a seeming or logical end, or, from many a litigant's view, without a real point except to create case delay and litigant frustration eventually leading in 98 percent of all adversarial cases to a forced pretrial settlement or surrender to the demands of an opposing party or both.

One is not implying that demands in the initial divorce complaint and supportive filings may not be necessary. However, it is quite often the verbiage within the complaint and filings that sets the stage for a contentious legal confrontation and war between divorcing couples. In fact, the very word *divorce* from a peacemaker perspective is not helpful. Some states, like California, have recognized the heavy image and latent aggressiveness in the word *divorce* and have opted instead for the word *dissolution*. Particularly in the family law and relational field, we should always observe the words we use. They do matter and they often have long-term consequences for divorcing couples and families. As the English proverb reminds us: "*Speaking without thinking is like shooting without taking aim*" (Davis 1992, 52).

As we can see, the language of violence permeates our entire culture, from our national sports, television, and movies to family court and right on to the national stage of politics. We live in a *Thunderdome* culture of violence. And despite reforms over the years, the adversarial family court world perpetuates this destructive cultural approach to arguably the most sensitive of human relationships—the family. As we shall see, it doesn't have to be this way.

It is possible in most cases—through careful selection of an ADR process—to have a civilized, nonviolent divorce. One can have dissolution of a marriage, in which a conscious, mindful, spiritual effort is made to resolve differences, without resorting to the language and tactics of the battlefield. With mindfulness, there can be a much more peaceful and transformative marital dissolution process.

Contribution

One antidote for the *blame frame* is the NVC concept of *contribution*, as in taking responsibility for one's role or part in a dispute. Consider the following real-life mediation situations.

"My husband cheated on me, causing the break-up of the marriage and he needs to pay alimony through the nose for it." Should the wife's emotional and sexual detachment from the marriage for several years prior to the cheating event be considered as contribution to the dissolution of their marriage?

A businessman is angry with his partner for negligently handling business accounts resulting in considerable loss of income. The angry partner's attention had been focused on his own emotional concerns and not business matters, including the accounts in question. Does the angry partner bear some responsibility for the income losing accounts?

A corporate executive is upset at employees for mishandling customer complaints while he was away, even though they were not trained to handle such matters, as she had promised to do before leaving. Should contribution play a part in how the executive handles the poor servicing of customers by her employees?

In playing the *contribution* card, the peacemaker seeks to focus the participants on understanding through meticulous fact gathering and education on *contribution*—the part each played in causing the harm complained about. When participants can transform their anger toward another by understanding they are really angry with themselves for their own failures under the factual circumstances, a spiritual moment of insight, mindfulness, and understanding has arrived. This is a delightful moment for a neutral that makes peacemaking as rewarding in human terms as any professional or voluntary endeavor (Stone, Patton, and Heen 1999).

We see this modern day focus on contribution exercised in international truth commissions, such as the *Truth and Reconciliation Commission* (TRC) undertaken in South Africa after the fall of apartheid in 1997 and chaired by Archbishop Desmond Tutu. The emphasis of commissions like the TRC is aimed at mutual understanding, avoiding repetitive negative behavior, and recognizing joint responsibility contributions by

and from disputants. It is a pragmatic approach that refrains from moral judgment, retribution, revenge, and punishment. This view of *contribution* represents what Desmond Tutu calls the "me we" or the core tenet of African philosophy: *the essence of what it is to be human*. Or, to put it another way, "If I diminish you, I diminish me." Such an approach is a far cry from the assessment of blame, revenge, and punishment methodology of the post-World War II Nuremberg Trials or, indeed, the adversarial divorce industry (Tutu 2007).

Feelings

A final NVC-inspired word on *feelings*. Feelings crave acknowledgement, and not necessarily agreement. Even among the most conflicted situations, most reasonable people can understand that even though they may factually disagree with a disputed other's assessment of controversial facts or reality, they can relate to how another feels regarding those facts. However, the danger in regard to feelings is in attributing feelings—by projecting how you think someone you are in dispute with is or should be feeling—about a conflicted issue or concern. The peacemaker must educate and assist disputants to express how *they* feel and not how they think *another* should or does feel.

> **Productive Expression of Feelings Example**: *I have felt emotionally and physically detached from you for almost our entire marriage.* **Rather Than**: *You are and have been emotionally and physically detached from me for almost our entire marriage.* Although both statements are harsh assessments of a marriage, use of the former statement will generally elicit less or little negative response from the recipient of the statement.

Many newly minted peacemakers only look to participant *problem solving* (i.e., division of marital property and child custody issues) and reaching a written divorce agreement. Where peacemakers often fall short is in providing participants with an opportunity to free themselves from the weight of their *feelings*. Feelings have been often long repressed and have led in great part to participants seeking a divorce. The reason for

this is that inexperienced peacemakers frequently substitute problem solving and a written agreement—no matter how brilliant the problem solving and fair the agreement may be—for dealing with the *underlying* emotional conflict leading to the divorce. In our experience, permanent healing and life transformation will almost always be impeded without some degree of individual and former spouse reconciliation and forgiveness (Rosenberg 2009).

This is why the *multidisciplinary approach* to divorce and relational mediation makes so much sense. One cannot expect lawyers and non-mental health peacemakers to professionally and ably assist participants with sorting out and reconciling their feelings. Having a *team member* who by disposition, training, and experience has the requisite skills *and* desire to perform the necessary *emotional component of relational mediation* is of great and lasting value to participants and peacemaking process!

Mental health professionals employ a wide range of modern psychological therapies, such as cognitive behavioral theory, attachment theory, and process group interaction, in helping participants and families through family counseling and marital dissolution process. As Rosenberg has said: "We don't see things as they are, we see things as we are" (Rosenberg 2009). Mental health professionals can help sort out the feelings that make Rosenberg's statement so profound. They can be of inestimable value to the underlying emotional side of most divorce (and other) disputes, helping individuals *to see things as they are*.

Summary

In summary, Yoga philosophy, brain science, Myers–Briggs' theory, Keirsey Temperament Test, and Western psychology, the author's own professional *difficult conversations* experience with disputants, indigenous wisdom, and NVC theory and practice, all overlap and support each other. Conscious, mindful communication is key to resolving conflict. In peacemaking—especially family law mediation—every word, gesture, physical movement, tone of voice, body posture, and manifested and unmanifested participant intention are part of the *communication dance* to be observed in a meditative state by the peacemaker. This would involve peacemaker consciousness of decreasing her heart and metabolic rate so

that rational thinking is not impeded, total focus remains on disputants, and breath awareness is fully engaged. Such peacemaker focus places her within the creative reaches of her prefrontal cortex, where assisting participants to resolve most human dilemmas and disputes can be thoughtfully and mindfully determined.

It is interesting to note that the *communication dance* may also include the observation that a person's movements give clues to their unspoken thoughts. Neuroscientist Dr. James Kilner of University College London observed the following in conducting games that revealed hidden thoughts:

> … Confident marble players moved more quickly, and observers of such action interpreted this speed as signaling greater confidence and … college students … with some poker experience did best at telling weak from strong hands by using players' arm movements as a tip-off. (As quoted in the Honolulu Star-Advertiser 2014, F8)

Observing these factors is not unlike perfecting a Yoga *asana* or physical posture with breath awareness. The yogi seeks perfection in *asana*—a convergence of body, mind, and spirit that flows without effort. *Experience indicates that in order to mediate one must meditate*. This is a high bar to reach and may never be fully realized. However, we peacemakers, who are called upon to serve as impartial facilitators for dispute resolution, must stretch our intellects and spirits to accommodate the challenges of a world in deep crisis.

In the next chapter, we will be looking at helpful mediation skills and techniques that will guide us to meet the challenges of a dysfunctional American divorce world.

CHAPTER 6

Mediation Skills and Techniques

In a paraphrasing of Prussian Carl Phillip Gottfried von Clausewitz, who said in his famous dictum that "war is the continuation of politics by other means." It can be said that adversarial divorce is a breakdown in communication that is war by other means.

Let us be clear from the outset in this chapter. There is no single magical, secret mediation skill or technique to help one resolve a family law or any other type of dispute. However, there is a full array of mediation skills and techniques in the peacemaker's toolkit that have proven to be helpful in resolving conflict. Knowing which ones suit your peacemaking style and approach, as well as the facts, issues, and personalities surrounding mediation participants is of great value to the peacemaker.

A Peacemaking Success Prediction Algorithm

Of primary importance to the peacemaker is to know which cases to undertake. The following approach is an attempt to quantify the normally intuitive process for a peacemaker to determine the potential for success in mediating a conflict. It was developed for study purposes for the author's graduate students in *Mediation and Conflict* at Hawaii Pacific University.

The suggested approach is an imperfect model at best. There is no mathematical model, no matter how thoughtful, that can substitute for case selection wisdom arising from years of practical experience with a spectrum of mediation participants. It can, however, be useful for beginning peacemakers as a tool to analyze a case for mediation suitability.

The algorithm will help remind you of many of the baseline variables involved in successful mediations. It will also assist you in saving yourself and mediation participant time, energy, and money—while not raising peacemaking expectations unlikely to be met.

A nonexhaustive list of equation variables for measuring potential for conflict resolution success would include the following:

A = Degree of nonjudgment of participants and conflicted issues by peacemaker;

B = Degree of focused attention in the moment or present-mindedness of participants;

C = Degree of conflict participant recognition of self-responsibility for the conflict;

D = Degree of participant ability to distinguish self-perception from reality (*we perceive things as we are, not as they really are*);

E = Degree of emotional intelligence of participants, as expressed in negative communication with another (i.e., *the accuser,* the participant who despite his or her own negative behavior is ready to blame and condemn another without accepting any responsibility for the dispute);

F = Degree of participant confidence or trust in the peacemaking process or peacemaker;

G = Degree of careful peacemaker precase acceptance screening of participants;

H = Degree of success in peacemaker education of participants regarding conflicted issues;

I = Degree of success in helping participants distinguish between their bargaining positions and true interests;

J = Degree of unaddressed emotion (*anger, depression, rejection, sorrow, denial*);

K = Degree of disparity in bargaining positions (*financial independence of spouses*) and negotiation skill of participants;

X = Degree of conflict resolution success, with 5 being assigned to X as a midway point distinguishing the likelihood of mediation success (i.e., any sum represented by X which is greater than 5 indicates a greater possibility for the mediation process to

succeed; any sum below 5 should give the peacemaker pause as to whether the mediation process is worth the effort).

Thus: A + B + C + D + E + F + G + H + I + J + K = X

The following example of the previous algorithm is instructive:

First, we place a subjective value (based on experience and observation) from 1 to 10 on each of the following variables, with 10 being the highest value. Next, we place a weight on each value ranging from 0 to 1.0, with 1.0 being the highest weight or importance. Thus, all assigned weights will add up to 1.0.

VALUES WEIGHTS			
A = 10	×	*0.2*	*= 2*
B = 8	×	*0.05*	*= 0.4*
C = 5	×	*0.05*	*= 0.25*
D = 8	×	*0.1*	*= 0.8*
E = 5	×	*0.05*	*= 0.5*
F = 8	×	*0.05*	*= 0.8*
G = 8	×	*0.1*	*=0.8*
H = 6	×	*0.1*	*=0.6*
I = 7	×	*0.1*	*=0.7*
J = 8	×	*0.1*	*= 0.8*
K = 8	×	*0.1*	*= 0.8*

Mediation success potential: 8.45

Conclusion

The preceding algorithm indicates that there is a significantly better than 50-50 chance for mediation process success. Based on prior experience, one would likely proceed with mediation, while seeking to improve upon weaker variables found in our equation as the peacemaking process moved forward (DiGrazia 2013).

The previous *Peacemaking Success Prediction Algorithm* is a fun exercise. However, let's examine a bit more in depth the variables presented in

the algorithm if we are serious about being able to more carefully screen appropriate cases for mediation in family law.

Perspective mediation participants often ask mediators what their batting average or success rate is in helping resolve marital dissolution cases. Generally, the more experienced a peacemaker is the higher her success rate. The reason for this is obvious: experience in resolving similar cases. Less obvious is the peacemaker's skill in screening out inappropriate cases. Inappropriate cases would include cases in which there is too great an unprocessed emotional charge, existing or potential psychological and/or physical violence, the facts and issues are beyond the peacemaker's skill set, participants are unable or unwilling to allow the peacemaker to facilitate the mediation process in an orderly fashion due to their uncooperative behavior, one participant is overwhelmingly dominant and a bully, and the like.

Variables

A: Degree of nonjudgment or impartiality of participants and conflicted issues by a peacemaker.

Due to importance, this variable was given the highest single value in our algorithm. From an ethical view, we have a nonstarter in a family law or other dispute resolution process where the peacemaker holds strong judgments about either one or both of the participants or the issue or issues to be negotiated that impinges upon his impartiality. For instance, if the peacemaker cannot tolerate or is having difficulty with a certain personality trait of the husband in a family law mediation, such as a domineering personality and aggressive negotiating style, one would have to question whether proceeding with the mediation is ethical or wise. If the reaction of the mediator to the described personality causes one to become overly protective or an advocate for the wife-spouse, consciously or unconsciously, the mediator must seriously question whether to take on the case or, if already engaged, proceed with it.

As Peter Adler, Ken Cloke, and other peacemakers have stated: *no peacemaker is neutral.* What is paramount, however, is whether the peacemaker can be *impartial* in assisting participants (Adler 2008; Cloke 2009).

This is an important distinction. Mediator ethics demand that peacemakers avoid or withdraw from cases in which their impartiality is in question (ABA 2005). Additionally and practically, if the peacemaker is continually spending time and focusing on attempting to control one's impartiality, he or she will eventually soon lose his or her focus and present mindedness for the case.

B: The degree of focused attention in the moment or present-mindedness of participants during a mediation.

If a participant(s) cannot stay focused during mediation negotiations to the extent that the mediation sessions are undermined, sabotaged, or cannot precede in an orderly fashion, one has to question the viability of the process and, sometimes, the motivation of the disruptive participant(s). As an example, lack of focus can be detected when a participant cannot detach himself or herself from his cellphone or handheld technological device. Such a person finds it impossible to turn off handheld devices or is constantly apologizing for taking calls or responding to texts, which disrupts the flow and efficiency of the mediation process. If this interruptive state cannot be initially addressed through the premediation screening and education process or eliminated once mediation commences, then the peacemaker must again question the viability of the process he or she is responsible for directing.

Even more important is the inability of usually one or occasionally both participants to stay in the negotiation *present* moment. This condition is almost always attributable to little or no emotional processing of the pending marital dissolution by a participant. This behavior is exhibited in a lack of present-mindedness. It is demonstrated when there is excessive and repeated emotional displays and drama created by a participant. Sometimes, the behavior is aggressive, full of finger pointing, accusations, dredging up of past negative experiences, hysteria, and tears. Sometimes, it is more passive and takes the form of noncooperation, depression, inattentiveness, and a wandering mind.

In the author's mind, the inability of a participant to maintain a reasonable degree of present-mindedness during peacemaking negotiations due to lack of emotional processing underlines the need for assistance

from mental health professionals during the marital dissolution process. It is better for a participant(s) to invest time and energy in processing valid and confusing emotions they are subject to with a professionally trained coach. Unprocessed emotions and consequent disruptions will undermine the peacemaking process. Working with a mental health coach will also make the peacemaker's job a whole lot easier, while significantly shortening the time and expense involved.

C: The degree of participant recognition of their respective responsibility for the conflict or divorce or being mediating is most important.

This variable is huge and was covered in the *Blame Frame* and *Contribution* sections in the previous chapter. If all that the mediator hears during sessions is how blameworthy and solely at fault the other spouse is, one has another real roadblock to assisting participants toward dispute resolution. Once again, we mostly have psychological or emotional issues best addressed by mental health professionals and proper case screening.

D: The degree participants are able to distinguish their own perception of the facts from the actuality of the pending divorce is a crucial variable.

This variable in our model algorithm was given a value of 8, among the highest values in our equation. This variable relates to our discussion of *Feelings* in the previous chapter. If you recall, we quoted the famous NVC maxim: "We don't see things as they are, we see things as we are."

If a mediation participant's thinking is so blinded by the unaddressed fury of his or her emotions and, therefore, sees negotiation strictly as a zero sum game, it is extremely difficult for the peacemaker to be of help. If a participant's feeling is that *the other spouse is totally responsible for the failure of the marriage and revenge is suitable punishment regarding (unduly) limiting the other spouse's access to the children or a wholly unfair division of marital property and postmarital support*, then the peacemaking process is likely to fail or result in an inequitable dissolution agreement. As indicated in our discussion of brain science, the fight response of the limbic brain would indicate to a person consumed by their emotions that

their *perception* of their divorce reality justifies an aggressive negotiation posture. This perceptual posture would apply equally to male and female spouses.

Of course, like all of the variables reviewed here, there are degrees to which participants are subject to the pull of any variable. As in the other algorithm variables presented, one would attach either an experienced driven intuitive or professionally aided mental health assessment to determine the weight to assign to a particular variable in determining mediation success potential.

E: The degree of emotional intelligence possessed by participants must also be assessed in determining the appropriateness of taking on a case.

Emotional intelligence (EI) is the ability to identify, assess, and control the emotions of self, others, and groups. EI is a measure of an individual's noncognitive skills and includes personality traits such as self-restraint, perseverance, empathy, compassion, and self-knowledge. EI is the sum total of a person's maturity and ability to relate and communicate well with others (Coleman 2008).

We all have varying levels of EI. Very rarely do mediation participants come to us with equal EI quotients. Like IQ levels, EI is a reflection of one's genetic inheritance and exposure to environmental factors. As a broad generalization, one finds that most women have more fully developed EI than their male counterparts. One can only speculate why. Perhaps this phenomenon is explained because women tend to mature earlier than men and have primary care for children. Or maybe because women cultivate social networks and communicate with peers and family with greater frequency.

Therefore, at premediation or as soon as possible after the peacemaker's initial experience with participants' stage, the EI variable with an appropriate assessment and weighted value is a factor, although not decisive on its own accord. Other variables collectively that militate toward a successful mediation outcome may outweigh it if participants are capable of being emotionally educated during the mediation process. This needs to be considered in predicting mediation success. Having preliminary

knowledge from trained professionals regarding participants' EI levels is most helpful to the peacemaker and ideally needs to be part of one's assessment for mediation success.

An actual case example comes to mind: *The husband had an online pornography addiction and had extra-marital affairs, which when discovered by wife led her to seek a divorce. Although completely devastated by her discovery, her EI level generally allows her to separate her negative view of her husband's sexual proclivities from his positive behavior as an attentive father and good provider for their child. However, based on her discovery and fears that their child will be exposed to what she feels is her husband's reckless sexual behavior, she insists on restrictive custody protocols for husband's living time with the child until she can be reassured by a psychologist and by her husband's future behavior that there is no psychological threat to their child.*

Husband's EI is underdeveloped. He is lacking in self-awareness. He has no sympathy for his wife's concerns. With the support of his lawyer and male therapist, he resists all restrictions, no matter how reasonable and temporary, on his sexual behavior and living time with his child. Here we have a classic clash of EI levels, which, if not accounted for in one's calculation of probability of mediation success, can retard a proper handling of a case.

This case was resolved with extensive mental health coaching for the parents and child. The coaching helped the husband to raise his EI level, and enough compromises were made by each participant to allow for a civilized divorce.

F: The degree variability of a participant's confidence and trust in the peacemaking process and peacemaker(s) must be taken into account in determining appropriateness.

Participants' trust and confidence in both the peacemaking process and peacemaker(s) is a high value variable. Peace at any level of human existence—from international relations to business affairs and marital dissolution—cannot be created or maintained without trusting the peacemakers and peacemaking process. Our experience informs one that if disputants buy into the peacemaking process, whatever its protocols, and feel confident the facilitator is honest, impartial, competent, and has the clients' best interests at heart, almost any dispute can be settled

amicably. Some successful mediator enhancers based on trust and confidence follows.

Rapport

The key to mediator success lies in developing rapport with the disputing parties.

—(Stephen P. Goldberg)

This quote from Stephen B. Goldberg is not only supported by one's intuition and experience, but also backed up from surveys of experienced mediators—mediators who have mediated at least 100 disputes (Goldberg 2006). Mediator success, operationally defined as assisting disputants to amicably resolve their differences, avoid the adversarial process, and get on with their lives, is built on rapport.

Rapport is based on a relationship of compassion, understanding, confidence, integrity—in short *trust*. As Adler pointed out some time ago, learning and mastering mediation techniques and approaches is important, yet pales in comparison to the importance of the relationship of trust and confidence held by the participants with their peacemaker (Adler 2003).

Trust is indispensable to communication between peacemaker and disputants. If participants withhold necessary information from the mediator, then the peacemaking process will be limited in effectiveness and often undermined. Each participant must feel that he or she can explain his or her point of view regarding mediation issues without restraint and that each one will be *heard* by the mediator.

Greater communication through rapport means more information is available for both disputants and peacemaker to review and respond to honestly and creatively. The more creativity you bring into the peacemaking process, the greater likelihood for a successful outcome. If there is good rapport between mediator and participants, when crunch time comes and participants need to make some necessary compromises or find common ground to effectuate resolution of their dispute, the advice offered by or sought from the peacemaker is much more likely to be accepted.

You cannot separate the peacemaker from the peacemaking process. That is, the peacemaker—through his or her ethical behavior, competence, and trustworthiness—brings that trust essence to the mediation process. That essence then becomes imbued in the process itself. If the participants invest their confidence and trust in the mediator, they will, almost automatically, support the process. The mediator and mediation process, if it is to be successful—and particularly in family law disputes, where raw emotions are always the pivotal factor in almost every case—must earn the trust and confidence of participants.

