

COMBATING ADVERSARIALISM IN NEGOTIATION: AN EVOLUTION TOWARDS MORE THERAPEUTIC APPROACHES

*Andrew F. Amendola**

Many negotiators—as well as their clients—hold fast to the traditional, adversarial approach to negotiation as necessary to achieve maximum gains while avoiding exploitation by their opponent. This approach has been proven ineffective in many negotiation situations and may contribute to adverse effects to the psychological well-being of both the practitioner and the client. This paper advocates the application of therapeutic jurisprudence principles to the techniques of negotiation, much in line with the gradual evolution the field of negotiation has experienced towards minimizing adversarial methods. A therapeutic jurisprudence approach involves a more collaborative process integrating aspects of the social sciences to more effectively address the needs of the client, maximize the bargaining zone, and reduce inimical aspects of conflict resolution. This process attains greater overall gains and increased satisfaction with the process and results achieved. While many of the examples herein focus on the American legal system, the concept of therapeutic jurisprudence is a universal one which could offer significant benefits to any adversarial-based system, including that of India.

I. INTRODUCTION

The field of law is experiencing a gradual evolutionary movement, as practitioners eschew the traditional adversarial approach in favour of cooperative methods that have shown to produce more beneficial, integrative outcomes. Problems associated with the traditional system including “[c]ongestion in court rooms, lack of manpower and resources in addition [to] delay, cost, [and] procedure speak out the need of better options, approaches and avenues.”¹

* Attorney and author, J.D. 2009, University of Connecticut School of Law. I would like to thank Professors Robert Madden and Jennifer Brown for their expertise and guidance, as well as the Board of Editors of the NUJS Law Review for their effort and consideration. An abridged version of this article was published in the Harvard Online Negotiation Law Review: Andrew F. Amendola, *New Perspectives in Negotiation: A Therapeutic Jurisprudence Approach*, HARV. NEGOT. L. REV. ONLINE (January 27, 2010), available at <http://www.hnlr.org/?p=577> (Last visited on September 18, 2011).

¹ S. B. Sinha, *ADR and Access to Justice: Issues and Perspectives*, available at <http://www.hcmadras.tn.nic.in/jacademy/articles/ADR-20Justice%20SB%20Sinha.pdf> (Last visited on September 14, 2011).

Recently, interdisciplinary collaborations between the fields of law and social science have endeavoured not only to optimize substantive outcomes, but also to create a more therapeutic process for the parties involved. This involves determining the psychological, emotional, and physical effects certain legal processes exact on attorneys as well as clients, and adjusting those processes to reduce adverse consequences in those areas. For legal practitioners, this therapeutic approach can help reduce stress, job dissatisfaction, and other problems associated with the practice of law. For clients, optimized resolutions and minimized adverse psychological effects are achieved through the attorney's increased receptivity to their client's interests, and greater client involvement in the process acts as an empowering tool, enhancing the client's overall well-being. The result is a more gratifying interaction and improved satisfaction with outcomes.

In the practice of negotiation, a similar evolution has taken place. Dissatisfaction with the results and effects of the traditionally adversarial approach has led to the development of more cooperative methods which focus less on pitting two opponents against one another in a zero-sum contest for the largest portion of the available bargaining zone, but instead strive to reach optimal outcomes for both parties both substantively and procedurally.

This paper examines the traditional adversarial style of negotiation, including its benefits as well as its disadvantages—disadvantages which apply not only to the outcome of the negotiation itself, but also to the feelings of satisfaction experienced by the client, and the psychological and physical well-being of both the client as well as the representing attorney. Subsequently, newer methods applied to the field of negotiation are analyzed with regard to their methodology, effects on outcome, benefits and disadvantages, as well as their physiological and psychological effects on the parties involved. Finally, this paper introduces the topic of therapeutic jurisprudence, detailing its origins, explaining how it has been applied to other fields of law, and examining how it might be applied to the field of negotiation as the next step in the evolutionary process of negotiation.

This paper does not purport to offer any sort of panacea for the competitive and often corrosive adversarial style. In fact, in certain negotiating situations, such as pure commodity purchases, lowest-bid transactions, and primarily distributive bargains,² the adversarial approach produces optimal results.³ It is not, however, the optimal method for all situations, and given the

² The Negotiation Academy, *Collaborative Negotiation Strategy*, available at <http://www.negotiationtraining.com.au/articles/negotiating-collaborative/> (Last visited on September 10, 2011).