A mediator's ability to develop *rapport*—a relationship of *understanding, empathy, and trust*—is the key to mediator success. Survey findings from mediators, advocates, and disputant participants reflect that empathy, compassion, integrity, and being well prepared are qualities and behaviors characteristic of successful mediators (Adler 2008, 61, 82, 122, 171).

The peacemaker on the issues and needs presented by disputants accomplishes a relationship of rapport through such means as focused listening or one-pointed mindfulness. Once again, *mediation* is a form of *meditation*, where the present moment rules. When a mediator's attention is focused solely on the case before him or her, every nuance in communication between participants can be fruitfully observed. In particular, such one-pointed focus can pick up on all-important nonverbal cues humans use to communicate. Every gesture, facial expression, and muscular movement holds import for the avid listener, giving one clues to what really is being said between disputants and supporting necessary rapport between peacemaker and participants.

Creative Issue Solving

Creative issue solving is another mediator success tool. *For example,* mom and dad are fighting over postmarital support. Dad will be paying $1,500 a month in child support to mom. In addition, mom wants transitional alimony of $2,000 a month for three years. She argues that the three-year period and amount requested will enable her to complete a master's degree in her field without impairing her standard of living. Dad is only willing to pay $1,000 a month for one year. Although he can afford to pay the

requested amount, he fears that mom will not have motivation to become financially independent from him if he pays what mom is requesting, and, therefore, alimony will be indefinite or prolonged unnecessarily.

The mediator, who enjoys open communication and rapport with mom and dad, suggests the amount of support be tied to mom's ability to rapidly obtain her educational and work transition goals. Mom will receive $2,000 a month as a full-time student for the one year she estimates it will take for her to complete her degree. During the following one-year job retention and full-time work transition, she will receive $2,000 the first month and $150 a month less each succeeding month until she finds full-time employment or the year ends, whichever comes first. Dad gets to deduct the postmarital support from his taxes and can claim both children as dependents for IRS reporting purposes during the two-year period. Dad only pays alimony for up to 24 months and his postmarital support ceases entirely at the end of two years.

The afore-mentioned creativeness only comes about when mediator and disputants are confident in their relationship with each other—a confidence that helps spawn communication so open and flowing within the mediation process that resolving issues and meeting needs become a team effort. This is that ideal place where peacemaker and disputants cooperatively find a solution to divorce issues that all can live with.

Humor and Laughter

Another tool to enhance participant trust and confidence in the mediator and peacemaking process is the use of *humor and laughter*. When humor results in laughter, good things can happen. Biologically, humor and resultant laughter releases chemicals in the brain like ***oxytocin***, which elevates one's mood (Kosfeld et al. 2005, 673–6).

Laughter increases the oxygen flow through the bloodstream to the brain. The brain, which is the largest consumer of oxygen in the body, becomes more energized and creative when laughter occurs. Humor relieves tension and stress. There are thousands of people around the globe who attend Yoga laughter classes and retreats to relieve negative emotions—even in prisons, where stress and depression are large issues (http://www.youtube.com/watch?v=yXEfjVnYkqM).

Experienced mediators use humor and laughter as an integral part of their work. Some peacemakers are blessed with being talented amateur, sit-down comics. Others tell humorous stories or show funny cartoons relevant to the subject matter of a dispute. As with all other mediation tools, humor should be used in a natural and discreet manner. It works best if unforced and, if possible, spontaneous. If you are not a good joke teller, find some *other* way to express humor.

Laughter and humor are people connectors—they help to open hearts and minds to the possibility of shared humanity and peaceful resolution of differences. In the family law dispute resolution world, opening hearts to the opportunity for reconciliation and forgiveness emanating from their marital dissolution is of the highest spiritual order and necessity for a peacemaker. Successful mediations are greatly aided by laughter.

Patience and Tenacity

Successful mediators are *patient and tenacious.* Successful mediators, especially family law mediators, must possess these qualities in abundance. *An example*: A family law mediator is often placed in the crosshairs of conflicting participant timetables. The initiator of the marital dissolution has generally been processing the emotional side of the divorce for many months and sometimes years prior to formally announcing her (from one's experience, 80 percent of the time the initiator is a women) intention to seek a divorce. In her mind, the emotional divorce has already taken place with legal and financial details for obtaining a marital dissolution a mere formality. The initiatee is not generally prepared for the divorce. He needs time to emotionally process the impending dissolution. Consciously or unconsciously, he will seek to slow the dissolution process down until he is ready to accept the reality of his wife's insistence for a divorce and move on with his life.

Such a scenario places the peacemaker in a position of having to balance the wife's need for a speedy end to the marriage with the husband's need for processing time. Working out a suitable average dissolution speed for husband and wife takes patience and tenacity. When wife is totally frustrated by what she perceives as husband's unjustifiable delays—such as husband's nontimely financial information gathering, continuous missed

appointments, frequent need to consult with his lawyer, and unreasonable negotiation positions—she is ready to bolt from mediation into the adversarial process. When husband feels that he is being coerced into an unfavorable divorce because wife wants a divorce right now, especially if she has a significant other in her life that is waiting in the relational or matrimonial wings for her, then he may seek out a lawyer who will tie his wife and her plans up into expensive legal knots.

In this type of situation, the peacemaker must exercise patience and tenacity in helping both participants to work through their fears, insecurities, and anxieties and do her best to keep them both in the mediation process. The peacemaker's efforts in this regard will be greatly aided if the peacemaking process is a multidisciplinary one. If the participants can be educated to at least understand, if not respect, the time needs and concerns of the other, an average speed acceptable to participants for advancing mediation negotiation and dissolving the marriage can be obtained.

The preceding is only one fairly common example of how a family mediator's patience and tenacity is the glue holding the peacemaking process together. Suffice it to say that there are myriad junctures throughout the family law mediation process where mediator doggedness in keeping the peacemaking flame alive is crucial to the success of a nonviolent divorce.

Consequences of Not Settling

Trust is also maintained by the ability of the family mediator to envision for participants *the consequences of not settling*. In the previous example, a family mediator's skill and experience in explaining (ideally with the support of other professional team members) the legal, psychological, and financial consequences of moving out of mediation to the adversarial process can be crucial to mediation success. In the preceding example, the mediator (or mental health coach or both) would explain to the wife that giving her husband a reasonable amount of time to process the emotional divorce is a worthwhile investment.

In the short run, it will help keep their divorce out of the adversarial system, saving her (and their future children's college education!) tens of thousands of dollars in legal fees and costs. Any delays caused by her

spouse's processing needs will likely be more than made up in getting a divorce sooner rather than later. Based on our experience in Hawai'i, we know that most mediated divorces take 12 to 18 months from start to final divorce degree. By comparison, most adversarial divorces take from 24 to 36 months from start to finish.

Showing some compassion for the father of her children and man she once loved and married will likely be reciprocated in future cooperation and support from her soon to be ex-husband. The marriage may be ending, yet their roles as coparents (and potential participants in a blended family—the merging of the family of the ex-spouses and their respective future spouses and their families) are forever. If the divorcing spouses with the help of the peacemaker can negotiate a civilized marital dissolution, which evolves into reconciliation and forgiveness between them, the future benefits to their children of cooperating coparents is enormous—*think*, jointly paying for children's education, weddings, and grandchildren needs. Educating the coparents as to the consequences of their emotion-charged actions and inability to settle is key to mediator success.

Timing

Life is all about timing; it is no different in peacemaking. One of the more challenging aspects of peacemaking can be observed in the dynamic tension that exists for a peacemaker between more aggressively directing participants toward settlement and allowing participants to move at their own inefficient and frustrating speed toward resolving their differences. The mediator is often called upon to make a very judicious decision: when, if at all, is the right moment to move participants to final settlement? When is the right moment in time to move from a facilitative to evaluative or transformative mediator mode?

There really is no law on this subject. More successful mediators appear to intuit the answer to the previous questions. This intuitive intelligence will add to participant trust in the peacemaker's ability to positively direct the peacemaking process on their behalf. *The following intuitive intelligence example is instructive.*

Husband and wife have been tediously negotiating a difficult child custody and living time arrangement for their children. Negotiations

have been quite dramatic and emotional. Their respective lawyers have been consulted at every negotiation turn and their legal advisers have done their lawyer *thing*—successfully slowing negotiations to a crawl. The spouses have spent thousands of dollars on legal and mediation fees.

Although they have made considerable progress in their 14-month mediation process, they have developed a delaying habit. Despite therapy and an 18-month physical separation from her husband, wife still has a high emotional charge toward her husband. This charge takes the form of feelings of betrayal and distrust toward her husband due to his infidelity during the marriage. Husband and his professional supporters feel that he must defend himself against a vengeful and unreasonable spouse seeking to isolate husband from his children. In response to these feelings, they have developed a negotiation style, which entails seemingly unreasonable periods of delay while they consult their respective therapists and lawyers.

So, what does a peacemaker do? Does he allow the participants to entirely dictate the speed of negotiations, no matter how unnecessarily time consuming and expensive? Or, does the peacemaker's role move from the purely facilitative—that is, the participants are the experts on their lives and should negotiate in their own manner and speed—to a more directive stance? That is, a directive stance that bluntly and forcefully encourages settlement through present compromise or introduction of a peacemaker settlement proposal—with a heavy emphasis on the consequences of not settling. This intervention question will often trigger the *denouement* of a case, a *denouement* that can end, suspend, or move the participants to settlement. When does a mediator more forcefully interject her or him into stalled settlement negotiations and test settlement resolve?

Since successful mediators primarily use their intuitive powers (and, if they are fortunate, the input from multidisciplinary team members) to fashion an answer to the intervention question, the skill in making this call is based on the wisdom of experience. Successful mediators plug into this wisdom experience base as often as necessary. There is no book of instructions directing one in this matter, only experience over time brings a mediator to this delicate decision making ability.

Sandra Brossman comes close to explaining the peacemaker's intervention role in helping participants to *let go* and settle a case. She posits

that we wrongly conclude that *letting go* is a form of resignation. Instead, what it actually signifies is that we have taken total responsibility for recognizing "… our personal roles in co-creating with the Universe by never giving up on ourselves …." As peacemakers, we can help participants view letting go as separating themselves from personal attachment to outcomes—another lesson in mindfulness (Brossman 2014).

"Needs" Translator

Successful mediators are translators. They are able to communicate the needs, not just the interests, of each mediation participant to the other. If the peacemaker has done his or her homework through careful screening and initial mediation session fact gathering—including not making assumptions about the participants and their negotiation positions—then he or she is positioned to act as a *needs translator* for participants.

Interests are bargaining positions. *Needs* are underlying apprehensions participants have in mediation outcomes. Interests are more like desires. Needs represent unfulfilled concerns participants have regarding their fears, anxieties, and insecurities arising from the marital dissolution process.

For example: A wife's negotiating position (*interest*) is to seek the maximum amount of alimony from her husband for as long as possible. Her underlying *need* is postdivorce financial security. Although wife has been the principle caretaker for the children throughout the marriage, husband's posture (*interest*) is to negotiate for full custody of their children. His baseline *need* is to have as much living time with his children postdivorce as possible.

The peacemaker's task is to help the participants understand their respective *needs* so that a meaningful dialog can occur between them. Once participants can move beyond negotiation posturing based on *interests*—that are more tied to their emotions and limbic brain reactions—they can progress to a conversation concerning *needs*. The family mediator's role in helping participants to nonviolently communicate their *needs* is crucial to successful mediations.

Using the preceding example, a mediator could, while in session with husband and wife, ask wife to explore her insecurities regarding loss of her husband's financial support postdivorce. With the help of a financial

planner or a realistic postdivorce budget or both, wife would be able to factually show her after marriage income will drop by 27 to 73 percent (a generally accepted statistical range in the divorce field). By presenting her "fact-based financial insecurity" with some *translation* assistance from the mediator, a more functional conversation about postmarital support can occur to address her insecurities.

Likewise, it is similar for husband in the previous example. In translating husband's *interest* to *need*, the peacemaker would call upon statistics indicating that dads in this situation often lose custody of their children postdivorce. Such a loss really represents a triple whammy for men, especially when their spouse initiates the divorce: in one fell swoop they lose their wife, children, and home—a most depressing situation that some men never recover from. This potential triple whammy fear needs to be explored through education of divorcing spouses.

Explaining the respective rights and responsibilities regarding child custody can be helpful in translating fear and anxiety over losing one's children into a positive conversation exploring living time arrangements with children. The use of mental health coaches can be crucial in advising coparents as to age-specific child sharing alternatives and ideas. Directing parents to online, interactive child custody resources, such as http://uptoparents.org/, can be an enormously helpful education tool. In short, education and dialog help support the mediator's role, as *need's* translator.

Integrity

There is no more important attribute for a peacemaker than being perceived by family law mediation participants as having *integrity*. The lack of almost all other mediator characteristics can be forgiven by the conflicted. Lack of family mediator integrity will collapse mediations every time. Unfortunately, lack of integrity also causes mediation to fall into disrepute among other professionals in the family law world and among the general public.

Integrity is defined as holding to or possessing firm principles. These principles include truthfulness, reliability, and uprightness. Lack of integrity by a mediator is often expressed in dishonesty in falsely relating a spouse's negotiation position to the other participant. Or, lack of integrity

can be found in falsely evaluating one or both participants' position. *And*, it can also be observed when a mediator seeks to impose on disputants her view of what a suitable resolution to a conflict should be despite the views of disputants and others.

Yoga philosophy, as expressed in the *Yoga Sutras*, is instructive here. At least three *Yamas* or ethical, social disciplines (i.e., *how to get along in relationship in the world*) apply to the instances of lack of integrity referenced previously. *Asteya,* which, among other things, means not to exploit others or manipulate others for one's own purposes or ego—as in falsely reporting negotiation positions—is applicable. *Aparigraha* or nonattachment to outcomes is certainly relevant when a mediator seeks to impose her view on disputants as to how a case should be settled. And, finally, *ahimsa*, which we have discussed in the previous chapters, and which means *to do no harm*, is certainly in play when a peacemaker goes rogue and is dishonest, exploitive, or manipulative (Iyengar 2002; Goldberg 2006).

Control of the Process

In *How to Borrow a Mediator's Power*, mediator *Dwight Golann* states that mediators often believe they have "no power." As he points out, this may be accurate in a very limited way, since a peacemaker has no authority to force participants to settle their differences. However, mediators have broad control over the peacemaking process that is utilized by participants to negotiate their differences. Golan informs us that:

> Like the conductor of an orchestra or the referee in a sports contest, a mediator can influence the rules, tempo, emphasis, and other aspects of a negotiation, and by doing so affect what the parties can achieve.

Thus, a mediator's power is in control of the peacemaking process—if he loses control of the process, he gives away possibilities for a negotiated agreement.

As examples of this power, Golann points to mediator *control and influence over when and how disputants will negotiate*. The family mediator plans when participants will meet, considering whether they have

had adequate time to prepare and process emotions from the last mediation session. He decides whether they should meet together or whether separate, private caucuses will be more productive.

Some family mediators exclusively use what is known in the trade as *Kissinger* or *shuttle diplomacy*. This style of family mediation is generally used by lawyer-mediators in cases where lawyers are directly involved with their clients in the process. (Shuttle diplomacy was named after former Nixon Secretary of State Henry Kissinger after he mediated a peace treaty between Israel and Egypt in the 1970s.)

It involves *shuttling* or going back and forth between individual adversaries or their representatives or both, always keeping them separate and apart until accord has been reached. Family law disputants and their lawyers are often literally placed in separate rooms with the mediator going back and forth between them.

In this manner, the mediator becomes a filter for communication between disputants, reducing drama, emotion, and possible confrontation among participants. Such a style of mediation can give a peacemaker a good deal of power over both the process and participants. It is a style reflective of a mediator's personality and comfort zone.

Other family mediators who are more inclined toward open, discursive communications between participants will use joint sessions almost exclusively with them. These mediators tend to be nonlawyers or mediator-lawyers who are comfortable facilitating difficult conversations. This more facilitative style of peacemaking, unlike the shuttle mediators, uses individual caucuses more judiciously. It relies on the inherent peacemaker belief that given enough good will, information, advice, and time, disputants—who are the experts on their own lives—will be able to resolve their differences.

It should be noted that no one style of mediation is best. Most experienced family mediators are pragmatists. They will utilize whatever style of peacemaking fits the issues, emotions, and personalities of participants. Most successful mediators are highly adaptive and will change, combine, or mix differing styles to meet the needs of the peacemaking situation confronting them.

A mediator *sets the discussion agenda*. What issues and in what order will issues be raised? Absent an emergency issue such as deciding how

next month's mortgage payment will be made, many family mediators prefer dealing with child-related issues first, followed by financial and other issues. This preference is based on a general experience finding that spouses are more likely to agree on child-related issues than financial and other issues. The peacemaker can than build upon the momentum generated from child-related agreements to better facilitate agreement on difficult nonchild-related issues.

Although mediators are strictly bound to their primary professional obligation of absolute confidentiality arising from communications with participants, they have wide lead way in *exercising their discretion about what they are told*. Their discretion is always subservient to the exception of where they are specifically prohibited from revealing a particular spousal confidence. Mediators must explain they will be exercising their discretionary exercise of judgment to participants at the very outset of the case, when describing the mediation process and their various peacemaking roles, so that confusion and surprise can be avoided.

A mediator's *impartiality* is a potent process force. As Golann points out, a mediator perceived by participants as impartial, and whose only agenda is assisting disputants to resolve their differences peacefully and who makes a proposal similar in kind to one that a participant has made, is much more likely to have his or her proposal accepted by the other participant. When humans are emotionally overwrought and believe others are their enemies, they will refuse even the most favorable settlement offer coming from that individual. That baggage should not hinder the mediator.

For further discussion of mediator power, see the Golann article.

Extrapolating from Sun Tzu in *The Art of War*, Adler offers us an analogy of the mediator's role and choreography (literally, "dance writing"). A skilled choreographer in such art forms as dance and opera is focused on governing the course of the developing storyline. Sun Tzu was a master choreographer of warfare and conflict, like choreographers in various other art forms, who "… set the mood and manage the action through the interplay of sound and light, the use of backgrounds and foregrounds, the positions and juxtapositions of people and things, and the unfolding tempo of the drama" (Adler 2008, 208.).

Among many other roles we play, we peacemakers, like Sun Tzu, are *choreographers* of conflict—only our major purpose is to help transform

conflict into nonviolent, peaceful resolution. Without perceived *impartiality* of the peacemaker by participants, conflict choreography is neither effective nor even possible.

G: Careful screening of participants is a variable of high value to the peacemaking process.

The degree of time and energy invested by a peacemaker in *precase acceptance screening of participants and the subject matter of their dispute* is another high value variable determining mediator success. There is an inverse ratio to screening: *the more time spent by the family mediator in precase acceptance screening of participants and the subject matter of the dispute, the greater likelihood of mediation success.*

Screening for these two essential peacemaking components—screening of participants and the subject matter of their dispute—starts with the first participant contact with the mediator, usually by phone or e-mail. *An example:*

> A gross yet typical screening arises when the mediator is contacted by a 21-year-old soldier (there are numerous military bases surrounding the author's office on Oahu, Hawai'i), who states he has just returned from military service in Afghanistan and discovered his 20-year-old unemployed wife of 10 months and mother of their one-year-old child has been having an affair with another male soldier.
>
> In an emotional and angry voice, he tells the mediator that he wants to strip his wife of any custody rights to their child, cut-off all military benefits, and ship her back to the continent. He states he wants a mediation appointment immediately. And he adds that his wife has (guiltily) agreed to all of his demands. He is not a happy camper. A follow-up phone call to the wife confirms all of the above facts.

Absent divine intervention or an overnight emotional reversal, this case will probably not get beyond phone calls and a possible anger management referral. The soldier's unprocessed anger and sense of betrayal, and wife's guilt and lack of independent resources all speak to mediation

not being a proper venue for this couple at this time. Experience dictates taking on a private case like this will most likely end in frustration and unnecessary expense for all.

Many public mediation organizations are forced by the terms of their funding and court-ordered referrals to take on all cases regardless of their mediation merit. Accepting a case like this will undercut mediation as an appropriate option for resolving family law disputes in the minds of the public. It will also lead to early mediator career burnout by taking on *mission impossible* cases.

The next level of screening is more involved. Let's say the first phone contact with a perspective mediation participant is not so obviously negative as the previous example. Many mediators offer free or low-cost initial *office consultations* with perspective participants. The consult offers an opportunity to meet both participants in a face-to-face manner. In our practice, the consultation is limited to a discussion of the *mediation process*. It also will address participants' questions regarding mediator experience and costs.

The office consultation is an excellent screening tool. The time together allows participants and peacemaker to get to know each other. The mediator can observe how well participants can communicate. Body language, and even the distance apart or angle participants place their chairs in physical proximity to each other, is valuable information for the mediator. The emotional charge between the couple can be felt first-hand. This helps enable the peacemaker to assess the appropriateness and current timing of mediation, along with the need for additional professional assistance. Questions, particularly about the mediation process, can be openly addressed. The willingness of both spouses to fully commit themselves to the mediation process can also be determined.

Assuming the mediator believes that the case should proceed, a *mediation agreement* is then executed by mediator(s) and participants to, among other things, protect the confidentiality of the mediation process. More screening can then come into play.

The use of a thorough participant *intake form* can then be utilized to garner still further important facts. Participant written responses to intake questions provide valuable data regarding the history of the marriage, children and parenting roles, mediation issues such as parental ability to

cooperate on children's needs, presence of lawyers and litigation status, participant use of other professionals, health and emotional status, financial planning, and whether—importantly—either participant or child has been or is currently subject to domestic physical or psychological violence and abuse.

If, for instance, a history of domestic violence and abuse was revealed in the intake, such information would in most instances indicate a nonstarter for mediation. The psychological interplay between abuser and abused is way too complicated for most divorce mediations—although there are some mediators specializing in this kind of mediation—and are better left to lawyers and judges in order to protect abused spouses. Always remember, the mediator's only real power is internal to the peacemaking process; any protection offered participants external to the process can only be provided by others.

If, after the preceding screening, the mediator(s) still has some reservations about taking on a particular case, it is recommended that *private individual participant precase acceptance sessions* or *caucuses* be held. Such sessions usually allow for a spouse to be more candid about their feelings, and their underlying fears, concerns, and interests concerning themselves, children, and spouse. All of the other previous screening information can be used by the peacemaker to zero in on what is really going on. That is, the greater part of the unseen emotional, familial, and factual conflict dynamic hidden behind their facial facades and often-false verbal bravado is what we look for.

For instance, private sessions have revealed the presence of significant others, unexpressed pregnancy, financial incompetence, secret sexual orientation, proliferate spending and illegal drug habits, and as yet unannounced intention by one spouse to move with the children to another state, which have not previously been revealed by one or both spouses to each other or the mediator or both. These underlying and unaddressed issues can undermine or reduce the effectiveness of the mediation process.

The intelligence gathered in individual caucuses is invaluable for screening purposes and generally leads a mediator to decide whether she will take on a case and be able to help the participants resolve conflict. Importantly, it allows participants to vet many of their pent up, unprocessed emotions in a safe environment, allowing the peacemaker to gage

the depth of the existing emotional charge of participants and the need for mental health coaching. It will also stimulate an appropriate mediation process roadmap of strategies and resources leading to a nonadversarial and nonviolent divorce.

One hopes the reader comes away from the preceding screening discussion with an appreciation of its importance to successful mediations. Proper screening directly relates to the next variable—education of disputants.

H: The peacemaker's education of disputants—regarding conflicted issues —is another important variable to successful dispute resolution.

Premediation divorce education is a rabbit's warren of misinformation. With a 40 to 50 percent divorce rate, almost every other person you meet has a horrible divorce story—usually, if they have suffered an adversarial divorce. It is quite natural for divorcing spouses to consult with family, friends, coworkers, and guy or gal in their health club for advice.

If these individuals had an adversarial divorce, there advice will be to take no prisoners (your spouse included) and to hire a *junkyard* attorney—a *pit bull*—as a legal representative. Many of those consulted have had really bad experiences in their divorces. They have had emotional and financial experiences that remain as open, unhealed wounds in their present-day psyches.

Another source of unreliable information is that offered by most divorce lawyers. One is not suggesting that divorce lawyers purposely mislead or provide misinformation to clients. Lawyers are first and foremost advocates for their clients. Most often they are zealous divorce advocates. There is a natural advocacy spin placed on advice given to clients, which paints client as all good and *opposing party*—the other spouse—as all bad.

Divorce legal practice—at least as it is played out in the adversarial world—is a black and white affair. *We are right and they are wrong* is often the mantra heard in an adversarial law office. (*Note:* pronouns can be dangerous to your communication health by unnecessarily and negatively objectifying another.)

Clients who come to mediation after first consulting with a divorce lawyer often have to be reeducated regarding their respective legal rights and responsibilities. For instance, a client may be mislead or because of

their depression and emotional malaise not truly understand they are not entitled as a matter of right to all or even lion's share of the marital estate or they are not automatically entitled to alimony—contrary to what they heard by way of lawyer bravado or misperceived from their lawyer, or third party.

It is not necessarily the lawyers alone who are to blame for the misinformation gap suffered by new mediation participants. It is an American cultural phenomenon, seen and endlessly repeated in our media. Major movies like *Kramer v. Kramer*, starring Dustin Hoffman, and its progeny, both in cinema and on television (currently *Suits* and *The Good* Wife), offer a frightening view of marital dissolution, where only the strong survive with scheming and aggressive lawyers on hand. *This is why peacemaker education of disputants is a crucial variable***.**

If the peacemaker has carefully screened participants regarding the afore-mentioned variables, there is a greater likelihood they will be open to being educated about the major issues to be negotiated, namely, children and money. Education of participants begins with their learning about their respective legal rights and responsibilities toward each other and the children. Such legal rights pertain to child custody and support, postmarital support, and division of the marital estate (which includes all assets and debts accumulated during the marriage by either spouse).

They will learn—at least in Hawai'i—that child support is required by law and determined by a court formula based on the respective incomes of mom and dad. They need to understand the noncustodial parent has a legal right to minimum living time with the child or children, absent factors such as child abuse, incapacity, or incompetence. Further, it often comes as a surprise to parents that children have a legal right to living time with the noncustodial parent.

They will learn that despite their feelings of outrage at a spouse's conduct during the marriage, postmarital support is generally granted only in the short term, and, among other factors, is based on need and ability to pay. These types of facts can come as a consciousness-raising moment in the new mediation client's mind.

They must come to understand that at least in Hawai'i, the division of marital property starts with a 50-50 division regardless who acquired or name the asset or debt is in. And the fact that one spouse earned

substantially or all of the family income to purchase a marital home or other asset does not mean he or she solely owns that asset. Likewise, debts incurred during the marriage, regardless of who incurred the debt, are joint obligations. These educational facts about division of marital property help to offset the misinformation often held by divorce participants and put everyone on the same page.

Where children are involved, education of participants needs to be deeper and more thorough. An educational child-related tool such as the aforementioned (*UpToParents.org* website 2015) is an extremely valuable instrument for raising coparent consciousness about the needs of children of divorce. The website offers interactive opportunities for parents to self-educate regarding age-appropriate concerns, fears, insecurities, and anxieties children of marital dissolution face. The website helps shed light onto issues such as *why parents just can't get along? Why they have to argue in front of their children when either parent picks them up at a coparents home? Or why children feel they are at fault for their parent's divorce and continuing conflict?*

The *UpToParents.org* website (it was developed and is managed by peacemaker-lawyer, Charles Asher, and his family psychologist wife, Barb Asher) and its present and future descendant websites are among the most efficient, convenient, informative, and free sources of practical and incisive help for families going through marital dissolution in the divorce field. It has suggestions for parents and professionals that join the very best of law, family psychology, and counseling into a peaceful spiritual union. It is an educational must-read-and-use guide for everyone divorcing with children or in the divorce field.

I: Of continuing importance as a mediation success variable is the degree to which the peacemaker can assist participants in distinguishing between their bargaining positions and their true interests.

This variable, which has already been touched upon previously, will be more properly taken up in the next chapter on *negotiation.*

J: A further mediation success variable is the degree of unaddressed and unprocessed participant emotions.

Unaddressed participant emotions such as anger, depression, rejection, sorrow, and denial are the bane of divorce negotiations. It is a high value success variable. These unprocessed emotions will cause misery for participants as well as those in a professional relationship with them. The previous discussions regarding the use of mental health coaches embedded in the collaborative, ED, and multidisciplinary approaches to high emotions are instructive ways for dealing with this phenomenon.

The writer's observation is that the passage of time for most divorcing spouses is the single best ameliorator of highly charged emotions. Generally and *ideally*, a one- to two-year period from the point of physical separation of divorcing spouses will operate to substantially lower the emotional flames for a divorcing couple. A recent poll found that it takes about 18 months to get over a divorce once a family court finalizes it. However, divorced spouses are often separated for months and years *prior* to issuance of a final divorce decree, so additional and often-substantial time has to be factored, in order to be able to move on with one's life. The more conflicted the divorce, the greater the recovery time (UK News 2009).

The hiatus allows disputants to get on with their lives. They are able to reconstruct their new spouseless existence, often finding fresh significant relationships to ease the passage of divorce's emotional malaise. They may also be able to face and overcome many fears and anxieties about emotional as well as financial survival. They are able to go through a year or two of annual events and milestones—birthdays, anniversaries, deaths, births, graduations, marriages, visits with grandparents, tragedies, and crises—without the other spouse. They can begin to realize there really is the possibility of life after divorce.

With time comes reflection—maybe the divorce is a good thing, enabling one to grow and mature in new ways. Perhaps, over time, one comes to realize that although personal transformation is painful, it is a necessary by-product of leaving a relationship—a relationship that is not conducive to further personal development and individuation. Also, on rare yet welcomed occasions, the timed physical separation can lead to marital reconciliation and forgiveness with one's spouse. It also enables children—resilient creatures that they are—to adjust to mom and dad not living together anymore.

Unfortunately, often one or both divorcing spouses want to get divorced *now* or sooner. Thus, metaphorical lemons often confront the peacemaker. How does he or she turn it into *lemonade?* One method if participants are up for it is to do a temporary agreement that protects the status quo during the period of separation prior to entry of a final divorce decree. The agreement can be informal—signed memoranda of understanding or a formal, legally enforceable contract between participants or a court-approved legal separation.

The agreement covers most of the same issues that would be covered in a divorce degree, namely, children and money. The status quo is protected—child and spousal support is determined, mortgage and car payments are made, and child educational expenses are agreed to and funded.

A time limit is often set on the temporary agreement. Participants sometimes agree they will seek counseling for themselves and children during the duration of the agreement. Divorce lawyers often seek to accomplish the same status quo result with the afore-discussed *motion for predegree relief*. As mentioned previously, although this *motion* can accomplish protecting the status quo, the motion can and usually does throw kerosene on an existing emotional fire that usually results in legal violence and warfare between husband and wife. However, sometimes, the motion is absolutely necessary to defend a spouse from the psychologically unhinged actions or threatened actions of the other spouse.

Often, the temporary agreement has the salutary effect of buying participants necessary dissolution processing time. It gives them an opportunity to step back from emotional confrontations and unnecessary drama that marital dissolution can produce. *It is an emotional timeout allowing participants to exhale*. And the peacemaker can be *instrumental* in suggesting, creating, and helping to implement much-needed respite from potential divorce warfare. A final advantage of a temporary agreement is it can easily be turned into the basis for a final divorce, saving time, mediation, and legal expense when a couple is ready to move forward with their marital dissolution. It can also be ripped up and caste aside if a couple should reconcile their marriage.

This simple approach to *time*—which has been defined as the, "eternal present … a mental concept used to describe the transformation of

matter" (Swami Savitripriya 1991, 114)—allows for changes or transformations in familial relationship. It is another nonviolent peacemaker technique worthy of replication.

K: Another high value mediation success variable is the degree of disparity in bargaining positions and negotiation skills.

Disparity in bargaining positions and negotiation skills between spouses was touched upon in Chapter 2. It is a high value variable in our conflict resolution algorithm worthy of further review.

Spousal bargaining positions usually coincide around money and children, our old standby factors. The *monetary negotiation factor* revolves around how financially independent husband and wife are relative to each other. For instance, in a more traditional marriage, if husband earns and controls substantially all of the family's financial assets, and wife has no independent monetary resources of her own or from her blood relatives, husband has a distinct bargaining advantage, particularly in an adversarial divorce.

Husband's greater finances will allow him to retain a more experienced and expensive divorce lawyer—a lawyer who generally specializes exclusively in family matters, knows the predilections of family court judges, and how to work the court system to his client's advantage. It will also allow husband to create a very heavy legal fee financial burden for his spouse, which she cannot readily afford and often results in a forced compromise to husband's demands. This would be akin to an army with greater resources forcing the surrender of an opposing army, which cannot match the other's financial power.

Even when a husband is ordered to pay his wife's legal fees, a wily divorce lawyer who represents the husband can force delays in fee payments that may cause more experienced lawyers to shy away from representing the wife-spouse. Many times, a spouse owed money for court-ordered legal fees will have to go back to court repeatedly to get the order enforced. At a minimum, such delays and frustrations will cause many a divorcing mom to think twice or more as to whether she wants to risk bankruptcy and poverty to pursue an obstinate male in court. This hesitancy is supported by many a woman's primary and emotional

concern for getting custody of her children at all costs, even at the expense of receiving a less than fair distribution of the marital estate.

On the other side of the negotiation coin, some women will hold their husband hostage to his *fear of losing custody and living time with their children*. This fear is often heightened when wife has left husband for another man, whom husband perceives to be displacing him as his children's father. This fear especially manifests when wife has been the principle caretaker for the children throughout the marriage, with husband almost exclusively engaged in providing an income for the family. Wife's lawyer can play on husband's fear of losing contact with his children and sometimes negotiate a less than fair division of marital property division. Also, greater postmarital support for wife, disproportionate educational financing for the children, and wife's legal fees from an anxious husband can also be unfairly negotiated from an anxious father fearful of losing meaningful connection with his children.

The respective disparity in *negotiation skills of participants* must also be factored into our algorithm. Negotiation skill disparities will be observed between stay-at-home moms and father's holding professional and executive work roles—where bargaining, asserting one's self, and negotiations are part of husband's everyday job description. It is also observed in many intercultural marriages, where one of the spouse's speaks English as a second language and is unable to understand the American divorce culture and legal system.

These types of disparities—as we shall discuss more fully in our following chapter on negotiation—can all be addressed to a large degree in mediation. For our purposes, in this section of the book, a mediator in screening a case must do everything necessary to uncover and address, if possible, disparities in negotiating skills between participants.

Negotiating disparity, especially as it affects wife-spouses, is a prime and continuing source of criticism levied against the mediation process by some women's advocates and divorce lawyers. It can also rise to an ethics issue for a mediator, who may proceed with mediation despite a disproportionately biased and unleveled negotiation playing field, often stacked against women. If a mediator is incapable of addressing this power disparity (by, for instance, bringing into the mediation process a neutral financial expert), she must refer participants to a more experienced

peacemaker or lawyer for assistance during mediation negotiation. *Or*, if the disparity between the participants cannot be overcome, the case must be refused. If other important variables, as discussed previously, also indicate the case cannot be successfully mediated, one should decline to act as a peacemaker (DiGrazia 2012).

Assuming one has carefully screened a mediation case and addressed the preceding variables, *and* has determined mediation is an appropriate forum for negotiation, there are additional techniques and skills, which can assist the peacemaker in his peacemaking mission. We will describe some of them in the next chapter on *negotiations*.

CHAPTER 7
Negotiations

At the root of every tantrum and power struggle are unmet needs.
—Marshall Rosenberg, NVC

Life is about one long negotiation. We negotiate every aspect and nuance of our lives; from getting along with our childhood comrades in the neighborhood playground to surfing the various shoals of life—education, marriage, contracts, distribution of power dynamics in families and professions, boundaries with neighbors, individuation with our parents, work promotions, street vendors, and, yes, divorce.

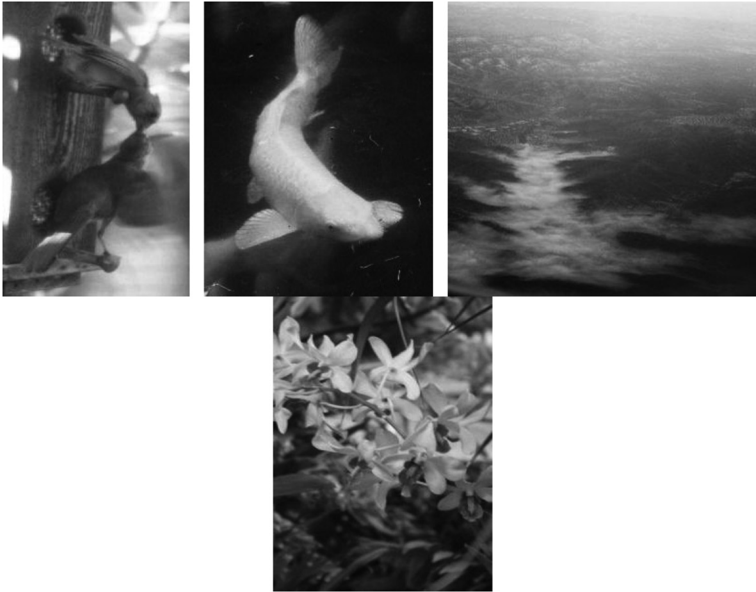
Negotiation is an art form. Negotiation skills come naturally to some, and through experience for the rest of us. Negotiation skills are at the core of peacemaking and mediation. Peacemakers believe that mostly everything is negotiable. Everything—from negotiating the subway, romancing a perspective mate to winning an election, to buying a home—is negotiable. Negotiations are how we get our *needs* met.

In the divorce field, how we get our needs met is a choice. We can go to war and choose a violent path—the adversarial divorce process with its warrior attorneys and their weapons of human *disconnection*—leading to judgment, criticism, comparison, denial of responsibility, demand, and a *I deserve* attitude. Or, one can choose the path of nonviolence based on human *connection*, as expressed through empathy, compassion, and meeting unmet needs, which is made possible through family mediation and peacemaking.

The following negotiation practice pointers and fundamentals apply to those who are negotiation participants as well as neutrals facilitating difficult conversations, particularly family law mediators. What we say about peacemakers applies equally to mediation participants and individuals seeking a more nonviolent way of communicating. We start with

an adaptation of an essay written by me for one of my Mediation and Conflict courses.

Hearing and Listening



Listening is the beginning of peace.

—Elise Boulding, Quaker Sociologist, and
Professor Emerita, Dartmouth College

For peacemakers, it is important to distinguish between hearing and listening. Mr. Krishnamurti is helpful in this matter (Krishnamurti 1999, 108; 2011).

Hearing is a physical act in which sound is amplified in the ear and reaches the brain for interpretation and response. Listening, however, is an act of cognition in which what is heard is interpreted and understood by the body and mind. In between the sound of what we hear and the interpretation of what is heard is a *meditative space* where the peacemaker's focused attention is drawn. That space consists of the speaker's tone or emotional spin being placed on the words being heard, the nonverbal cues emanating from the speaker, and one's subjective reaction to what is being uttered.

Intonations

The intonations of a speaker's words, as well as the choice of words used, especially in a highly charged emotional environment, are tremendously important. Often, it is not what you say; it is the emphasis placed on the spoken words that informs a peacemaker as to what a disputant's true meaning may be. A peacemaker's reflex to a tonal cue or spin should be to *question* the speaker to ensure that his or her words and tone truly reflect the intended meaning.

When confronted by a division between verbiage and the truer, nonverbal, tonal implications of what is being said, two peacemaker tools to overcome these divisions come to mind. One is to call a halt to the proceedings and take an educative moment with the participants. The educative moment can be done either privately with the negatively intoning speaker or as a lesson for all participants to observe and note the communication error between them. This more effective approach works best when participants have given *prior* permission to the peacemaker to perform this important educational function. The peacemaker's function in this regard is ideally explored at an initial appropriate dispute resolution (ADR) *process only* oriented session with participants. This is a good example of the peacemaker's ability to continue to educate participants on poor communication habits that can be crucial for the success of an ADR process. The disconnect between words and tone and how that gap can make the other participant(s) defensive and hostile to even the most reasonable suggestions can be pointed out to the unconscious speaker in a respectful and helpful manner. Also, one can have participants reverse roles and have each step into the shoes of the other and experience the potential destructiveness of negative tonality as their own reality, experiencing firsthand how negative tonality feels.

The second tool is reframing. When a participant continues to use negative tonality, such as sarcastic spin to his or her words, an automatic reflex should be triggered in the peacemaker that seeks to recast the negative tone so that a more positive, nondefensive response from the other disputant(s) is elicited. Reframing will also help educate the unconscious speaker to be more careful about his or her tonality in subsequent negotiations. Prior participant permission to perform this peacemaker

function is also advisable. As an example, in divorce mediation, a participant might intone caustically and state:

> I don't understand why you want joint physical custody of the children when during the marriage *your first concern was always your career*? (Emphasis added)
>
> The Peacemaker might reframe this statement, which she perceives to be an emotional button pusher for the recipient of such a tonal assault, by stating: "Are you really saying that X is not capable of the post-divorce parenting skills necessary to co-parent the children or because his time and energy were focused on providing financial support for the family, you felt neglected in the marriage, which is why you are seeking a divorce?" A reframing statement may, at the peacemaker's intuitive discretion, be stated in the presence of both participants or privately in caucus with the participant uttering the caustically charged statement.

Such a reframe will help to ensure that words and intent behind the words match and will keep participants on a better in the moment negotiation track. Remember, intonation matters. Sarcastic and caustic comments are almost always *trigger words*. In psychology, trigger words are viewed as a form of dishonest communication, which are designed to mask feelings. Hurt, anger, resentment, fear, anxiety and similar emotional statements are not legitimately seeking information, the exchange of ideas, or resolutions to conflict.

Nonverbal Cues

Similar to the previous observations on tonality are nonverbal, physical cues emanating from a distraught or unconscious speaker that negatively impact peacemaking negotiations. Classic nonverbal signals would be rolling of the eyes, repeated and inappropriate laughter and loud breath release, finger pointing, facial contortions, and rigid crossing of arms and legs. Once again, the peacemaker needs to perform an educational role in helping distressed participants to disarm themselves from inappropriate body language. Often, participants come to the peacemaking process

because of negative patterns or a failure in their communicative relationship rather than a real dispute over a particular issue. As in the preceding example, the real issue for an aggrieved spouse may be the divorcing couple's prior inability to talk about the balance between coparenting needs and family financial security and not the husband's postdivorce parenting ability.