³ In fact, a seminal study on the effectiveness of negotiation approaches used by lawyers confirmed that an attorney can be very effective or very ineffective within the constraints of either the adversarial or cooperative methods. See GERALD R. WILLIAMS, LEGAL NEGOTIATION

adverse consequences in many cases, may be more wisely relegated to particularly anomalous circumstances. Rather, this paper examines the evolving movement in negotiation towards a more therapeutic process, and suggests a possible next step.

II. NEGOTIATION

Negotiation is a “consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter,”⁷⁴ a term originating from the Latin word *negotiarī*, meaning “to carry on business.”⁷⁵ Considering that more than 90 percent of all lawsuits in the United States resolve through settlement or plea deals,⁶ and almost all lawyering activities involve negotiation of some sort,⁷ the importance of negotiation theory in the practice of law cannot be overstated. The methodology of negotiation has long been associated with aggressively adversarial tactics. The image of the proverbial “negotiator” has often been portrayed pejoratively by the public, replete with stereotypes ranging from the grizzled, veteran businessman,⁸ whose take-no-prisoners attitude leaves in his wake the carnage of those lacking his figurative appetite for blood, to the sneaky, duplicitous, used-car salesman-type. For many attorneys, the imagery often induced by the term is not markedly different, with the exception of the concomitant dread of having to work with such an individual.

While such depictions admittedly represent the stereotypical extremes of the common perception of those involved in the art of negotiation, public opinion regarding its practitioners is not that far from the above description—and these perceptions are often warranted. Such perceptions (and the conduct those perceptions are derived from) reflect poorly on the field of negotiation, as well as on attorneys and the practice of law in general.⁹ Moreover,

AND SETTLEMENT 18–19 (1983). There are, however, more effective cooperative than effective adversarial negotiators, *id.*, 49.

⁴ BLACK’S LAW DICTIONARY 1064 (8th ed. 2004).

⁵ JIM V. LOPEZ, THE LAW ON ALTERNATIVE DISPUTE RESOLUTION: PRIVATE JUSTICE IN THE PHILIPPINES; HOW TO RESOLVE LEGAL DISPUTES WITHOUT A COURTROOM TRIAL 103 (1996).

⁶ Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 182 (2004).

⁷ See Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 263–64 (2005) (noting that lawyers engage in skills similar to those involved in negotiation not only when participating in settlement or plea discussions, but also when meeting with clients to discuss a case or strategizing with colleagues about litigation).

⁸ The masculine pronoun is used here to exemplify the often chauvinistic stereotype surrounding negotiators and the practice in general.

⁹ See e.g., Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 551–53 (1998) (discussing the increasingly negative public opinion of lawyers and the legal profession due to what many perceive as greed, unethical and uncivil behavior, and unprofessionalism); See also RICHARD

negotiations handled in the contemptuous and outmoded manner illustrated in the previous paragraph have a definite, adverse effect on clients, the representing attorneys, and ultimately the legal profession. While some attorneys still choose to operate within the aggressive, competitive dynamic commonly referred to as the *adversarial style*, new methods have emerged in the practice of law and more specifically, negotiation.

III. CHOOSING A NEGOTIATION STYLE

Negotiation styles are varied and innumerable, and can fit anywhere along the stylistic spectrum from purely competitive (adversarial) to purely concessionary. Figure 1 details the tendency for concession or aggression, principal considerations during the negotiation, and generally characteristic tactics associated with certain levels along the spectrum:

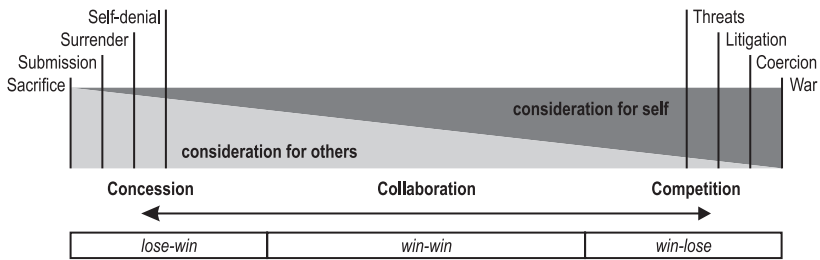


Fig. 1: Spectrum of Negotiation Styles¹⁰

It would be imprudent to follow a singular approach to any and all negotiations. In fact, it is often most advantageous to alternate between different approaches during the negotiation to best accommodate various phases of the process. Choosing which style will prove best for a given situation depends on a number of factors. To decide upon an appropriate negotiation strategy, it is important for the attorney and client to determine:

- 1) The strength of the alternatives to negotiation; and
- 2) The importance of a long-term relationship with the counterpart in this negotiation.¹¹ The diagram below displays regions of appropriate

A. ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 3–4, 130–31 (1999) (discussing the impact of lawyers' behavior on public opinion of the legal system).

¹⁰ Changingminds.org, *The Spectrum of Negotiation Styles*, available at http://changingminds.org/disciplines/negotiation/styles/spectrum_negotiation.htm (Last visited on September 10, 2011).

¹¹ The Negotiation Academy, *supra* note 2.

negotiation strategy depending on the investment value and strategic impact of the outcome on the client.¹²

Buy Side Negotiation Strategy Example

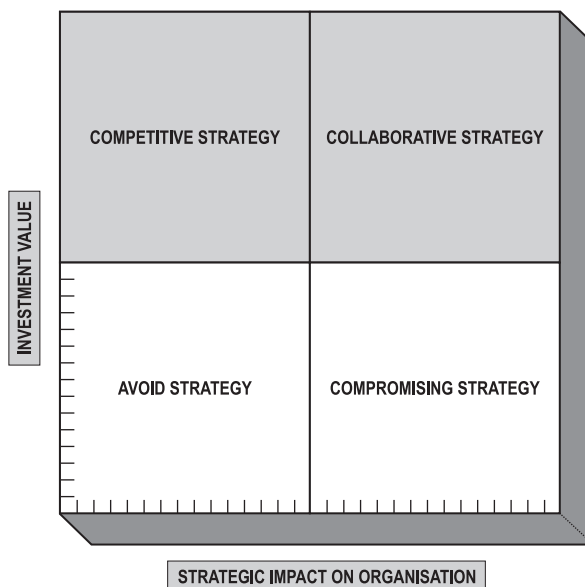


Fig. 2: Buy Side Negotiation Strategy¹³

IV. THE ADVERSARIAL STYLE

Negotiation ought strictly to be viewed simply as a means to an end; it is the road the parties must travel to arrive at their goal of mutually satisfactory settlement. But like other means, negotiation is easily converted into an end in itself; it readily becomes a game played for its own sake and a game played with so little reserve by those taken up with it that they will sacrifice their own ultimate interests in order to win it.¹⁴

The most commonly known negotiation style is undoubtedly the adversarial style. This competitive, aggressive, often ego-driven style epitomizes the stereotypical lawyer machismo. The adversarial approach is characterized by a hard-bargaining, forceful, attacking style. Most adversarial negotiators view the process as a zero-sum, win/lose prospect, and opposing

¹² *Id.*

¹³ The Negotiation Academy, *supra* note 2. (Although the diagram is addressed to corporate transaction negotiation, the principles equally apply to any negotiation).

¹⁴ L. FULLER, ANATOMY OF THE LAW 128 (1968).

counsel as a warrior opponent in a battle of wits.¹⁵ Some of the particular attributes displayed by more effective adversarial negotiators are listed below in figure 3:

Fig. 3: Effective Adversarial Negotiators¹⁶

Aggressive Objectives:

1. Maximize settlement for client
2. Obtain profitable fee for self
3. Outdo or outmanoeuvre opponent

Aggressive Traits:

1. Dominating Forceful Attacking
2. Plans timing and sequence of actions (strategy)
3. Rigid
4. Uncooperative
5. Carefully observes opponent
6. Unrealistic opening position
7. Uses threats
8. Reveals information gradually
9. Willing to stretch the facts

While these qualities highlight the competitive, aggressive nature of the adversarial style, characteristics displayed by ineffective adversarial negotiators showcase some of the qualities that have perpetuated the negative connotation surrounding the style:

¹⁵ See JULIE MACFARLANE, DISPUTE RESOLUTION READINGS AND CASE STUDIES 175 (2nd ed., 2003) (explaining the way many adversarial negotiators view their role in the process).