Subjective Reaction

The peacemaker's subjective reactions to what ADR participants are saying, including nonverbal cues and tonal content, is of paramount importance in being an effective mediator, neutral or communicator. At issue for the peacemaker is whether he or she can maintain a meditative state of choiceless awareness. As *Krishnamurti* imparts and as applied to the mediation process, can we listen to a dispute participant's words without judgment? Can we observe the words, tone, and nonverbal cues of a participant without our prior conditioning, images, and thoughts—which are based on memory—that are monopolizing our consciousness? If we can observe what is being said in a state of nonjudgment or choiceless awareness, we are much more likely to be helpful to and creative on behalf of conflicted participants in the present moment.

We will be better able to help participants get to the root of their dysfunctional communication patterns. We can then help or guide participants to deal with issues that need to be addressed in the present moment and not dwell in the realm of their past history and poor communication habits. When we are free of the limitations of our own preconceptions about what is being said (or not said), we peacemakers are able to open up space in our own brains to see more clearly the road to a more peaceful and civilized ending of conflict between disputants.

Conclusion

Learning to distinguish between hearing and listening is a practiced meditative art form. As was often repeated to the writer by the indigenous *Yupiit* elders of southwest Alaska: "The Creator gave us two ears and one mouth; therefore, we must listen at least twice as much as we speak."

One's role as a peacemaker will be greatly enhanced by finding space for observation in your brain between what is being said or not said verbally and through physical cues, tonal quality of the words being uttered, and, most importantly, your subjective reaction to the participant's verbiage.

Remember: As a neutral in the eye of the storm of conflict, being and remaining impartial and nonjudgmental is a very worthy and conscious state of being.

The Four D's of Dispute Resolution Disconnection

Long ago in this book, we mentioned the adage "connection before resolution." What was meant by this peacemaker expression is that participants to a dispute, marital or otherwise, must find a communication bridge or connection spanning the chasm of their disagreement and conflict.

According to *Marshall Rosenberg* and his philosophy of *Non-Violent Communication (NVC)*, connection is most difficult, if not impossible, when a disputant holds one or more of the following factors or attitudes, especially in the highly charged divorce mediation realm. These factors, also called *disconnections*, are *Diagnosis*, *Denial of Responsibility*, *Demand*, and *Deserve-Oriented Language*. Often, these disconnects can be rooted out through disputant vetting and education, yet not always.

Diagnosis by one disputant of another is manifested in judgment, criticism, analysis, and comparison. Statements like *he has been a terrible father, who only pays attention to the children when it's convenient.* Or, *I'm the one who takes care and responsibility for the children since my spouse is always irresponsible and cannot be trusted.* Or, *why can't she be like other women and contribute more financially to the family?* All of these types of statements have an analytical edge, which will mire negotiations in the dead past rather than present, where it is only possible and necessary to solve problems.

Such statements, when combined with denial, are toxic to fruitful negotiations. They speak of a basic distrust, animosity, and lack of respect for the other spouse and are usually found in highly charged emotional divorces. If the peacemaker cannot help a disputant, especially with assistance from mental health coaching, to overcome the diagnosis disconnect, mediation must be suspended while a participant reflects on his or

her views of the other spouse or be cancelled with referrals to lawyers and mental health coaches.

Denial of Responsibility for any or all of the underlying reasons why a divorce has become necessary is perhaps the most impactful of all disconnects to resolution. One sees this disconnect phenomenon when one spouse has been in an extramarital relationship and the other spouse—feeling rejected, abandoned, and depressed—states that his or her husband or wife alone caused the breakup of the marriage.

The spouse holding this denial-of-responsibility viewpoint will conveniently forget his or her own failure of intimacy, or inability to grow and change, or pathological behavior exhibited in their marital relationship, which may have caused the other spouse to look elsewhere for what was denied or impossible for him or her to obtain in the marriage. When confronted with continuous and substantial or total abnegation of responsibility by a spouse for his or her share of the destruction of the marital union, even the most experienced mediators can do little other than refer disputants for legal and mental health assistance or suspend or terminate negotiation proceedings. (See also our discussion of the *Blame Frame* and *Contribution* for additional insight into denial; Chapter 5 pp. 94–101.)

Unreasonable demands are another nonstarter and can cause a disconnection in marital dissolution negotiations. A depressed and angry spouse seeking to punish the other spouse for infidelity or perceived financial irresponsibility may demand such a spouse be deprived of access to their children, financial resources, or medical insurance. The angry spouse may only be expressing a need for security or control over a life felt to be dematerializing before him or her, yet the need gets garbled and is put forth in the form of unreasonable or unrealistic demands.

Unless the spouse making such demands is so pathologically or neurotically embedded in a belief system about the other spouse that resists reasoned legal or psychological education or the disloyal or irresponsible spouse is a danger to the children, the latter parent and the child independently have a legal right to have living time and visitation rights with the other. A mental health coach could help point out to a depressed or angry spouse that his or her enabling conduct during the marriage was a factor in the other spouse's negative behavior. Most unreasonable demands can be overcome with time and patience. The negotiation

process will continually be short-circuited and eventually destroyed by persistent unreasonable demands.

Deserve-oriented communication language by a family mediation participant while a serious disconnection to effective negotiation is not necessarily a fatal barrier to the mediation process. Here, we are talking about the communication habit of one spouse or occasionally both spouses using language that starts off with words like *I deserve* or *ought to have* or *rate greater custody* or *more postmarital support because of all of your broken promises, infidelities or lack of attention to myself and the children during our marriage*.

An *I deserve* speaker can be assisted by an experienced peacemaker to reframe or rephrase such language into expressing similar thoughts with words that instead reflect feelings and needs. *For instance*, the previous statement could be reframed either by the participant or mediator to state: *Since you have broken your marital promises and left me so alone during our marriage, I am **feeling** depressed, lonely and afraid. I **need** the security of having our children around me as much as possible and to not **feel** financially insecure. Can you support my **needs** and respect my **feelings*** (a request for empathy and compassion) *right now?* Such reframing is much more likely to elicit support, empathy, and compassion from the other spouse than an *I deserve* statement. (See also our discussion of *Feelings* for corresponding information; Chapter 5, pp. 101–2) (Rosenberg, *Wikipedia* 2015).

Communication and Negotiation

We think at about 450 to 500 words per minute. We can only speak at about 150 words per minute. In order to communicate effectively, between thinking and speaking speeds, there must be a meditative focus or pause—a time for a deep inhalation and exhalation—so as to truly understand what is being said in negotiation. Otherwise, between the diverse activities of thinking and speaking, the brain in its ever programmed race for survival will jump to conclusions, day trip, plan a defensive response, or be engaged in a mental argument with the speaker (Barkai 2014b, 1). In short, one's ability to really listen—as explained previously at pages 122 to 126—will be limited, and misunderstanding, confusion, and unnecessary emotional reactions will result to retard marital dissolution

negotiations. *Real listening*—that space between thinking and speaking—was defined by renowned psychologist Abraham Maslow as the ability to listen without presupposing, classifying, improving, controverting, evaluating, approving or disapproving, without dueling with what is being said, free associating to portions of what is being said so that succeeding portions are not heard at all. In other words, to learn to mindfully listen to another without thought in one's own mind—just silence.

Long ago, *John Keats*, the great English poet, had his own take on what Professor Barkai (2014b) calls *active listening*. In describing Shakespeare's ability to have his readers suspend moral judgment between his protagonists, Keats coined the term *negative capability*. He defined negative capability as "when a man is capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason" (Peter 2011).

The modern philosopher *J. Krishnamurti* describes meditation as *choiceless awareness*. This definition would include active listening as a core component of the meditative mind. For our discussion purposes, *Krishnamurti* is speaking of a mind that is aware, vibrant, nondiscriminatory, and receptive to sensory input. He is describing a mind free of prior judgment, criticism, opinion, evaluations, diagnosis, comparison, and other *thought-choices* arising from our psychological, cultural, and environmental conditioning, which corrupt our ability to really listen to the world and people around us.

> As he states: "… to listen negatively is not to accept or reject what (the speaker) is saying. You just listen. In that state of negative listening, you are aware of your own reactions without judging them; therefore, you begin to understand yourself, not just what the speaker is saying." (Kri*s*hnamurti 1992, 201)

Yeats, Maslow, and *Krishnamurti* set a high human awareness or consciousness bar for negotiation communication, especially in the emotional vortex of divorce mediation. Even though most mediation participants will not achieve the level of meditation suggested by these intellectual giants, we peacemakers are engaged in the art form and discipline of family mediation. In any art form or discipline, we must seek the highest goals—including the mindfulness suggested previously for our mediation

participants and ourselves. With our focused attention as peacemakers, we can assist participants through education and practice to begin being more mindful in their divorce negotiations and future postmarital, often coparenting relationship.

Communication Assistance

There are some basic ways a peacemaker can assist participants (or negotiators can learn) to communicate more effectively in negotiations. *George J. Thompson* and *Jerry B. Jenkins* in their book *Verbal Judo* (1993) and Barkai in his paper, *Communication for Conflict Resolution* (2014b), name five ways for starters, and we will address them briefly.

Active Listening or Paraphrasing

When someone negotiating as a participant or acting as a neutral peacemaker is fully engaged in actively listening to the words actually being used in the course of negotiation, he or she can magically turn conflicted words into a dialog. Simply by using the words *hold on for a second* or *just a minute* as an insertion in a conflicted conversation, the mediator can halt the onslaught of an escalating violent war of words and thoughts.

This initial insertion can be followed by the all-encompassing and empathetic statement: *Let me be sure that I heard or understood what you just said*. As Barkai states about uttering this classic peacemaker statement, the peacemaker becomes the epitome of empathy. The insertion strongly connotes to a participant that the mediator is doing his or her best to comprehend what the participant is saying. Regardless of how emotionally overwrought a participant may be, the insertion generally acts to quiet the participant and get them to listen to what the peacemaker is saying. According to Barkai, the participant will stop his or her narrative and listen because he or she is seeking confirmation that you actually picked up what he or she said.

> *In fact, the surer she is that you were not listening, the more likely she is to now hear you out, if only to prove you wrong!* (Barkai 2014b)

This magical insertion statement is a form of peacemaker *magic*. Such an insertion statement by a peacemaker can turn the *dirty dishwater* of an emotionally distraught family mediation participant from conflicted diatribe to the *fine wine* of fruitful dialog. Barkai goes on to list 14 benefits to paraphrasing or active listening. Among the more important points to consider are the following in summary form:

1. Paraphrasing or active listening allows the peacemaker to interrupt—often a heated, emotional monologue—without producing more resistance from the speaker. It is a technique that takes the power and force of potential and actual violent verbiage to a more nonviolent and productive plane. In fact, it can further improve relations between speakers and the neutral by showing that the latter is totally being attentive to what the speaker is saying and emoting.
2. The mediator's use of insertion takes momentum and control away from the speaker by forcing him or her to become a *listener*. This presents an opportunity to train participants to be better listeners in an *on the job* negotiation environment and demonstrate how to respectfully interrupt each other in negotiations.
3. Mediator insertion statements and active listening are an opportunity to gather more information about the speaker and his or her issues. Lawyers who are also mediators often use—in a gentle manner—their cross-examination skills to elicit greater knowledge about a case and participants through paraphrasing.
4. The use of insertion statements and active listening in general as mediator tools is a chance to educate the other coparticipant on facts and issues as seen by the speaking participant, without the coparticipant's need to frame an immediate defense—thus increasing possibilities for a nonviolent and more productive dialog.
5. These tools allow the peacemaker in the presence of the nonspeaking participant to explore the emotion behind the speaker's reasoning. A peacemaker follow-up statement, which explores feelings and emotions, is a learning moment for the other participant, as well as a neutral, controlled, safe vetting occasion for the speaker. *Examples* of mediator follow-up statements would be:

> Thank you for expressing your anger so cogently. It's helpful that you have expressed your anger for others to better understand you. Now let me be more *certain* that I understand you. Are you saying that you become insecure and angry when your husband threatens to take the children away from you in court? Can you explain more fully for me so I can understand you completely? How do his threats make you feel and act?

6. Such tools can be utilized to promote better understanding between codisputants through utilization of what Barkai calls *reverse paraphrasing*. For instance, in the emotional jungle of divorce negotiations, the peacemaker can ask the speaking participant to repeat what she just stated. This request would be made when the speaking participant has been speaking with a high emotional charge and facts and issues hidden in her fear, anger, alienation, or depression have not been fully heard by the nonspeaker or neutral. Simply taking a time-out after emotional rhetoric has been spoken—utilizing a brief walk or change of environment, breathing or meditation exercise, and then asking the previous speaker to "please repeat what she said earlier"—can help educate everyone more fully and allow the peacemaker to bring more understanding to the negotiation process (Barkai 2014b, 3–7).

Reframing

Reframing or rephrasing can be defined as changing a negative into a positive discussion statement framework. In short, it is another opportunity for the ever-eternal optimistic peacemaker (by nature of his or her role as negotiation process facilitator) to perform more *magic*. We learn from psychologists that one set of facts can be emotionally cast in a positive or negative light.

For a quick instance, a participant wife states to her husband: "Your property settlement proposal sucks big time; it insults my intelligence." The mediator immediately reframes the negative casting saying: "Your property settlement proposal is a good place to begin your discussion of property issues." *Magic*: The neutral reflexively moves the intentionally

negative statement by wife—who may feel she is being settlement *low-balled* and manipulated by her husband—to a positive and affirming one.

Reframing is a matter of changing the perception of the negotiation challenge—in our preceding example, a perceived dismissive settlement offer—to another more workable participant mental reference frame. Such reframing fits the facts being negotiated equally well and with considerably less angst. By reframing, the peacemaker has disarmed a potentially dangerous weapon—an insulting statement. Such a statement could trigger an avalanche of coparticipant emotional responses that might derail and unnecessarily sidetrack divorce negotiations. And, instead, the mediator has melted that weapon down into an instrument for fruitful discussion. The mediator has, by reframing the initial ill-advised statement, turned that statement into a sane, workable basis for a productive property division discussion.

As Urey tells us about reframing, don't reject an offer no matter how inappropriate, rather reframe it and move from negotiation positions to interests. The peacemaker, particularly in a private caucus, can gently remind participants that unreasonable and insulting statements and demands, especially if vociferous and volatile—which is often the case in family law mediations—may be soothing to the ego yet is generally a waste of time and resources. It is better to assist divorcing participants to place their energy behind exploring needs and feelings so as to clarify real interests and not just bargaining positions (Urey 1993).

Here are some other summarized rephrasing and reframing suggestions from the *Center for Alternative Dispute Resolution* in Hawai'i:

- Be sure to use your own words and don't *parrot* what the speaker said.
- Take the time to organize your thoughts. You may want to say something like "Let me think about this for a minute to make sure I understand."
- Make sure to listen for emotion as well as content.
- When you're ready to offer your paraphrase, try something like "Let me see if I understand," offer your paraphrase, then end with a question to ask for confirmation such as "Is that right?"

- Speak calmly and don't rush your words. Take time to show the other person that you want to understand what they are saying.
- Consider it a success if the speaker corrects your statement. More information will help you better understand the message. Keep paraphrasing and checking for confirmation until you have agreement (Center for Alternative Dispute Resolution, ADR Times 2013).

Body Language

Earlier we discussed *Nonverbal Cues* as part of active listening (p. 140–41). It is time to elaborate on this topic as it applies to negotiations.

First a caveat: Don't over rely on your ability to read the body language of another, especially in family law mediations where the emotions may be flying. Folding one's arms can be read as being resistant to what is being said. Or, it can simply be a means for someone to relax or a lifelong listening and contemplative habit.

Our caveat or disclaimer given, there is widespread scientific and experiential evidence that from 50 to 90 percent of all human communication is nonverbal (Barkai 1990, 101; Mlodinow, 2012).

Remember: Being able to better understand the nonverbal messages we send and receive is an important part of negotiation and peacemaking.

Visual Dominance Ratio

As an example, during the initial screening of divorce mediation participants, it is important for the mediator to quickly learn the dominance pattern or what scientists call the *visual dominance ratio* (VDR) between spouses. This is how *Leonard Mlodinow*, writing in his *Psychology Today* blog in 2012, explained this *ratio.* He states that the *ratio* can be determined when you change roles between being a listener and speaker. *Mlodinow* notes that psychologists are able to describe behavior (listener to speaker change) through quantifiable social metric tests that have an outstanding result. *Mlodinow* charts the listener to speaker change by:

> … Taking the percentage of time you spend looking into someone's eyes while you are speaking, and dividing it by the percentage spent looking at that same person's eyes while you are listening.

According to *Mlodinow*, the quanta of time that we expend looking into and away from another's eyes are a good indicator of social hierarchy. The VDR can help us measure what position on the social, political, and familial totem pole individuals occupy. When applied to divorce mediation negotiations, the VDR can be quite telling, if not scientifically exacting.

Most women have a lower VDR than most men. In many emotional mediation negotiations, women will more often look away from the eyes of their husbands when speaking. They will gaze away, cry, verbally express emotions like anger and disgust, or otherwise not fully engage the eyes of their spouse. For most men, the opposite is often true: They will generally seek out and engage their spouse's eyes, which is often a culturally inculcated male dominance reflex.

The peacemaker needs to determine whether the VDR present in negotiations is a dominance issue, as reflected in bodily movement of the eyes, or it is a *cultural phenomenon*—many non-European believe it is impolite to look into another's eyes—or it reflects a *current relational issue*—one of the participants who is mostly looking away from their spouse may be feeling guilty about their behavior with significant others. And the other spouse may be just plain angry at the other's behavior and is thus more visually confrontational. Occasionally, the VDR may be an indicator of psychological and physical *abuse* in the marriage.

The mediator's response to VDR can be handled in a number of ways, depending upon its severity. One can ask pointed questions in private caucuses to determine the root cause if the VDR of a participant is overly submissive and abuse is suspected. If the VDR between the spouses is disruptive to negotiations, the mediator can direct the participants to only speak and look at him or her, thus lowering the possibility for verbal violence.

Additionally, if the VDR is so high—one spouse is almost always submissive and dominated in negotiations by the other spouse even when seemingly inappropriate (i.e., there is no clear reason for the spouse's

overt submissiveness)—the mediator can recommend psychological and educational support for the overly submissive spouse. In extreme cases, the mediation can be suspended or terminated, and the participants can be referred to lawyers for negotiation representation either within the mediation process or adversarial context.

The point to be made here is nonverbal cues need to be observed, assessed, and acted upon—in ways outlined previously—by the peacemaker. One is not suggesting a peacemaker conduct a scientifically and verifiable quantum study of participant eye movements to determine spousal and negotiation dominance. Body language, however, is a rich source of information about divorcing spouses and always needs to be considered by the peacemaker.

In conclusion, one has to consider communication holistically. What is being said? What is the intonation being used by the speaker? What is the current relationship of husband and wife—still living together, recently separated, or physically apart for months and years—and how might one of these factors affect spousal communication in mediation? Are there significant others involved in the divorce, thereby and potentially raising the emotional quotient involved in negotiating? Is there a power imbalance or dominance issue between husband and wife? Is there a high emotional charge present between the spouses? What body language cues and signals are the mediation participant sending? All of these factors and others will affect nonverbal communication and must be interpreted by the observer as part of the whole fabric of spousal divorce negotiation.

Our peacemaker maxim could easily be: *Focus on the movements of the body and have the mind's thoughts revealed*. This maxim is a two-way communication street for mediation participants and neutrals. Not only can we read the body language cues of negotiating participants, they can also read the peacemaker's body language.

Interesting Thought: "*Clothing is communication*."

Andy Mohan, custom tailor to five Hawai'i governors, stated the preceding quote before his recent death in November 2013. On his company's website, Mohan said: "If you look great, you feel good. Clothing is a legitimate form of communication." Our point, once again, is peacemakers need to search for any and all clues exhibited nonverbally by those they are assisting in resolving conflict.

How we dress is revealing of how we view ourselves. It offers yet another glimpse into what and how someone sitting at the negotiation table is feeling and thinking. One should not make too big a deal out of this insight. A participant who is disheveled and physically unkempt may be exhibiting signs of depression or, less telling and important, being idiosyncronistic. Observing clothing and personal hygiene is merely another tool in the peacemaker's conflict toolbox (*Honolulu Star-Advertiser* 2013, B4).

Nonverbal Physical Negotiation Positions

Barkai posits that there are two helpful physical positions for participants and neutrals when communicating nonverbally in negotiations: the SOLER and Mirrored Positions.

SOLER is an acronym for:

1. **S**QUARELY facing the client;
2. **O**PEN body position (arms or legs are not crossed);
3. **L**EAN forward showing attention;
4. **E**YE contact that is appropriate; and
5. **R**ELAXED body position.

A *SOLER* body position bespeaks openness. It allows an observation post for monitoring participant behavior. And it helps to screen out diversions. It is a very focused position for a neutral or participant to occupy and encourages a mindfulness attitude on the part of the user. It is best accomplished *without* physical barriers—especially square or rectangular desks or tables, between participants and users of this nonverbal tool.

A *Mirrored Position* differs from the SOLER position in that it is fully dependent upon the corresponding position of the other participant. Basically, it imitates the body posture of the coparticipant speaker. As Barkai points out, people who are in accord, mirror or echo the other. Mirroring should be done subtly and without obvious mimicry (Barkai 2014b, 10).

Yoga Philosophy and Practice Can Be Helpful

A word or two about Yoga philosophy and practice is helpful here. There are eight disciplines to the art and practice of Yoga. The sixth discipline, *Dharana*, sometimes referred to as *mindfulness*, is the cultivated skill that centers on the present moment to the exclusion of extraneous thoughts. It requires a silent mind. *Dharana* prepares the mind for meditation.

In Yoga legend, as cited in one of Yoga's earliest texts, the *Bhagavad Gita,* there is the story of the mighty bowman and warrior, *Arjuna*. *Arjuna* was famous for his skill at centering in on a minute point of his hunting targets. In hunting for a bird, he would aim for the bird's eye as a mind awareness exercise—not the trees, branches, or bird's head or body. His skill was based on his unerring one-pointedness in hunting—his ability to be entirely in the present moment, becoming one with his target (Curtis 1996).

Yoga brain science relates that we light up multiple and higher reasoning areas of the brain with one-pointed focus that includes the cerebral and visual cortex and neo-cortex, where the center of perception resides. This focus makes the brain more centered, and in becoming more focused, screens out the more distracting brain activities, much like *Arjuna's* mindfulness hunting ability (Goleman 2003, 1–2).

One can take the view that the whole previous discussion regarding communication in negotiation is an opportunity to exercise *mindfulness*. Active listening, reframing, and body language are all dependent upon an attentive, focused, and mindfully present peacemaker. The peacemaker must cultivate what yogis call *atha* or *now-ness* or being in the present moment. One cannot actively listen, reframe, translate, and communicate in body language effectively without being in the *eternal now*.

Among other exercises, yogis through the centuries have utilized a *Dharana* exercise called *the creativity meditation*. With appropriate mediation participants—those who are open minded and educable—this exercise can be useful in assisting them to become less violent in thought and word with each other, allow them to better able draw upon their intuition, and become more creative in their divorce mediation negotiations (*Yoga International Magazine* 2011, 51).

This meditation exercise is a peacemaker-guided visualization for participants. It should *only* be employed if the mediator is comfortable with its philosophical underpinnings—that there is a universal fountain of creative consciousness we can all easily tap into with mindful awareness. And this abundance of creativity can help us resolve our negotiation differences in an aware, civilized, and nonviolent manner. It is also a lot better than being subjected to sitting through and being examined about every facet of your life at a six-hour deposition in preparation for a divorce trial. A deposition composed of a hostile spouse, legal stenographer, and aggressive lawyers sitting across the table from you charging $350 or more per hour.

Exercise Instructions for the Spouses Are as Follows

1. Sit comfortably and consciously and focus your attention on the tip of your nose, point between the eyebrows, or other comfortable location of focus or image, so as to activate one-pointedness in the brain.
2. Close your eyes, relax, and become aware of your breath.
3. Repeat a silent chant: *so hum* (or "I am That" in English) several times to help plug participants into universal creative consciousness. *So* (I) on the inhalation and *hum (am)* on the exhalation breath. Gradually lengthen the inhalation and exhalations along with the silent chant.
4. Set a creative ideal for oneself or prayer such as finding a *connection*—such as the children's happiness—between the disputants that will lead to *resolution* of outstanding differences. Have the participants visualize each other smiling and bridging their differences. Guide them to envision in detail a positive picture of them and their fully grown children looking decades back on the divorce experience as transformative and not destructive of the family.
5. To close: The spouses will chant three times the words *Sat nam* or, in English, "I am truth." Although there are many meanings to *Sat nam*—some carrying a religious connotation—we employ its use

> in the nonreligious Yoga tradition of increasing awareness. As *Kaur* indicates, the chanting of *Sat nam* goes far beyond a literal translation of its two words. The chant focuses your attention on "the state of the vibration of truth," thus creating an internal experience of the significance, and not the mere utterance, of the words *Sat nam.*

> Truth, enlightenment, consciousness and above all awareness, comes into your experience. (Kaur 2012)

There will come a time in the near future when our society will realize that educating divorcing spouses as to the benefits of developing mindfulness in their negotiations is far better than adversarial warfare. With a mindful and meditatively trained mind—utilizing such practices as the preceding *Dharana* exercise—one is better able to handle the complex and confusing emotions generated by the marital dissolution experience. As *Goleman* indicates, the human brain is characterized by its plasticity and ability to be altered in the face of new knowledge and experience. The findings of today's neuroscience allow us to better study and understand the nuances of the brain's capacity to reinvent itself at any age, thus improving our health and well-being, and improve mindful communication between divorcing couples (Goleman 2003, 4).

Preparing for Negotiations

In law school, we were taught that for every hour of expected court time we should spend a minimum of two hours of preparation time. The same rule applies to mediation and peacemaking. Perhaps, a rigid time schedule is not possible or realistic for many peacemakers; however, one needs to gather as many facts and information as one reasonably can. One can review intake forms, individual caucus notes, and other information from experts familiar with participants and their issues.

One carefully studies the principle factors in almost all disputes, including divorce cases: people, relationships, issues, positions, and interests (Barkai 2015). To this list, one would add *creative thinking*, especially in highly conflicted and emotional divorce cases.

Where participants are deadlocked over a particular issue—such as when should wife and spouse move out of the marital home prior to its sale, when and under what circumstances should minor children be introduced to significant others, and who has the right to claim the child marital deduction for income tax purposes—the peacemaker's ability to offer effective solutions to entrenched positions of these kinds is a substantial resource in helping disputants reach the necessary compromises for conflict resolution.

Barkai, Ury, and Fisher offer a menu of classic negotiation stratagems to help move negotiations toward resolution. These stratagems would include *expanding the negotiation pie*. For instance, if the participants are stuck on whom should claim the children for tax deduction purposes, prior mediator research might indicate that only one of the participants with a higher income would benefit and, therefore, there is no need to fight over a baseless issue. Or, as an alternative, the participants could agree to annually alternate or share claiming one or more children for tax purposes.

Other often used approaches include *trade-offs* and *nonspecific compensation, and one may also utilize objective and external standards and experts* and, the most important one, *cocreating new options*. The last strategy—*cocreating new options*—is the most important because it allows divorcing coparent spouses to practice what they will have to naturally do in the future regarding raising their children from separate households: to be able to *cooperate and brainstorm together*. Where a multidisciplinary team is handling the divorce, coparents can seek creative ideas and conflict solutions from other team members, including child mental health coaches and financial planners. Such an approach removes negotiation from a war to a collaborative and creative zone of peaceful cooperation.

For instance, where the wife and spouse is reluctant to move from the marital home due to emotional attachment or financial anxiety, recommendations from the peacemaker or divorce team can offer a creative solution to a deadlocked mediation negotiation regarding transfer of the home. A peacemaker suggestion that husband continue to pay all or a substantial portion of the mortgage and solely claim the mortgage interest deduction for the home for Federal tax purposes, while wife occupies

the home now and during its subsequent sale period can end a serious negotiation deadlock.

Here, we have recognition of the emotional difficulty for the wife and spouse in letting go of the often-physical manifestation of the marriage—the marital home with its dreams and memories. In addition to her additional emotional processing time, her financial insecurities are better addressed by allowing her more time to figure out her postdivorce financial picture. Wife will have more time to answer postdivorce security issues such as will she be able to refinance the home and purchase her husband's interest and keep her home, can she reenter the workforce and independently support herself and children, will she require more training and education to further her career? In return, husband gets a significant tax perk, an uncontested certain move-out date, wife's more likely cooperation in the sale of the marital home, and the ability to better plan his financial future, including buying his own new home with the proceeds from the sale of the marital home. Thus, we have expanded the negotiation pie before cutting it up between the disputants.

Negotiation Strategies

There are almost as many negotiation strategies as there are mediators. Although there are some basic principles every peacemaker should at least be aware of, many participant and neutral mediation negotiation strategies are quite personal and have been honed over many years of trial and error, and are thus not easily and successfully replicable. The reader is directed to books, articles, and websites cited in the *Reference Sources* section of this book for more detailed discussion about traditional strategies.

However, Fisher and Ury in their classic books, previously cited, deserve our attention. In their writings, these two great mediators posit five basic strategies that are at play in almost all mediations, especially in family law negotiations. Let's review these basic strategies together.

The *first principle* is to *separate people from the dispute*. At pages 45 and 46, we discussed one of *Don Miguel Ruiz's* famous *Four Agreements* regarding not making assumptions. Ruiz's third *agreement—don't take things personally*—is particularly valuable for negotiators and their peacemakers to keep in mind.

In emotionally charged marital dissolutions (very few are peaceful), the most difficult assignment for the peacemaker and his or her team is to lower the emotional temperature in the negotiation room. One's failure to lower the divorce cocktail of emotions between participants *will almost always result in participants taking everything said or done by the other personally*.

One deals with the phenomenon of personalization in a variety of ways. Fisher and Ury recommend vetting of emotions (Fisher and Ury 1981). As pointed out previously, ideally, vetting should occur in private or joint sessions specifically designed for that purpose, *before* engaging in issue discussions. Having the spouses work with their respective mental health coaches to process raw emotions arising from the divorce experience can be hugely helpful *prior,* if possible, to negotiations.

Also recall *Ruiz's* third agreement—*don't make assumptions* (Ruiz [1997] 2012, 45–6)—suggests asking clarifying questions that will zone in on the disputed problems or issues rather than the negotiating personalities. A line of inquiry from the peacemaker like:

> I understand your strong feeling of anxiety regarding your perceived post-divorce precarious financial situation. However can you be more factually descriptive of what you expect your financial needs to be for you and the children? If responding to my questions are too emotionally difficult for you, may I suggest working with our Team financial planner who can assist you with your factual response and presentation?

The ability to *not make assumptions* is codependent upon another cultivated mediator skill: *active listening*, which was previously discussed at pages 105 and 106. It is part of the peacemaker's role as an educator to teach or remind participants to attentively listen to each other and not make assumptions about the other based on memory of perceived past wrongs and their own anxieties. Once again, mental health coaches can be very helpful in this educative process regarding listening without expectations (Fisher and Ury 1981).

In short, Barkai, Fisher, and Ury advocate getting participants to focus in on the problems, issues, or challenges that need addressing and not

personalities and surrounding drama. From experience, one might add to this admonition the inverse ratio often at play in divorce mediation: *The greater the attention and time spent through education and coaching of mediation participants regarding the processing of their emotions—fear, anxiety, depression—the less their focus will be on personality and drama. Address emotions first and the path to tackling issues, instead of people, will be more easily traversed.*

The *second principle* has to do with negotiation interests versus positions—the *why* versus *what* in negotiations. Fisher and Ury recommend getting into the shoes of participants to really understand what is motivating their negotiation behaviors.

> *An example*: In divorce negotiations, mom's negotiation position is tenaciously refusing visitation and living time for the couple's two children, ages 2 (female) and 4 (male), with their father. Her stated position is the two children are too young to be adequately cared for by dad. She holds this viewpoint even though during the marriage, dad was a model parent who shared servicing the children's primary needs with mom. Mom's viewpoint also flies in the face of the couple's child psychologist who feels dad is a competent and loving father. This is her *position.* Her real *interest* as revealed to the mediator in private caucus is to forestall as long as possible the children spending any substantial time, particularly overnights, with dad's significant other—whom she fears will displace her as the children's mother.
>
> Dad's *position* is to have equal visitation and living time with the children, and equal to mom. His *interest* revolves around his fear that if denied significant access to the children.

Once the real interests of mom and dad have been revealed, the peacemaker with, if possible, the help of the child's counselor can begin to offer resolution suggestions that address the *common fear-based interest they both have*. This interest concerns their respective fear of being displaced as the children's caretaker and coparent by the introduction of new significant other relationships.

Resolution for This Couple Is Multifaceted

First, they each need to state their individual fears to each other in a safe environment, which could take place with the children's counselor, mediator, or in troubled cases, jointly with the counselor, mediator, and parents together at one session.

Second, they need to be helped through counseling or mediation to walk in the other's as well as their children's shoes. This can sometimes be accomplished through selected readings as contained in divorcing parent educational sources such as *UpToParents.org*. Or, they can read books related to this very subject such as Wallerstein and Blakeslee's *Second Chance* (1989), in which the authors state that the issue of late adolescence low esteem among teenagers of divorced parents is related to unprocessed feelings by children of *feeling rejected, unloved, and undervalued* by their fathers.

> Children long for their fathers in the years after divorce, and those who are close to their fathers beforehand are especially preoccupied with the notion of restoring the closeness that they remember or fantasize.... This is a relationship that breaks children's hearts. (Wallerstein and Blakeslee's 1989, 149–151)

Both parents need to see that their respective fears of parental displacement although understandable will (most likely) be interpreted by their children in later years as choosing the adult's over the children's needs. As Wallerstein and Blakeslee document from their studies of children of divorce, choosing their own adult needs based on unprocessed depression, fears, and anxieties at their children's emotional expense can cause irreparable harm to children.

This harm includes the children becoming depressed, unable to maintain future social and employment relations, becoming intensely angry at their parents, feeling less protected, less cared for, less comforted, being fearful of adulthood and adult commitments, lacking a sense of ambition or drive to succeed, and significantly lower educational achievement.

A recent and troubling article is found in the *Journal of Community Psychology* supporting the previous information regarding effects of the absence of fathers from children's lives. Kruger et al. report that there is a direct correlation between absence of adult men in the lives of their sons and youth assault rates. They relate that where fathers are absent in the lives of young people between the ages of 10 and 24 years, youth violence increases significantly. Absent fathers coupled with poverty and lack of education were predictive of youth assaultive behavior. They recommended interventions that promoted "… social, material, and protective support from fathers and other adult male role models (which) may ameliorate risk for youth violence" (Kruger et al. 2014).

Although this study did not specifically factor in divorce as a variable, we know from Wallerstein and Blakeslee that children of conflicted divorce are prone to poverty, less educational achievement, and predisposed to risky social behaviors, especially when an adult role model, particularly their father, is tentatively or minimally involved in their lives.

Resolution of child-related divorce issues often hinges on the ability of the peacemaking team to educate parents regarding how displacement of either parent can negatively affect children. Education is the single best motivator to assist parents in moving beyond their emotions and self-oriented interpersonal agendas.

One Has Observed That the Divorce Process Is an Intensely Self-Centered Activity

Getting conflicted coparents to see the other as well as their own children's perspective is tricky business. In some cases, one can bring in a mutually agreed upon child mental health coach to a mediation session to help educate parents on children's emotional needs during and after divorce. Such a strategy would cover a *third* Fisher and Ury principle: *an independent mutually agreed upon third party expert*. A child psychologist can bring a wealth of important information to coparents regarding their children's age appropriate needs. Additionally, the expert can educate divorcing parents on long-term consequences relating to present decisions made for divorce purposes, especially if these decisions are motivated by emotions and not intelligence.

Another approach, if the mediator is comfortable and participants are willing, is assisting coparents with *role reversals*. This technique calls for parents to assume the bargaining position of the other so as to gain greater perspective of the other's negotiating position. It is a challenging technique for a peacemaker to execute; however, it can bring much needed understanding and light to a dark negotiating standstill. Hopefully, such an educative effort will allows parents to fashion their own solutions to the preceding hypothetical impasse. If not, the peacemaker or peacemaking team needs to suggest workable resolutions.

In the preceding example at pages 89 and 90, one resolution to parental displacement fears by a significant other might be the slow, child age appropriate introduction of future significant others. *For instance*, one solution might be for up to a year or more; neither parent will have a significant other spend an overnight while the children are present, and significant other visits or time with the children will be short, mostly outside the home.

The coparents can also agree to have the children's counselor monitor the children for any potential adverse effects in their relationship with new parental figures in their life. And the counselor can make recommendations when the parents are in future disagreement regarding the children's postdivorce needs on this or any other issue.

This approach reflects Fisher and Ury's *forth principle*: creating alternatives that are beneficial to both coparents. Both parents' concern about parental displacement and living time with the children gets addressed with the added bonus that the children's divorce needs receive more attention. The option also allows both parents and children *more time to process the divorce and any new significant parent-like figures* coming into their lives.

In Barkai's words, the *fifth principle* is to know your *BATNA* or *best alternative to a negotiated settlement*. BATNA is what a participant will do if they cannot reach a negotiated settlement.

From a purely negotiation outlook, knowing one's BATNA is like driving in your car toward a predetermined destination and having your route blocked by an accident or some other obstacle. If you have scouted out in advance alternative ways to reach your destination, the delay and expense in reaching your destination will be minimized and less dramatic.

For all participants to family law mediation, neutrals included, reaching a BATNA stage of negotiations is crucial. This is the stage where the negotiation process can spiral out of control and be wreaked on the shoals of the adversarial legal system. This period is where a mediator must go into overdrive to help impasse-driven participants to dig deep within themselves to avoid legal violence from erupting between them. If there are children involved in the negotiation mix, one must advocate even more purposely for a cooperative and peaceful resolution of differences.

If no compromises are forthcoming from participants, even after the mediator and mediation team have presented their resolution recommendations, then peacemakers must go back to their educational function. *First* bring the children metaphorically into the room. This can be simply accomplished by insisting that a current and large photo of the children be placed in easy viewing proximity to participants. This serves as a visual reminder to put the children's interests first.

Second, roll out objective negotiation criteria. Such criteria would include educational materials previously prescribed. Additionally, if mental health coaching is available, have individual and children's therapist's coach participants through impasse, focusing on consequential impacts of an adversarial BATNA on the children. Sometimes in-person backup support from the therapists can be brought right into mediation sessions.

Third, bring in a mutually agreed upon neutral and experienced family law adversarial lawyer. The lawyer can describe in detail what the time and expense will be if the only BATNA is an adversarial one. He can also offer an expert opinion on what the chances of an adversarial BATNA succeeding in family court will be, and the likelihood of appeals and their consequent additional time and expense to both participants. However, keep in mind that even a legal expert's opinion as to adversarial outcomes is not definitive, and subject to the previously discussed (p. 57–8) judicial and other adversarial vagaries.

Fourth, failing all of the previous conditions, the neutral can assist participants (and if possible their respective lawyers) in choosing an ADR modality that will help them resolve their differences in a nonadversarial manner. Modalities such as a private judge or experienced family law arbitrator

deciding the contested issues in a timely manner—minimizing both financial and emotional expense—can be utilized by mutual agreement.

The previous suggestions are good if participants can financially afford and are conscious enough to embrace them for themselves and their family. If not, and participants are still willing to explore a mediated settlement, then the peacemaker must go into mediator overdrive.

Mediator Overdrive: When People Are the Issue—Difficult Mediation Negotiations

Drawing upon the author's own intuitive experience and the work of Barkai and Urey, when mediation participants are floundering in a sea of negotiation confusion and emotion regarding unresolved divorce issues, it is time for the peacemaker to renew even more energetically his or her efforts at educating them on the importance of a peaceful marital dissolution resolution.

Here, we are speaking about that point in negotiations where the subtle balance between participants protecting his or her perceived interests is often made manifest. We may see a reflexive *no* response to all suggestions for compromise and maintaining a positive coparenting relationship postdissolution. The ability of participants to move to a *yes* response needed for compromise and closure is at issue. This is when a mediator must go into *negotiation overdrive* to keep the peacemaking process alive and on track.

Once again, Yoga philosophy is helpful. *Niyama or Personal Discipline #3—tapas*—relates to passionate commitment and discipline. *Tapas* direct us to do all things reasonably necessary to reach our objectives. It is the *fire* or ardor that brings life transformations for ourselves and, through our efforts, others. *Tapas* empower mediators to stay focused on the prize—conflict resolution—no matter the dramatic emotional distractions posed by the conflicted. *Tapas allow one to bring full attention to the moment in mindfulness* (Iyengar 2002).

Mediator ardor or passion for assisting others to resolve differences is, however, not enough. Some basic peacemaker skills are also called for. As reported by various mediators, some cited in the following, many of

who are psychologists, a mediator's response to the point of impasse is crucial to mediation process success. There are a number of very effective mediator reactions developed primarily by psychologists, some of which we have already explored, that are worth mentioning again.

As reported by Craig Robinson, PhD, and Lou Chang, Esq., both of who are experienced mediators, in their instructive booklet on Pain, Anger, and Denial (Robinson and Chang 2011), there are several mediator response models for dealing with challenging mediation cases that have reached the breaking point of either unraveling altogether or moving toward resolution.

"LEAPS" and Pain

There is the *LEAPS model* by psychologist Bill Crawford. It is utilized where the *pain* of divorce is the principle issue standing in the way of resolution. The acronym LEAPS stand for the following.

Listen with one-pointed attention, focusing on what's really important to the speaker. Paraphrase and reframe frequently to be sure you understand completely the speaker's viewpoint while reassuring the speaker that she is being understood by you.

Empathize by not trivializing their concerns no matter how inconsequential they may at first appear. Show your interest and concern by making statements like *Listening carefully to you, I can see why you are so concerned and feel the way you do by your perceived precarious financial situation.*

Ask questions that will increase your (as well as the other participant's) understanding of the facts driving the opposing viewpoints. Questions like *Can you tell me what your specific concerns and issues are regarding … ? What ideas and solutions can you tell me that will help resolve these concerns and issues? How do you think your spouse will receive your ideas and solutions?*

Problem solve by creating a team atmosphere where disputants and peacemakers work together to find livable solutions. A peacemaker can say: *Please, I am not an authority on your lives. You two are the authority, the experts on your lives and family. However, together working as a team we can find solutions to these issues that will allow you to get on with your lives.*

Speak without diagnosis. Do not analyze, judge, assign blame, or criticize a participant no matter how tempted so as to put them into a defensive posture as: "*That's a rather ill-considered remark or point of view. That's a ridiculous position!* Spend your time educating participants rather than judging them" (Crawford 2015; Robinson and Chang 1998, 7).

EARS and Anger

When the central challenging emotion interfering with the peacemaking process is *anger*, psychologists suggest the acronym *EARS* model response by mediators.