¹⁶ *Id.*, 171.

Fig. 4: Ineffective Adversarial Negotiators¹⁷Aggressive Objectives:

(Same as effective adversarial negotiators)

Aggressive Traits:

1. Irritating
2. Unreasonable opening position
3. Bluffs
4. Uses “take it or leave it” approach
5. Withholds information
6. Attacking, Quarrelsome, Demanding and Aggressive
7. Rigid, Egotistical and Headstrong
8. Arrogant
9. Disinterested in others’ needs
10. Intolerant
11. Hostile

The adversarial negotiator’s typical approach involves making high demands (which escalate over time), stretching facts (a technique that increases over time), and attempts to outmanoeuvre the opponent (sometimes aiming to make the opponent look foolish), intimidation, and an unwillingness to make concessions.¹⁸ The adversarial negotiator’s penchant for intimidation, although consistently employed, is utilized for different purposes depending on the style of the opponent. Against more cooperative opponents, the use of intimidation serves the purpose of maximizing the adversarial negotiator’s own gains while simultaneously maximizing the opponent’s losses. Against an adversarial opponent, the use of intimidation helps reduce the likelihood of falling victim to exploitation and attack.¹⁹

¹⁷ *Id.*, 172.

¹⁸ *Id.*, 175.

¹⁹ *Id.*

Some lawyers advocate the adversarial style, professing its effectiveness in increasing their clients' gains, avoiding exploitation, and zealously pursuing the clients' goals.²⁰ In fact, it has numerous advantages; in certain negotiating situations the adversarial approach produces optimal results,²¹ such as pure commodity purchases, lowest-bid transactions, and primarily distributive bargains.²²

The adversarial approach is not the optimal method for all situations, and given the adverse consequences in many cases, discussed *infra*, may be best left to a specific set of circumstances. The adversarial style can create tension, mistrust and misunderstanding, and can often result in fewer settlements (more negotiations reach an impasse, even when a bargaining zone exists), create lower joint gains, and provoke costly retaliation from the opponent (if taken too far).²³ It also tends to remove the client from the negotiation equation, projecting the appearance that the client has hired the attorney to speak for her, and thus relegated herself to a position of self-imposed preclusion. The client's limited involvement may result in the attorney's placement of monetary goals above such interests as happiness, well-being and respect (which may be of greater importance to the client).²⁴ Furthermore, an attorney's adversarial approach can lead to declining professionalism, overzealous advocacy, incivility, excessive litigiousness, and violations of the ethics codes.²⁵

Andrea Kupfer Schneider, who studied the negotiating styles of Chicago and Milwaukee attorneys, concluded that over the past twenty-five years adversarial styles have become more extreme, and are perceived by other lawyers as less effective:

“...the study shows that effective negotiators exhibit certain identifiable skills. For example, the research indicates that a negotiator who is assertive and empathetic is often perceived as more effective. The study also reveals distinctive characteristics of ineffective negotiators, who are more likely to be stubborn, arrogant, and egotistical. Furthermore, when this adversarial negotiator is unethical, he is perceived as even less effective.”²⁶

²⁰ See Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 146–47 (2002) (*‘Shattering Negotiation Myths’*).

²¹ See *supra* text accompanying note 3.

²² The Negotiation Academy, *supra* note 2.

²³ MACFARLANE, *supra* note 15, 175.

²⁴ Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 128–29 (2000).

²⁵ See e.g., John G. Koettl, US District Judge for the Southern District of New York, *From the Bench*, 23 LITIGATION 3 (1997); Stuart Taylor Jr., *Sleazy in Seattle*, available at <http://doug4justice.org/Lawyers/Sleazy.htm> (Last visited on September 14, 2011).

²⁶ Schneider, *supra* note 20, 147–48.