> (Anger) clouds our objectivity because we lose trust in the other side; it narrows our focus from broader topics to the anger-producing behavior; and it misdirects our goals from reaching agreement to retaliating against the offender. (Emotions in Negotiation 1998)

Anger is a creative solution mind-killer.

Psychologist, lawyer, and mediator Bill Eddy and psychologist Nadine Ryan Bannerman suggest the following strategies for dealing with anger in mediation negotiation.

Empathy once again is a principle response to anger being expressed by a participant. Indications of anger are fairly obvious. They include vitriolic, uncontrolled, and emotional interruptions of the negotiation process. Anger will destroy any opportunity for objectivity regarding an issue. It often arises from feeling frustrated, wounded, rejected, betrayed, and threatened (Robinson and Chang 1998, 8–12). Here are some suggested ways for a mediator to handle anger emanating from a participant during the mediation process:

Use verbal and nonverbal cues to import that you are observing their hurt. Ask open-ended questions such as: *I hear how difficult this is for you. You sound extremely upset about this issue; can you please tell me more about it?* Don't agree with the anger or its cause. Just empathize with the speaker. Do not seek to remedy the cause of the anger, place that burden on the participants: *We have a problem here, how do you want to resolve it?*

Resist being judgmental about the angry behavior being exhibited. If the peacemaker becomes upset about the behavior, one might ask oneself: *What is this person doing or saying that is a trigger for my (the mediator) judging them* (Rosenberg 2009). The challenge for the mediator is not to accuse the speaker of bad intentions, which is a waste of time and energy, and instead just have the nonspeaker describe the impact the words of his or her spouse are having on him or her, thus, moving from motives to feelings—a much more productive arena.

As with other strategies dealing with various emotions, it is important to give the angry speaker your full *attention* and *respect.* Attention can be manifested through verbal validation of the speaker's feelings: *Please tell me why you are so angry?* And it can also be accomplished through nonverbal language such as eye contact, affirmative nodding, and leaning forward into the conversation.

Peacemakers model good communication habits for participants. By being respectful in tone, words, and body language, a peacemaker can lower the emotional heat and conflict level in the negotiation room. When respect between disputants is floundering, take a time out, suggest a walk around the block, do a breathing exercise with disputants, and utilize individual caucuses as a way of recentering negotiations in a productive way.

Finally, the peacemaker must set *limits* or boundaries on repeated unruly and angry discussions. A mediator statement like: *If you continue to angrily disparage each other and won't settle down to reasonably discuss this important issue, I will have to suspend or terminate further mediation sessions.* This type of *limits statement* by a neutral should be uttered with the courage of conviction. This conviction reflects that although anger needs to be acknowledged in a positive fashion, it should not be allowed to dominate and control the negotiation process.

Remind participants that when they first engaged your services, they empowered you to be their negotiation guide. They authorized you—the peacemaker—to help them with a very difficult conversation and to abide by your negotiation instructions and rules. And, if they continue to repeatedly disregard your suggestions for reasonable discourse between them, you reserved the *right to fire them and walk away from negotiations, temporarily or permanently*.

Such a *limits statement* indicating a peacemaker's willingness to suspend or withdraw from the negotiation process is one of the last cards in the mediator's deck to get participants to move beyond anger to issues and interests. It should be employed rarely and as a last resort. Limits statements must be uttered in a very mindful and respectful manner. Referrals to existing or new mental health coaches are always a worthwhile suggestion for processing anger *prior* to or in conjunction with mediation negotiation. As it has been said: *(Remember) … "they are not yelling at you (the mediator), they are yelling at each other"* (Robinson and Chang 2011, 12; Eddy 2011, 9–12; Bannerman 2012).

Denial

A final hot button emotion tending to disrupt productive negotiation discussions is *denial*. Denial is a psychological coping skill, which can be helpful in the near term—helping one to adjust to trauma, and harmful in the long run—denying present reality and living an illusory existence. "When an individual is in a state of negative *denial*, one refuses to acknowledge a stressful problem or situation; avoids facing the facts of a situation; and tends to minimize the seriousness or consequences of the situation" (Mayo Clinic 2014).

Some form or level of denial is at play in most family law mediations. An experienced divorce mediator will inquire at the earliest possible moment, ideally in the initial screening period prior to accepting a case, whether denial is at play and at what level of intensity. Two quick questions to a potential participant or participants will usually provide preliminary answers to the questions posed: Are you presently physically together in the same household or are you living apart? If living apart, for how long? Often financial concerns will keep a couple in the same household while living in separate parts of the marital home and leading mostly separate lives.

As a generalization, if the answer to the first question is they are still living together, then the noninitiating divorce spouse—who usually has done little or no processing of the *emotional divorce*—will have some initial and sometimes strong denial issues. Such a spouse seeks in denying the pending spousal dissolution to reject a painful reality. The denial

assists the person to deal with frightening realities and adverse future possibilities.

If the answer to the second question is the couple has been living apart for months and years, the possibility is enhanced that both participants have had enough time to process the emotions connected with divorce on their own or with professional assistance. In such situations, denial is much less a dominant factor in mediation negotiations (Robinson and Chang 2011, 13–18).

For a related discussion regarding denial, please see p. 143.

When emotions run high, mediation negotiations can become quite challenging for the mediator. Our next chapter continues to zero in on difficult mediation conversations when people and their unresolved emotions are the issues.

PART III

Advanced Issues

CHAPTER 8

When People Are the Issues—A Further Word About Difficult Mediation Conversations

> *Behind intimidating messages are simply people appealing to us to meet their needs.*
>
> —Marshall Rosenberg

When the problem the peacemaker faces is not the issues but the participants themselves—that is, their fears, anger, pain, denial, anxiety, and other emotions are interfering with finding reasonable conflict solutions—the peacemaker must find the inner strength and resources to persevere on the pathway to helping the conflicted fine peace. As we can infer from the negotiation suggestions in prior chapters, the most important inner peacemaker resources are truth, integrity, and ability to educate participants.

One must educate disputants not to get mad at each other regardless of their opposite viewpoints. Rather, for the peacemaker, the path to peaceful resolution lies in his or her ability to *reframe* proposals in a manner that builds upon the positive and sheds the negative.

The educational process calls for upmost impeccability and honesty in word and deed by the peacemaker. Yoga and other ancient indigenous philosophies hold up impeccability and truthfulness as ethical standards of the highest order for humans. When emotions cloud the judgment of disputants, their faith in the integrity of the peacemaker assisting them to find a fair, amicable, and cost-effective resolution to their impasse is paramount in importance.

Children Are the Bridge to Transforming Impasse to Resolution

Regarding children's need over a lifetime, one must define a *healthy relationship* in terms of civil and supportive rapport between divorced parents. This rapport would include living up to the financial and child sharing terms of their divorce agreement. When emergencies and unexpected occurrences sideline a parent from a child-related responsibility, a healthy parental relationship would include being the default substitute for a coparent, especially if the coparents are living in close proximity to each other and the default parent has the time to substitute for the other parent.

Keeping the *needs* of the children paramount in the minds of participants can be an essential key to breaking through *impasse.* To minimize present and future harm to children, disputants must keep them a constant in their minds and hearts. Then litigation as BATNA ("best alternative to negotiated agreement") is never on the negotiation table. The only *real alternative* becomes the children's need to have their parents experience a healthier postdivorce relationship.

A healthy postdivorce relationship means not disparaging the other parent in front of the children. It also includes being time flexible and sensitive to your own reactions and feelings regarding child visits to or from grandparents and other special familial opportunities. A healthy relationship means taking a mindful and long view of coparenting postdivorce. This view envisions both parents and their significant others being as supportive as possible of and present for all of the important life events in their children's lives. These events would include graduations, marriages, divorces, funerals, anniversaries, successes, failures, medical emergencies, and grandparent roles when the children have children.

The education and training in communication skills arising from the divorce mediation process can be a springboard for coparents in building a healthy postdivorce relationship. To accomplish the goal of a future healthy coparent relationship, Ury and the author of this book's own experience suggests the following peacemaking strategies when dealing with problematic disputants. The peacemaker:

1. Can help to maintain participant inner peace by reminding participants to breathe deeply and slow down the spinning movement of their thoughts. The peacemaker must also maintain inner peace within himself or herself as both an example to participants and to aid his or her ability to stay completely focused on productive negotiations;
2. Must reassess foundational interests regarding children and money (such as have any possible trade-offs emerged from negotiations that could help break an impasse);
3. Should double his or her efforts at mediation session preparation (such as revisit what you know about the facts and personalities of the case and consult with other involved professionals);
4. Needs to review alternate plans suggested by participants, neutral experts, and mediators (for instance, have each disputant prepare a substitute option for their *no* negotiation position);
5. Should see if there is a power imbalance between participants that needs adjusting to surmount impasse (such as use a financial planner or a participant's lawyer, if possible, to help rectify any financial and negotiation skills imbalance between participants); and
6. Must maintain mediation process boundaries and insure participants remain nonviolent, respectful to each other, and the peacemaking process (such as stop a mediation session if necessary to focus on mindfulness) (Fisher and Ury 1981).

Mediator Pat Brown makes the following statement on the UpToParents.org website about how parents would want their children to relate to their parents' divorce: "Separated parents who agree on one thing, will agree on everything, if that one thing is: What do we want our children to (feel) like when they are 25?" According to 64 percent of respondents on the *UpToParents'* website, the *children's needs* as reflected in the previous question *was the single most important reason for cooperating to resolve divorce issues*.

As further pointed out on the *UpToParents'* website, children's needs should be and usually are the *central fact* of coparent's new postdivorce relationship. The very reason they continue to have a postdivorce

relationship in the first place is their children. Additionally, most parents—regardless of their differences—either know or can be educated through the mediation process to understand that the quality of their postmarital relationship will have long-term effects on their children. And they will almost always agree that the individuals they are most concerned about are their children. *Thus meeting their post-divorce children's needs is arguably the single most important variable for coparent mediation resolution of issues—and one the peacemaker can build upon to surmount impasse and help settle all differences* (UpToParents.org 2013).

Other Impasse Strategies

Breakdowns are breakthroughs delayed.

Adler, Eye of the Storm Leadership, Chapter 29

Openhearted Listening

Other responsive stratagems arising from the psychotherapeutic field include *openhearted listening*. Conceptually, openhearted listening is easy to understand. It entails encouraging mediation participants to listen to the person they are in conflict with *nondefensively*. This is an opportunity to demonstrate to the other person that you are interested in understanding his or her reality even if you disagree with it.

In practice, for highly emotionally charged participants, openhearted listening as a nondefensive stance can be an extremely difficult strategy to pull off. Divorce, as it has been pointed out before, is a highly self-centered activity. For the mediator, it is the most challenging stratagem to get participants who are in pain, anger, denial, survival mode, or at impasse to *open their hearts to each other*.

However, if openhearted listening is used after proper emotional education of disputants by the peacemaker and mental health coaches and at the appropriate time—when other attempts at bridging impasse have been unsuccessful—it can be surprisingly effective. For participants, it involves two communication stages: *mirroring* and *validation*.

Mirroring is a process of learning how the other disputant feels. The speaker relates how a particular event or situations made him or her feel

and how it disturbed the speaker. The listening, responding participant repeats in his or her own words what the speaker verbally has communicated. The speaker then corrects any inaccuracies repeated by the respondent, and he or she goes back and forth, paying close attention to feelings, until each one fully understands what the other has said.

In many ways, mirroring is a lot like a role reversal, where each disputant plays the role of their opposite participant. Either mirroring and role reversals are techniques for opening a person's heart or feelings—*a walking in the other's shoes experience*. Since divorce negotiation experience is 90 percent emotional, mirroring can move participants to a more closely connected level of communication. It can transform *impasse* to a more productive place of understanding.

Mirroring prepares the way for *validation in openhearted listening*. Coen Tran, communications trainer and personal coach, states that validation or support of another's feelings through openhearted listening is a way of communicating to them that you can appreciate their feelings and "… can imagine having such feelings under (similar) circumstances." Here, one is not saying that you are responsible for the other's emotions, only that you comprehend the *nexus* between your actions or inactions and their feelings (Tran 2011).

The peacemaker's role is to listen with complete attention to the openhearted exchange. Listen with your mind and your heart and encourage the same approach by participants. This allows one to model good listening behavior for participants. As Adler has stated, "Never miss a good opportunity to shut up" (Adler 2008, 138).

Good listening behavior also supports the peacemaker's ability to accurately reframe and summarize participant verbal statements as necessary. This ability helps to surmount barriers to real listening and understanding by participants. Thus, the neutral helps to insure both participants have a full and uninterrupted opportunity to speak from their hearts and be heard by the other, sometimes for the first time in years (Robinson and Chang 2011, 22–3). Former civil litigator and now divorce mediator and lawyer, Dennis Cohen, states in regard to this last point that: "The most important reason that people get involved in litigation is that they aren't being heard. Their voices can be heard through mediation" (Cohen 2011).

The mediator's role during impasse is crucial to not only help participants to be heard but also to *listen* to them in as deep a heartfelt manner as possible. Hopefully, if the mediator is successful in this endeavor, he will assist participants in transforming negotiation intransigence to understanding and communication beyond defensive emotions and limbic brain response, as previously discussed in Chapter 4. As Susan McHenry reminds us about listening: "Deep listening is more than hearing with our ears, but taking in what is revealed in any given moment with our body, our being, our heart" (Quoted in Nepo 2012, 83).

Mediator as an "Energizer Bunny"

Dwight Golan has stated that a mediator is like an "Energizer Bunny." (The Energizer bunny metaphor arises from a once very popular battery television commercial that promoted the long-lasting nature of the battery company's product.) Golan was speaking in the context of the commercial mediation field, yet his metaphor is applicable to family law mediations as well.

However, it is applicable with a *caveat:* Although commercial mediations can be heated, their intensity does not approach the high emotions found in family law mediations. As has been pointed out continuously, if these emotions cannot be adequately addressed through healing over time, education, or game-changing negotiation breakthrough strategies such as openhearted listening, no energizer bunny or mediator, no matter how invigorated, will likely succeed.

What Golan was referring to is the mediator's continuing optimism that despite repeated failure to reach settlement agreement, breakthrough is almost always possible. The mediator is generally the last person to give up on divorce mediation. The mediator's instinct is to keep negotiations going until they hit you over the head and drag your inert peacemaker body out of the mediation room, or, less dramatically, until negotiations have deteriorated to such a point that there is no plausible or reasonable way to change minds.

A peacemaker facing a potential unbridgeable impasse will go back to negotiation basics. Robinson and Chang suggest asking some questions, which are paraphrased here:

- What are your interests and goals at this point in our negotiations?
- Which of those interests are most important, urgent at this time?
- What negotiation compromises are you willing to live with right now?
- How important is it to you to get on with your life?
- Will your position on this issue be important to you in the future?
- Will your anger be important to you 10 years from now?
- After the hurts heal, what type of relationship would you like to have with each other in the future?
- What is it you really want?
- What is the most important *need* (not desire) that you would like to see fulfilled here?
- What do you think the lack of agreement problem is from the other party's perspective?
- How do you think the other party is feeling right now?
- Have you reviewed the costs in time, money, and health of not reaching agreement in mediation and having to go to litigation on this issue?
- What are your biggest fears of what could happen on this issue if you can't settle it here?
- Is being right more important than finding a resolution?
- If your BATNA is to litigate, what happens to you if the judge rules against you on this issue?

If there are children of the marriage, one might add two additional questions if impasse continues to loom:

- If your children were observing your inability to reach agreement on these issues, including issues directly related to them, how would they feel?
- When your children are 25 years old and come to you and ask why you two could not get along after your divorce concerning their needs, what will you say to them?

Remember: "The go-between wears out a thousand sandals"—Japanese proverb (as quoted in Adler 2008, 58).

Participant Overconfidence

Another strategy to revisit if impasse continues is to review if *overconfidence* on the part of one or both participants is at play. Many mediation participants are often overconfident or overoptimistic regarding their negotiation positions. They mistakenly believe their positions are reasonable and an objective third party will fully agree with them. Such a state of mind can lead to an uncompromising position and a mediation impasse, where a participant's BATNA may only lead to the adversarial process.

Often this biased mindset arises from their sources of support, including their lawyers, therapists, family, friends, coworkers, neighbors, fellow carpool riders, and health club buddies. It is up to the peacemaker to assist disputants through education to disabuse themselves from overconfident negotiation positions leading to stalemate. Donald T. Saposnek, PhD, calls the biased nature of support inflicted upon divorcing spouses *Unholy Alliances and Tribal Warfare*. He maintains that each spouse to a conflicted divorce manifests a viewpoint that often is supported by a legion of supporters, including family, friends, and retained experts like lawyers and mental health coaches. These supporters see the spouse as being victimized by the other spouse and seek to guard and shelter the spouse from further harm. They provide this unquestioned and often misguided support "…after hearing only one side of the dispute in vivid, distorted, and compelling detail" (Saposnek and Rose 2004, 5).

This tribal behavior can sometimes result in the divorcing couple becoming secondary players in their conflict. Instead and unfortunately, the major protagonists can become the tools of their respective supporters who are outside of the divorce legal process. Researchers such as Wallerstein and Kelly (1980, 206–34) and Wallerstein and Blakeslee (1989) have long sounded the alarm that the real losers in this dysfunctional divorce tribal warfare are the children. Many years after a conflicted divorce, adult children still suffer from postdivorce stress and anxiety. They can instantaneously recall their feelings of abandonment, mixed parental loyalties,

distressful court proceedings, worry about having to choose sides, and, in general, physical and emotional insecurity (Saposnek and Rose 2004, 4).

Voice of Reality

One of the many roles a peacemaker plays is to be the *voice of reality*, especially for overoptimistic participants. If the mediator is legally trained and family litigation savvy, he or she can give a more objective analysis of how a family court judge will react to a participant's position.

If not so legally trained and experienced, he or she can with participant's permission obtain an objective assessment in the presence of participants from an *experienced and neutral* family law lawyer. The assessment would include the likelihood of legal success at the trial and appellate levels, and financial and time costs for pursuing a particular legal position. (As afore-mentioned, the use of a legal expert should always be given with the *caveat* that the expert's viewpoint may very well differ from a family court judge's perspective.)

In a protracted legal battle, mental health professionals would ideally be available to coach parents on the consequences of their violent and noncooperative behavior and actions on their children. The peacemaker and coaches can suggest educational information as found in *Wallerstein's* books and *UpToParents* website.

The following *reality testing* questions posed to participants can be helpful:

- How would your (overoptimistic) negotiation stance help resolve this issue?
- What if the trial judge or appeals court takes a different position than yours?
- How will your viewpoint help you to obtain the freedom you so desire from this relationship?
- What do you think the consequences of your position will be on your children and future life?
- What response to your view would you have if you were your husband or wife?
- What will you really gain by punishing the other participant?

- If your position is taken how would your husband or wife financially survive and be able to contribute to the children's future educational and other needs?
- If you go to court and lose, are you willing to be left with nothing? (Robinson and Chang 2011, 31–35)

One Final Question That Can Be Useful Is

Have you asked your divorce lawyer whether he or his family lawyer colleagues went to court or settled with his or her spouse despite their differences? The response from their lawyer will most likely be settlement, often using divorce mediation as the medium to accomplish an out-of-court agreement (Kulerski in UpToParents 2015).

With the previous resources, the mediator can slowly reframe the negotiations and, while working collaboratively with the participants, help forge compromise solutions reflecting what both sides *will gain* from a proposed settlement. The suggested compromises can move participants from overconfidence to the reality of needed compromise (Bazerman 1986).

One word of caution: The peacemaker must be ever vigilant not to *inappropriately manipulate* disputants toward his or her own ideas or agenda for settlement. One can be a guide, source of information, offer expertise and optimism, an educator, reality mirror, compassionate listener, inspired communication model, and all the other roles played by the peacemaker that will undoubtedly influence settlement negotiations, *without* unduly manipulating negotiation outcomes.

The Preamble of the *Model Standards of Conduct for Mediators,* adopted by the *American Bar Association* (ABA) in 2005, is very clear about the purpose of mediation, which should be driven by needs of participants and not peacemakers:

> Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired. (ABA, Model Standards 2005, 2)

Remember: It is the disputants' lives and not one's own that is being negotiated. Therefore, do not press your own interests by imposing a settlement. That includes forcing an agreement to put another successful *settlement notch in your mediator's belt.* Once again, the ABA *Model Standards* are quite distinct about participant *self-determination*.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although *party self-determination* (emphasis added) for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, (and), where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others. (ABA, Model Standards 2005, 3–4)

If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation. (ABA, Model Standards 2005, 8)

The chief method for protecting participants' self-determination is to encourage at every opportunity that they seek a second opinion from their own individual family law legal representative. *One recommends a practice pointer*: that *encouragement to make informed choices* be placed in both the cover letter to the final negotiated divorce agreement and divorce agreement itself to insure it has been formally brought to participants' attention prior to execution of any written agreement.

If participants already have lawyers representing them, the custom in Hawai'i is to have the lawyers review, approve, and sign off on the final divorce agreement *prior* to its submittal to the family court. Such an approach as outlined above will help insure participant self-determination and protect the mediator from later attack for unethical conduct and coercing a nonvoluntary divorce agreement.

Caveat: Participants should be advised to carefully choose a lawyer for a second opinion. The lawyer selected needs to be a *constructive* consultant, that is, a consultant whose role is to be helpful in making suggestions for needed changes, if any, in the divorce agreement. Here, we are not looking for an adviser whose mission is to destroy and unhinge the work of the mediation team—participants, peacemakers, and coaches—as reflected in the proposed final divorce agreement. Rather, we need a consultant whose a team player seeking to help the spouses improve upon their negotiated agreement.

Along with their children, blended and extended families, soon-to-be former spouses will have to live their lives based on the agreements they reach in negotiation. And the best, most long-lasting agreements are self-generated and not imposed by an outside authority, including the mediator no matter how well intentioned. Donald T. Saposnek, PhD, clinical child psychologist, child custody mediator, trainer, consultant, and teacher, has stated that the greatest value of a nonviolent, mediated marital dissolution is *self-determination* by the participants. In order to successfully master the mediation process, participants must learn and model respect for each other. Postmarital communication based on mutual respect by participants is the key to a more civilized and fruitful relationship that directly benefits the children. Having parents that respect each other through a postdivorce pattern of nonviolent communication provides the children with a greater sense of security and

well-being even though their parents are no longer together (Saposnek and Rose 2004, 10–11).

In this chapter, we have discussed difficult mediation conversations and impasse strategies. The preceding Model Standard, p. 183, poses a question for a mediator. What can be done as a last resort to avoid postponing, terminating, or withdrawing from the mediation negotiation process?

Last resorts strategy in divorce mediation negotiations can be a challenging time for the peacemaker. Remembering some key principles previously discussed is helpful when negotiations are near or at the endgame.

This is a time in negotiations when tensions are high. A peacemaker must draw from his or her inner well of strength and remember the eye of the marital dissolution storm is not for the timid. It is a time for *boldness*.

The peacemaker is required to be impartial yet *does not need to be neutralized* or disempowered. This means truthfully reflecting back to disputants—through education and one-on-one discussions—their still retained misperceptions and misunderstanding of the issues leading toward impasse. To accomplish this gracefully is naturally a difficult and challenging dance (Adler 2008, Ch. 21–22). It means balancing participant need for self-determination versus the quality and control of the mediation process, an often-exquisite fulcrum point.

Participant perception of facts is emotionally driven. One needs to remember the *truth trap:* difficult conversations are not about facts; they are about how participants *perceive* the facts. One must go below the emotional surface of a recalcitrant disputant(s) and not be put off or make quick judgments about their moral character or poor behavior. What are of real importance are creativity, imagination, and forgiveness. The peacemaker needs to focus on the prize—*helping participants to reach an accord reflecting their individual and familial needs*—and not be diverted by emotional ferocity (Adler 2008, Ch. 26).

Famed professor of peace, Ari Hahn, in reference to the peacemaker's need to stay focused on accord and settlement, reminds us that the peacemaker *must be in a state of inner peace* in order to assist disputants in achieving outer peace. He states in relationship to inner and outer peace that peacemakers who are not conscious of their self-issues regarding inner conflict, prejudices, and revulsions to the peacemaking table can and often will undercut dispute resolution.

> Peacemakers aware of their own inner issues of conflict and anger, as well as empathy and compassion, can better control the inner complexity they bring to the peace table … (so) as to maximize their effectiveness in helping broker peaceful resolutions to conflicts. (Hahn 2015)

In recent times, we need to look no further than the late and great peacemaker, Nelson Mandela, as an example of a modern political leader aware of Hahn's inner and outer precept for peacemaking. Mandela was a dramatic victim of the unjust and inhuman system of apartheid in South Africa. Imprisoned for 27 years in the prime of his life, he could have upon his prison release easily brought vengeance, hatred, anger, and inner conflict to peace negotiations with his jailers—the white South African government. Instead, he demonstrated an inner, strong model of peace and reconciliation, which brought his sole focus into outer manifestation: peacefully achieving freedom and democracy for all fellow South African citizens.

CHAPTER 9

Some Last Resort Options

Sometimes, none of the earlier suggestions prove successful in helping to break impasse. The following ideas and suggestions may then become helpful to the peacemaker in moving the peacemaking process forward.

Develop Alternatives and Proposals

Get participants to agree that all accords are contingent upon a bundle of agreements until they reach a global negotiated settlement on all issues. In this manner, one has greater negotiation opportunity to trade and effectuate compromises on the full spectrum of disputed issues. Such an approach is holistic in nature with participants gaining what they need from an overall settlement, rather than one narrow issue that creates intransigence, such as impasse over alimony. In this manner, participants become concerned with the overall benefits to them of the whole agreement rather than become fixed on one nonbeneficial aspect of settlement.

> *Example*: I will agree to pay alimony, which is tax deductible to the payer, for a brief and stated period of time, if child support is computed on the basis of joint physical custody. You get to live in the marital home until it is sold at a mutually agreeable time and price, and I can claim the full homeowner's tax deduction. You can claim the kids for tax deduction purposes, and I will split my 401 K with you 60-40 in my favor. You keep all the household furnishings except for my half of the bedroom furniture, and I keep the newer of our two autos.

The afore-negotiated settlement emphasizes a give and take between spouses. It is more likely to succeed than becoming fixated on a payer's reluctance to pay alimony.

Temporary Cessation with Private Mediator Evaluation

Assuming the peacemaker has a full grasp of the issues and interests of each participant, a private caucus with unrealistic disputants may be in order. Calling a temporary cessation to joint mediation sessions and resorting to individual caucus, the peacemaker can offer her assessment of a participant's negotiation position that is creating impasse as well as offering mediator solutions.

> *Example*: I have been a divorce lawyer and mediator for over forty years. I can tell you with confidence that your private agreement with your spouse to only pay $200 a month in child support will not fly with the family court. In our state, child support is strictly controlled through a court formula, with almost no exceptions. Your desire to pay $300 when the court formula requires you to pay $450 a month will not work. However there may be some legitimate deductions for your providing the children's health insurance that could reduce your child support payment. Can we explore this possibility? What if ….

The preceding last sentence lead-in of "What if" offers the opportunity to provoke a brainstorming session in which participants, individually and together, along with peacemakers, can generate previously unthought of creative options.

The mediator's foray into providing solutions can stimulate participants to create their own workable solutions. *In the previous example*: What if the payer spouse pays full child support and for the children's medical insurance? In return, what if the other spouse allows payer spouse to claim one or more children as dependents for tax deduction purposes and pays all medical insurance copayments for the children up to $500 collectively in any given year?

Use of Comediator

Ideally, divorce mediation would almost always be conducted with a comediator, preferably a gender balanced peacemaker. Male and female

comediators always add a peacemaking dimension not easily obtainable by a sole mediator: a *yin and yang* or balanced perspective enhances understanding into participant needs, interests, and emotions.

If impasse has been reached, one should consider having one's comediator take the lead in seeking to breakthrough a negotiation bottleneck. Or, one can bring in a new peacemaker if one's peacemaking style, personality, or background is not the most optimal for the participants.

A Dramatic Mediator Exit

Mediator-Lawyer Lou Chang calls the dramatic mediator exit, "the walkaway with an open door." This *walkaway* is often part of the negotiation process, especially in emotionally charged divorces when impasse seems insurmountable. In such difficult cases, the peacemaker can state to participants something like the following example.

Example: As I stated to you both when we first met, I would act as your guide and professional friend to assist the two of you to reach a civilized and amicable divorce settlement agreement that would never be perfect yet you could live with and get on with your lives. Working together as a team we have made significant progress relating to your children and most division of marital property issues.

There are only two substantial issues in which the two of you are deadlocked: alimony and dividing the family owned business. Despite our best efforts these two issues remain elusive. As your supportive guide, I do not feel comfortable continuing as your peacemaker when the two of you are not ready to find some common ground for settlement. Therefore, I am withdrawing as your mediator at this time.

However, we are so very close to settlement on these two issues. As your supportive guide may I suggest that we take a break from negotiations and reevaluate your positions on these two issues? I respectfully suggest you consult with your financial planner and respective lawyers regarding these issues, next negotiation or other steps, if any.

Ask these experts:

- *What their experience is regarding your current negotiation position and its likelihood of prevailing in court?*

- *What price you will have to pay even if you succeed in terms of financial resources, time, and emotional energy?*
- *Will you have to pay the legal fees and costs for your spouse's lawyer should you not succeed in court?*
- *What will you do if your present negotiation position goes down in court flames?*
- *What happens if you succeed in the trial court and your spouse appeals the decision?*
- *Is your only real BATNA—going to court to settle your differences—better than working out an agreement in mediation?*
- *In the face of all you have learned about the deleterious impact of continued divorce conflict on children, how will your refusal to compromise on these issues affect your kids?*

Please consult with your mental health coaches and your children's therapist to gauge the impact of continued conflict between the two of you on the children.

> *Although I am presently withdrawing as your mediator, please note that I am available for contact at anytime. Facts and circumstances regarding the remaining issues may change. If you and/or your representatives can think of anything helpful to move us beyond deadlock, I am a phone call or email away.*
>
> *Let's leave the negotiation door open. I will continue in the future to be of whatever assistance I can to you both. This includes contacting you both should I think of anything useful that will help you bridge your present deadlock. It has been my pleasure to serve the two of you and your children.*
>
> *And please remember the mediation adage: negotiation breakdowns are merely negotiation breakthroughs delayed.* (Adler 2008; Chang 2001)

Practice Pointer

A *nocebo* is the opposite of a *placebo*. It is a word or statement that causes a negative, ill effect on the listener. Notice in the preceding mediator exit soliloquy that a *nocebo* was not uttered.

In recent medical experiments, the *nocebo* effect was observed even when patients were administered real, *non-nocebo* medicines. According to a recent *New York Times* article, when doctors tell their patients that a certain drug they are prescribing for them may have certain side effects, those side effects actually increase. In one clinical study, the drug finasteride, often used to treat the symptoms of prostrate expansion, was given to male patients. Only half of the patients administered the drug were informed that the drug could cause erectile dysfunction. The other half was not told of this potential side effect.

> In the informed group, 44 percent of the participants reported that they experienced erectile dysfunction; in the uninformed group, that figure was only 15 percent. (Nocebo Effect, *The New York Times* 2012)

Thus, a peacemaker must be careful to not plant a *nocebo* in the minds of disputants. One must avoid statements like:

- *We have reached the end of the road with nowhere to go;*
- *I don't see this dispute ever ending giving your dug-in negotiation positions; and*
- *I'm out of here; there is no hope for settlement.*

A well-planted *nocebo*, much like a landmine in warfare, can totally blow up all hope for moving beyond impasse to future accord. Like a doctor, a peacemaker's choice of words matters.

Mindfulness

In discussing last resorts in mediation impasse, we must be thoughtful of the role ego, humility, and mindfulness play in negotiation and social interaction. Noted *The New York Times* columnist David Brooks relates the following mindfulness information from an Association for Psychological Science convention in 2011. Brooks summed up the Association's conclusions regarding people who think that their ego or self-identity is in danger in most social encounters and people who are mindful.

The first group of people is subject to over reactive and cortisol-driven (freeze, flight, fight) responses to stress. The latter group of people enjoys a greater, more comfortable understanding of self in relation to others. They are more open to being in the present moment rather than the fearful, anxiety-driven, angry past. Their cortisol levels are much lower in stressful situations, making for more reasoned decision making for difficult to solve problems.

Brooks goes on to quote *Mark Leary* of Duke University, who addresses the question of what is *determinative* of how people react to stressful situations, either from an ego-driven or more mindful mindset. *Leary* states that what is determinative is the nature of an individual's self-awareness. He reasons that when an individual leads his or her life in the present moment, he or she is not overly concerned about how others perceive him or her. That is, your focus is on what you are undertaking—the task at hand—and there is little concern for one's standing in the eyes of others or threats to their concept of self-worth. Such an individual will respond to the swirl of surrounding events with composure.

> … (And) will not overgeneralize—just because I am good at this one particular thing does not mean I am wonderful in all things. (Quoted in Brooks 2011)

Given the information previously imparted by Brooks, two further last resort ideas emerge. First, training and education in *mindfulness* can go a long way in avoiding impasse. We observe that disputants who have been trained in mindfulness and are aware of and modulating their breath—and how it relates to their emotions—are going to be more conscious of the eternal *Now: the present moment*.

People experiencing aware consciousness or mindfulness are going to be less caught up in past fears and future anxieties. One will not overreact to ego threats arising from a spouse's negotiation positions. Also, one will tend to be more pragmatic and flexible in an impasse situation, and one is much more likely to find a reasonable compromise to extricate oneself from it. One is more inclined to go "… from a self-centered to more humble thought process" (Brooks quoting Leary, *New York Times* 2011).

Related to mindfulness and impasse is a *second* thought for peacemakers. Impasse may simply be a product of a *cortisol spike*. Cortisol is a steroid hormone released by the brain in stressful intersocial situations, where there is a perception that survival of the human organism is at stake (Scott 2014). Thus, if the mediator observes negotiations is overly stressful and likely producing a cortisol spike in one or both of the participants that is leading to impasse, it behooves the mediator to immediately call for a time-out or suspension of negotiations.

The tendency of many (especially legally trained) mediators, when faced with impasse, is to continue to push on through to a settlement despite participant angst arising from stress and other emotions. Such an approach may be counterproductive, dysfunctional, and, sometimes, even destructive to the negotiation process. Judgment as to when to act and the present inclination for settlement by participants must be factored into the impasse scenario. As Robinson and Chang point out regarding types of mediators, the psychologist under an impasse situation will *defer*, while the mediator's (often mediator-lawyer's) sensibilities lead him or her to *pursue* settlement even if the case is not ripe for agreement (Robinson and Chang 2011, 38).

Yoga Practice

Hatha Yoga practice (physical postures, breathing, and electromagnetic manipulation techniques) can be an enormous asset when mediation impasse is looming. When mediation participants are approaching, or *at* impasse, they are often terribly confused and mentally disturbed. They are being pulled apart by fears, anxieties, and conflicting emotions. Their cortisol levels are high, and thoughts of flight, fight, or doing nothing reign supreme. Participants' breathe is being held or is quite short and limited, causing from a Yoga perspective a diminution in their life force and lowering of intelligence.

Centuries ago, yogis developed exquisite exercises to deal with mental confusion—ways of calming and balancing the nervous system and one's mind to allow greater reflection and better decision making. One such exercise is called *nadi sodhana pranayama*—literally, alternate nostril

breathing. The purpose of this breathing and energy movement exercise is the cleansing and balancing of the nervous system through the movement of electromagnetic energy through the body's energy channels or *nadis*, in Sanskrit (which are similar to the role and function of the meridians in acupuncture).

Renowned Yoga teacher and philosopher B.K.S. Iyengar explains that this *Pranayama* exercise rejuvenates both sides of the human brain. By alternating the inhalations and exhalations through each nostril, the electromagnetic energy is able to reach the deepest parts of the brain through the *nadis*—the energy centers or *chakras* (which are the seven major energy transformers in the body through which electromagnetic energy is processed and controlled), channels, and acupuncture meridians that circumnavigate the entire body.

> (Thus,) the (yogi) gains the secret of even and balanced action in all the quarters of the brain, and thus experiences peace, poise and harmony. (Iyengar 2006, 209–10)

What do mediation participants need most when their emotions have driven them to the gates of impasse? They need "peace, poise and harmony." They need to be more self-reflective, observant, focused, and mindful. These are all qualities of mind promoted by the practice of *nadi sodhana,* which in classical Yoga practice is often used as a prelude to meditation.

Nadi sodhana as a technique for peacemakers facing impasse is not for everyone. It calls for detailed knowledge and experience accumulated by a neutral practitioner after study and instruction with a qualified Yoga instructor, as well as continuous self-practice. It is well worth the effort by the peacemaker, both for himself and mediation participants. When utilized at an appropriate time and with the right participants—those participants with whom the peacemaker has established sound rapport and trust—the exercise can be most effective. It can change the consciousness of participants to a more harmonious and cooperative mindset from

that of their prior high-cortisol, impasse-driven state. It can provide the breakthrough that changes the whole fabric of negotiations to a more open and heartfelt experience.

A brief *nadi sodhana* lesson follows:

- Exhale through both nostrils. Inhale long and deep through the right nostril while closing off the left nostril with the pinky of the right hand.
- Hold the breathe for a few second while closing off both nostrils.
- While holding the right nostril closed exhale long and deep through the left nostril. Hold the breathe out for a few seconds.
- While keeping the right nostril closed with your right thumb breathe in long and deep through the left nostril.
- Close off both nostrils with your right pinky and thumb and hold the breathe for a few seconds. Release the right nostril and exhale long and deep.
- You have now completed one full round. Repeat the same exercise for three to five rounds.
- Stay within your breath inhalation and exhalation comfort zone (For more detailed instructions, see Iyengar 2006, Ch. 28, 209–20).

With your mediation participants in a more receptive and diminished cortisol space, the peacemaker is now equipped to help move participants away from impasse and toward a peaceful and fair resolution.

Budding Peacemaker Encouragement

Don't be overwhelmed by all the principles, rules, caveats, and suggestions regarding negotiations, stressed or otherwise. Just allow yourself to absorb, practice, and experience the art form called peacemaking. Then

take a deep breath while letting your inner peacemaker pour forth and all—and you—will be well.

After taking that deep breath remember the story found in Adler, Eye Of The Storm, 177. The story is called "Seeing Tahiti." Nainoa Thompson, famed Native Hawaiian navigator of the *Hokulea,* a double hulled canoe reproduction of an ancient Hawaiian sailing vessel, tells the story of his tutoring with Mau Piailug in the ancient Polynesian art of open-ocean voyaging. Thompson trained for many months with Piailug until one day his teacher called him aside and asked to join him at a place called Lanai Lookout. Lanai Lookout is on the eastern side of Oahu, near a channel called *Kealaikahiki* in Hawaiian or *The Road to Tahiti*.

After some preliminary conversation, Mau asked Nainoa if he could see Tahiti? Realizing that his teacher was not asking him a frivolous or casual question, Nainoa hesitated before answering. When he finally responded, Nainoa stated that: "he could see it in his mind." After some more silence, Mau told Nainoa that it was crucial for him to be able to manifest this mind picture of Tahiti since he would be spending days at sea without finding Tahiti or seeing anything at all.

> Maybe you will be in a storm … a fog, or … sitting in the doldrums waiting for the wind. Maybe the crew will be agitated or preoccupied. No matter what, the only thing that will keep you on course is whatever picture you have in your mind.

As Nainoa recounted, this interchange with Mau would turn out to be the last day of his training for his and the *Hokulea's* historic first modern day sailing voyage to Tahiti, the island from which the original Hawaiian people first came to populate Hawai'i. Soon after this conversation between Mau and Nainoa, Nainoa and a crew of intrepid Hawaiians departed on the first successful voyage to Tahiti in over 1,000 years.

Always remember that as the peacemaker sailing in the eye of the emotionally fraught divorce ocean storm, your responsibility is to keep your mind's eye on the metaphorical *Tahiti*. The *Tahiti* where nonviolent

resolution of divorce disputes are possible, no matter how fearful, anxiety-ridden, angry, and depressed your participants or aggressive their advocates and tribal supporters may be. Like Nainoa, *Tahiti* is your ultimate destination.

Last Word

The following dialog between the author and one of his graduate students in a Mediation and Conflict class may also be helpful. The dialog underscores the need for mindfulness and ego detachment by the peacemaker as well as the participants.

> *Question*: The only question that I walked away with last night was in regard to what happens when we fail? Inevitably there will be at least a handful of times where our parties cannot reach an agreement, and I want to be prepared for that. How do you walk away still with an inner peace, and with giving the parties hope for peace?
>
> *Author's Response*: Knowing that you have given the participants your best effort is always helpful. Ultimately, however, you must realize that responsibility for the dispute and their inability to reach accord lies with the participants and not the peacemaker. As for hope, the peacemaker keeps her door and mind open to the participants possibly returning at a better time for reaching agreement. Your cultivation of mindfulness allows you to *detach* from (the ego's craving for) a particular outcome and prepares you for what the present moment, now and in the future, may bring.

The preceding advice is consistent with *Ruiz's Fourth Agreement*: *always do your best*. This means that under the circumstances presented and your own state of mind and well-being, you serve your mediation participants to the best of your capabilities in the mediation moment. One must remember not to be attached to what was or might have been

a potential settlement. The peacemaker's present mindfulness is to be cultivated as a discipline, even when a challenging mediation fails to finalize in agreement (Ruiz 2012).

It is also consistent with well-known poet and writer Mark Nepo, who once stated in regard to a failure question similar to my afore-mentioned student, in an interview on *NPR Radio* in early 2014: "The sun continues to shine even when people are blind." Do your best, detach from outcomes, learn from the teaching and experience presented, and move on with your *seva* or service to others.

CHAPTER 10
Conclusions

As mentioned at the outset of this book, from our earliest beginnings, we humans have existed in a dynamic tension between the "peace and war chiefs" within us. This dynamic helps define us as human. Indeed, Yoga, Buddhism, Taoism, and other Eastern philosophies have sought to remind us of this fact; they all acclaim that before we can have true peace with another, we must develop and find it within ourselves, thus balancing the aggressive, violent side of our human nature.

This inner peacemaker has been latent for too long. Our *yang,* male testosterone driven, aggressive, and violent tendencies, have prevailed in our predominately male actions toward others—actions which have resulted in wars, on the battlefield and, as we have seen, in the adversarial world of divorce. And so, my hope is this book will encourage that mostly dormant inner peacemaker within all of us to exert female *yin* energy and balance the male gender's generally aggressive nature for settling disputes with violence—whether that violence is expressed in a drone strike or in a conflicted marital dissolution—thus becoming the very *union* of male and female energy embedded in the definition of Yoga.

The personal side of this requirement for a peacemaker does not necessarily mean he or she is totally free of all conflict and violence in his or her life. Rather, it does require that the peacemakers be aware of any unaddressed conflict within themselves and be sensitive to how it may affect working with people in conflict when engaged in the peacemaking process. This awareness by the peacemaker of the healing dynamic provides a basis for a nonviolent approach for assisting conflicted dissolving marital couples and their families toward transforming their dispute *from tragedy into an opportunity for growth and change* (Gandhi 2007).

American society—with its emphasis on greed, competition, worship of individuality, and raw ambition—has turned its back to the ancient *Sanskrit* admonition to *ahimsa* or *to do no harm,* which, as we have seen, is

the first and highest principle of Yoga spiritual practice. This principle was expressed in the *Yoga Sutra*, some 2,000 years ago, and is as relevant now as it was then for conducting our lives in a conscious, spiritual manner.

There has never been a more urgent need for those of us drawn to the field of peacemaking and, especially in our American divorce culture—with its often savage ill-effects on families, particularly children—to offer our skills and hearts to the conflicted, as our personal and planetary *seva* or service to humanity. This call for humanitarian service—what Buddhist commentator Matthieu Ricard, quoted at the outset of our *Introduction*, calls "peacefully taking on the suffering of others" or helping fellow humans to end conflict, violence, and sorrow in their lives—propels us to step forward, and to use our expertise, experience, and evolving consciousness to create a more peaceful world, and, in the case of marital dissolution, to help couples *consciously uncouple.*

In today's world, peacemakers are needed more than ever before as we stand at the abyss between enlightenment and annihilation. For the previous reasons, this book has been written. Hopefully, this book will be a small contribution toward encouraging the peacemaker within all of us to answer the call of being and teaching *ahimsa—do no harm*—in our everyday lives.

In answering that call, it is time to let go of the violence inherent in the family law adversarial process. It is time for a new generation of peacemakers within the family law world to forge a current, nonviolent approach to assisting families through the challenges of divorce and transformation to new lives.

December 6, 1966, marks the anniversary of the Beatles' commencement of the recording of their landmark album, *Sgt. Pepper's Lonely Hearts Club Band. Paul McCartney* originated the idea that for this album they would detach from their Beatles' persona and assume the role of Sgt. Pepper's Band. This would allow them the opportunity to have complete artistic and creative freedom and not be tied to any *image* of what the Beatles were or might be.

The album revolutionized the musical world: "Nothing was ever the same again" (Lewisohn 2008). *Sgt. Pepper's* went on to become one of the most popular albums of all time. In *McCartney's* wisdom, a lesson for all: in peacemaking, as in other areas of life, leave the old, timeworn

approaches behind. Be new and creative to the circumstances you face while suspended as a peacemaker in the eye of the storm. If, as we have seen throughout this book, the adversarial legal system and its violence prone zero sum game approach to divorce is not working, if it ever did, in the 21st century, then it's time to join *Sgt. Pepper's Lonely Hearts Club Band.* By joining a creative *PeaceBand,* we can transform divorce from its violent tendencies to one that "supports peaceful (and just) connections between people" (Rosenberg 2009).

If we can learn as peacemakers to diffuse violence in one of the most intimate and personal of human settings—the divorce field—we can use those same peacemaking tools that include hospitality, friendship, education, and respect to create a more nonviolent world. Providing a spiritually driven, nonviolent approach to matrimonial dissolution brings a new dimension to divorce. It is a dimension, in the words of William Ury, called the *Third Side.*

The *Third Side* to any conflict is *all of us*. The surrounding community, friends, family, and neighbors being "the us" or immediate social relational web, which is what Ury is referring to, and most particularly applicable to divorcing families (Ury 2010). By changing the divorce dynamic from an isolated violent confrontation between spouses and their lawyers and opening it to the wider perspective of peacemakers and professional friends, we facilitate *ahimsa.* After all, our presence, our observations, and our attention as individuals, professionals, friends, family, and community are among the most valuable gifts we can give to another. This is especially true when one is suffering through, and in great emotional distress from, the marital dissolution experience.

We facilitate by recognizing that divorce, like marriage, is a community event. When we gather to celebrate the union of two people in matrimony, it is a community event in which we show our support for a newly married couple. Likewise, a family challenged by the emotional onslaught of divorce should not stand alone. Divorce should be a nonviolent event, a conscious uncoupling in which as community we support all members of a family through difficult circumstances, both professionally and personally.

During my years serving as legal counsel to the *Yupiit* of Southwest Alaska, I observed firsthand an ancient aspect of Ury's Third Side. The

population of this region, surrounding the Kushkokwin River and the western shores of the Bering Sea, are called the Yupiit—Real People—occupying 56 small villages (250 to 350 people). In the early to mid-1980s, when I (and my wife and daughters) lived and worked among them, both genders were subsistence hunters, fishermen or women, and gathers. They successfully subsisted and flourished in the Arctic's frozen paradise for over 20,000 years. In the more vibrant and traditional of their villages, their approach to peacemaking among village and tribal members was most instructive to this student of peacemaking skills.

In most of the Yupiit villages, there was no running water conveniently available for bathing and hygienic purposes. At the end of each day, there would be two communal "sweats" that served as bathhouses, one for the women and one for the men. Each small bathhouse held up to 12 or more people. It was totally dark in there, sealed with one entrance and exit. One entered the "sweat" without clothing and only a small towel, soap, and a scrub brush.

For the uninitiated, these sweats often felt like you were going to die from the heat, with small stoves in a tiny sweathouse enclosure, heated by a wood fuel fire to produce temperatures approaching 105 degrees Fahrenheit or more, making breathing and any form of physical exertion difficult. The experience for myself was like every pore and molecule in my body and mind was rendered open by the intense heat that simulated a near death occurrence. Not only was one washed, clean of the dirt, grime, and sweat acquired during the day, one could also be cleansed of accumulated emotional toxins as well. One cooled oneself by exiting the sweat at various times into the subzero outside environment, sometimes jumping into a snow bank for heat relief.

When mostly younger men and women were having marital difficulties or contemplating marital separation and divorce, they would come to the sweathouse where elder community members were available for support, advice, and counseling. The troubled individual and a group of mostly elder grandfathers, uncles, cousins, siblings, and friends from the village held extended and very personal conversations with those in need of assistance regarding the distressed marital relationship under discussion. A similar contemporaneous sweat with female elders, family relations, and friends was held for the troubled female counterpart to the marriage or relationship.

For centuries, Yupiit have helped each other in this form of *community sweathouse counseling* to help resolve or mitigate marital and relationship difficulties without the need of courts, lawyers, mental health counselors, mediators, and other professionals. In this manner, they helped reduce the fears and anxieties of couples whose relationships were failing. The community helped to provide a sense of safety, security, greater tranquility, and support to troubled families, especially children, who, together with their parents, intuitively understood that the interconnectedness of the community would help them to survive a very difficult life challenge.

What I observed anecdotally in these *sweats* was a prehistoric, yet effective, form of community involvement in family dispute resolution. More often than not, in these traditional villages where elders were highly respected and held political and social control, marital problems were either resolved or their severity was greatly lessened through this direct, therapeutic community involvement.

Yoga philosophy is once again helpful to our *Third Side* discussion. The Yoga concept of *Tapas* or the ardor, and inner will or personal fire that brings transformation into our lives has a similar goal as the informal *Yupiit sweat.* In Yoga practice, we create through the disciplines of *asana* (physical poses) and *pranayama* (breathe and energy work) the *fire* or *strength* to address our personality challenges. With the focused attention garnered from a disciplined Yoga practice, we gain the strength of character to *burn away* our fears, anxieties, anger, insecurities, and depression. This focused disciplining of our mind and body, similar in goal with the extreme, death like experience in the *Yupiit sweat*, opens us up to inner observation in the present, mindful moment, and the possibility of transformative change. As noted Yoga teacher and scholar, *Rama Joyti Vernon* states:

> Tapas *help* the human psyche to transcend pain … and find … inner peace … in all conditions of life. (Tapas*)* … *move* us from rigidity and contraction into the fires of expansion and self-transformation. (Vernon 2014, 242)

(See: Iyengar 2006, 7; Iyengar 1979, 38; Vernon 2014, 241–42)

It was only years later that I realized that what I had observed in these tiny and isolated *Yupiit* villages was a very early form of Ury's *Third Side.* This experience among the *Yupiit* has convinced me that our marital

dissolution culture would do well to emulate in some form the *Third Way* of these *First World* people.

As Ury states and we extrapolate, bringing the *Third Side* to any conflict is the secret for ending conflict and its offshoot—violence. And each time we find a way to resolve conflict in our lives, whether it is a divorcing couple or an international dispute, we become a little more civilized and a little more evolved. Surely, as smart as we are in so many ways, we can, like Sun Tzu, *become choreographers of conflict* in the family law arena, moving from the violence of the adversarial process to the nonviolence of peaceful marital dissolution; from enemies, blame, and judgment to connection, needs, and nonsuffering.

Peacemaking should be the presumptive first step in any divorce. Many jurisdictions and communities around America and the world are moving in this direction. Australia, England, Wales, British Columbia, and Quebec all have various family and divorce laws that shift focus from litigation as the first option to mediation and ADR modalities as primary dispute resolution in family law cases. In the USA, in Connecticut, North Carolina, Utah, and California, all require mandatory mediation or diversion from the legal system in family law divorce matters (See extended discussion and references in Baer 2012).

We may be entering a social and legal historical period that rejects the violence-begetting, pathological milieu of adversarial divorce as the *default* system for marital dissolution. Instead, we are beginning to embrace a *consensual* world of mediation and other forms of Peacemaking as the new ADR *norm* for divorcing families (Baer 2012).

A new and creative transformation in the family law arena would have as its primary ethic a nonviolent approach to marital dissolution that emphasizes the interconnectedness of human beings. Rosenberg sums it all up quite well. He reminds us that even the most protracted disputes can be settled if *the flow of communication* between disputants can be maintained. This flow of communication between people implies that they cease being critical of and evaluative of each other. And, instead, they begin to express their needs and begin to understand the needs of others involved in the conflict. And above all else, the conflicted must begin to understand "…the interdependence that we all have in relation to each other." As Rosenberg sums it all up:

> We can't win at somebody else's expense. We can only fully be satisfied when the other person's needs are fulfilled as well as our own. (Rosenberg 2009)

As peacemakers, if we can help conflicted divorce participants move away from blame, judgment, and denial, and move toward understanding who they are, the chances for personal transformation and a nonviolent divorce will be greatly enhanced. Mindfulness meditation, Yoga, indigenous peoples' wisdom, and Buddhist and Eastern philosophy are ancient tools relevant for helping us in this 21st-century process. This process can be accomplished when utilizing the peacemaking skills described in this book.

Our patience will be tested. It is often a herculean task to help each other bring light to our darkest places. One has observed that it may take as long to remove disputants from a conflicted situation as it took for the conflict to arise. Together, as a community of peacemakers, we can move away from today's default adversarial divorce system. Utilizing nonviolent processes as our first and most appropriate choice for assisting families through the marital dissolution challenge, family law mediation should be our highest good and objective for achieving nonviolent and conscious uncoupling in American society.

“And Now Peacemaking”

अधुना शांतीकरणं च

(Translation by Kiran Paranjabe @ SanskritTranslations.com)

AUTHOR’S NOTE: The above Sanskrit image and statement is a takeoff on the first *sutra* or principle from Patanjali’s classic treatise, the *Yoga Sutra* that states: “And Now Yoga.” Our meaning here is that Now it is the reader’s turn to let flower their inner peacemaker and practice the peacemaking lessons found in this book.

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Index

ABA. *See* American Bar Association
Abstract intuitive thinkers, 59
Active listening, 129–132
Adler, Peter, 58, 92
ADR. *See* Appropriate dispute resolution
Adrenalin, 55
Adversarial divorce approach, 54
Ahimsa, 8, 79
American Bar Association (ABA), 166
Anger, 151–153
Aparigraha, 80
Appropriate dispute resolution (ADR)
  alternative and, 8
  cultural reflex, 7
  FAA standards, 12
  history of, 11–12
  Le tournament approach, 8
Arbitration Society of America, 12
Asher, Barb, 114
Asteya, 80
Avidya, 53

Bannerman, Nadine Ryan, 151
Barkai, John, 68
BATNA. *See* Best alternative to negotiated agreement
Best alternative to negotiated agreement (BATNA), 147–148
Blame frame, 78–83
BMTI. *See* Myers-Briggs type indicator
Body language, 134–137
Bonding hormone, 55
Brahmacharya, 80
Brain science, 53–64
Brooks, David, 175–176
Brossman, Sandra, 103
Bullock, Grace, 2
Burchell v. Marsh, 11

Chang, Lou, 150, 173
Child specialist, 27
Choiceless awareness, 129
Christison, Randall B., 59
Cloke, Kenneth, 61, 92
Collaborative divorce process, 22
Collaborative law, 21–24
Co-med-arb, 33
Comediator, 172–173
Comerford, Lynn, 16–18
Communication
  active listening/paraphrasing, 130–132
  reframing/rephrasing, 132–134
Communication for Conflict Resolution (Barkai), 130
Concilio-Arbitration, 33
Conclusion, 125–126
Conflict, 51–53
Consequences of not settling, 101–102
Contractual arbitration, 13–14
Cornfield, Jack, 27
Cosmic intelligence, 2–3
Court-annexed arbitration. *See* Judicial arbitration
Crawford, Bill, 150–151
Creative issue solving, 98–99
Creativity meditation, 138
Cultural phenomenon, 135
Cultural reflex, 7
Current relational issue, 135

Daicoff, Susan, 59
Dali Lama, 54
Death of marriage, 7, 9
Deleterious behaviors, 38
Demands, unreasonable, 127
Denial, 153–154
Denial of responsibility, 127

Deserve-oriented communication language, 128
Detached thinkers, 59
Diagnosis, 126–127
DiGrazia, Lu, 53
Dispute Review Boards (DRBs), 18–19
Divorce emotional rollercoaster, 9
Dramatic mediator exit, 173–175
DRBs. *See* Dispute Review Boards
D's of Dispute resolution disconnection, 126–128

EARS model, 151–153
Eddy, Bill, 151
Educated divorce (ED) model
  careful screening, 29
  child specialist role, 27
  description, 24–25
  financial planner, 26–27
  gender-based perspectives, 28–29
  required curriculum, 25
  transformative moment, 29
Educational child-related tool, 114
Ehrenreich, Barbara, 51
EI. *See* Emotional intelligence
Electro-magnetic energy, 44
Emotional intelligence (EI), 95–96
Empathy, 151
Evaluative mediation, 39–42

FAA. *See* Federal Arbitration Act
Facilitative model of mediation, 37–39
Family law mediation, 15–16
Federal Arbitration Act (FAA), 12
Financial planner, 26
Flow of communication, 188
Four Agreements: A Practical Guide To Personal Freedom, The (Ruiz), 76

Gender-balanced mediators, 28
Goldberg, Stephen B., 97
Good Karma Divorce, The (Lowrance), 17

Hahn, Ari, 169
Halpern, Charles, 54–55
Healthy postdivorce relationship, 158
Hearing, 122
Humor and laughter, 99–100

Iintegrative/holistic model. *See* Multidisciplinary team approach
Impartiality, 108
Impasse strategies
  mediator as "Energizer Bunny," 162–164
  openhearted listening, 160–162
  participant overconfidence, 164–165
  voice of reality, 165–167
Integrity, 105–106
Intention invention, 77–78
Internet mediation, 32
Intonations, 123–124
Iyengar, B.K.S., 178

Jenkins, Jerry B., 130
Judicial arbitration, 14

Kabit-Zinn, Jon, 55
Keats, John, 129
Keirsey Temperament Sorter, 71
Keirsey Temperament Theory (KTT), 70–72
Kissinger, Henry, 107
Krishnamurti, J., 129
KTT. *See* Keirsey Temperament Theory

Lakota, Oglala, 1
Last Resort strategies
  alternatives and proposals, 171
  comediator, 172–173
  dramatic mediator exit, 173–175
  mindfulness, 175–177
  temporary cessation with private mediator evaluation, 172
  yoga practice, 177–181
Latham, Tyger, 58

Lawyering characteristics, 59
Leone, Giuseppe, 32
Le tournament approach, 8
Levine, Peter A., 50
Lincoln, Abraham, 4, 13
Listen, Empathize, Ask, Problem solve, Speak (LEAPS) model, 150–151
Listening, 122
Lowrance, Michele, 17

Mandela, Nelson, 3, 170
Maslow, Abraham, 129
McCulloch, Barbara, 31
Mediation
  critics, 15–17
  definition, 14–15
  evaluative, 39–42
  facilitative model, 37–39
  family law, 15–16
  Internet, 32
  mobile, 32
  multidisciplinary team approach, 47–50
  narrative, 30–31
  negotiation process, 15
  shadow, 31–32
  transformative, 42–47
Mediation/arbitration (med/arb), 19
Mediation Plus, 32
Mediation skills and techniques
  consequences of not settling, 101–102
  creative issue solving, 98–99
  humor and laughter, 99–100
  integrity, 105–106
  needs translators, 104–105
  patience and tenacity, 100–101
  peacemaking success prediction algorithm, 89–92
  rapport, 97–98
  timing, 102–104
  variables, 92–97
Mediator as "Energizer Bunny," 162–164
Meditative space, 122
Med-Recommendations, 33
Mindfulness, 138, 175–177
Mindfulness approach, 55
Mindsight: The New Science of Personal Transformation (Siegel), 57
Mini-trials, 31
Mlodinow, Leonard, 134–135
Mobile Mediation, 32
Modern day spirituality, 2
Monetary negotiation factor, 117
Motion for predecree relief, 60
Multidisciplinary team approach, 47–50
Myers-Briggs type indicator (BMTI), 67–70

Nadi sodhana, 178–179
Namaste gesture, 11
Narrative mediation, 30–31
Negative capability, 129
Negotiating disparity, 118
Negotiation
  active listening/paraphrasing, 130–132
  body language, 134–137
  communication and, 130–134
  conclusion, 125–126
  denial, 153–154
  difficult mediation, 1491–50
  EARS model, 151–153
  hearing, 122
  intonations, 123–124
  LEAPS model, 150–151
  listening, 122
  multifaceted resolution, 145–146
  nonverbal cues, 124–125
  nonverbal physical negotiation positions, 137–140
  preparing for, 140–142
  reframing/rephrasing, 132–134
  self-centered activity, 146–149
  strategies, 142–144
  subjective reactions, 125
  why *versus* what, 144
Negotiation groove, 69
Negotiation skill disparities, 118

New York Times, 175
Nocebo effect, 174–175
Nonverbal cues, 124–125
Nonverbal physical negotiation positions, 137–140
Nonviolent communication (NVC)
assumptions, 75–76
blame frame, 78–83
contribution, 84–85
definition, 72–73
difficult conversations, 74–75
feelings, 85–86
intention invention, 77–78
trigger words, 73–74
truth trap, 76–77
NVC. *See* Nonviolent communication

Openhearted listening, 160–162
Oxytocin, 55

Paraphrasing, 130–132
Participant overconfidence, 164–165
Partnering, 19–20
Party self-determination, 167
Patience and tenacity, 100–101
Peacemaking
definition, 2
healthy coparent relationship, 158–159
spiritual and nonviolent views, 2–3
Peacemaking success prediction algorithm, 89–92
Peacemaking tools
Keirsey Temperament Theory, 70–72
Myers-Briggs type indicator, 67–70
nonviolent communication, 72–86
Power disparity, 118
Pranayama, 26, 62, 75, 187
Private judging, 20–21
Psychology Today, 134

Rapport, 97–98
Real listening, 129
Reframing/rephrasing, 132–134
Rent a judge. *See* Private judging
Respectful inquiry, 30
Reverse paraphrasing, 132
Rezoud Corporation, 33
Robinson, Craig, 150
Rosenberg, Marshall, 72, 126
Ruiz, Don Miguel, 76

Saposnek, Donald, 18, 168
Satya, 80
Self-centered activity, 146–149
Shadow mediation, 31–32
Siegel, Daniel J., 57
Stress Assessment Scale, 9
Subjective reactions, 125

Tao Te Ching (Tzu), 55
Tapas, 149
Technology enhanced dispute resolution (TeDR), 33
TeDR. *See* Technology enhanced dispute resolution
Thompson, George J., 130
Thompson, Nainoa, 180
Time magazine, 51
Transformative mediation, 42–47
Translators, 104–105
Trigger words, 73–74
Truth trap, 76–77
Tzu, Lao, 55
Tzu, Sun, 108

Unreasonable demands, 127

Vagus nerve, 61–62
VDR. *See* Visual dominance ratio
Verbal Judo (Thompson and Jenkins), 130
Virtual Mediation Lab, 32
Visual dominance ratio (VDR), 134–137
Voice of reality, 165–167

Warrior Culture, The (Ehrenreich), 51
Washington, George, 13

Yoga practice, 177–181
Yoga Sutra, 5
Yoga Yamas, 79–80

Zealot, 54

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Thomas DiGrazia received a JD from the University of Notre Dame Law School, a certificate in English and American law from the University of London, and his MA in political science from Rutgers University. He has practiced law in South Dakota, Indiana, Alaska and Hawaii. Early in his career he was a Robert F. Kennedy Fellow working with the Lakota in South Dakota; and he practiced public interest law with Native Americans all over the US. He is a peacemaker, lawyer and director of the Mediation Center—Windward Oahu. He is an adjunct professor at Hawaii Pacific University, teaching graduate classes in Mediation and Conflict. His concurrent profession is as a senior teacher, co-founder and co-director of the Yoga School of Kailua and Hawaii Yoga Prison Project. He is author of *Peacemaker: A Sicilian American Memoir*.

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