Additionally, in concluding that the “myth of the effective hard bargainer should be destroyed,”²⁷ Kupfer found that over 50 percent of the adversarial bargainers were ineffective. This number increased with each breakdown into a smaller cluster. Close to 60 percent of the adversarial bargainers from the three cluster analysis were considered ineffective. Finally, 75 percent of the unethical adversarial bargainers from the four cluster analysis were considered ineffective. As these negotiators become more irritating, more stubborn, and more unethical, their effectiveness ratings drop. The historical analysis comparing these results to Williams’ results also teaches the same lesson. As adversarial bargainers became nastier in the last 25 years, their effectiveness ratings have dropped.²⁸

In addition to these results-based disadvantages, the adversarial style of negotiation presents numerous problems that affect the psychological and physical wellbeing—as well as the effectiveness—of both the attorney and the client. The adversarial approach is often characterized as “attacking.”²⁹ When an individual feels attacked, a neurological reaction takes place. In the brain, the hippocampus induces a heightened sense of alertness (described as the “fight or flight” reaction), affecting the prefrontal lobe in a manner that shuts down executive functioning.³⁰ This reaction causes extreme stress and anxiety.³¹ The amygdala, when stimulated in this way, causes the release of certain stress hormones, including cortisol, which “heightens the senses, dulls the mind, and steals energy resources from working memory and the intellect so that such energy may be used to prepare the individual to fight or run.”³² High levels of cortisol also produce distraction, mental errors, and “impairment in the ability to remember and process information.”³³

²⁷ *Id.*, 196.

²⁸ *Id.* In defining “cluster analysis,” Kupfer stated that:

“Cluster analysis uses a computer to break down data into natural groups by finding similar patterns in descriptions given by a survey. The original Williams study had used Q Methodology, which is a technique of factor analysis. The cluster analysis used here is a similar type of analysis but updated to take advantage of greater computer capacity. In both types of analysis, the factors representing the various negotiation characteristics outlined on the three ratings scales are used to determine the behavioral groupings. The data is used to divide the attorneys into their groupings or clusters as contrasted to pre-determined groupings. In other words, I did not tell the computer that empathetic should be linked with perceptive or that all people with a certain adjective highly rated should fall into one group. There is no attempt to tell the computer what kind of patterns to find or to give special emphasis to one set of characteristics. The program merely looks for any identifiable patterns in the descriptions of the attorneys.”

Id., 162–63.

²⁹ MACFARLANE, *supra* note 15, 171–172.

³⁰ Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 110 (2000).

³¹ *Id.*

³² *Id.*

³³ *Id.*

A. THE SOURCE OF THE ADVERSARIAL MENTALITY

One might assume that the adversarial mentality is gradually adopted by lawyers after years of operating in the trenches of negotiations. Alternatively, one might assume that the legal profession itself attracts individuals of a certain competitive predisposition, which inevitably affects the negotiation techniques utilized by its practitioners. Research, however, indicates that this is not necessarily the case.

It is impossible to escape the fact that the American legal system is based on the concept of adversarialism.³⁴ Attorneys generally have been found to possess pre-existing personality traits related to competitive behaviour such as dominance, leadership, a heightened need for attention, decreased interest in the emotional concerns and needs of others, and a lower tolerance for assuming subordinate roles.³⁵ Studies show that a majority of law students enter law school with the same personality traits as other professionals, but go through a substantial psychological transformation during the first year.³⁶ Dr. Andrew

³⁴ See e.g., Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257, 260 (2009) (“[t]he United States, on the other hand, has relied on an adversarial system of judicial dispute resolution, where each side presents its case and a jury decides the winner.”).

³⁵ Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1353–55, 1403 (1997).

³⁶ See e.g., Connie J. A. Beck, Bruce D. Sales & G. Andrew H. Benjamin, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J. L. & HEALTH 1 (1996). (The authors explain that certain psychological distress symptoms “are not exhibited when the lawyers enter law school, but emerge shortly thereafter and remain, without significant abatement, well after graduation from law school.” *Id.*, 2. The authors also note that in a 1986 study

“pre-law students did not show significant elevations of psychological distress when tested in the summer prior to law school entry. Yet, within two months of beginning law school the students’ psychological distress was found to be significantly elevated. Depending on the group (first, second, or third year), the authors found that 17–40 percent of the law students fell above the cutoff on symptoms relating to depression. Of these same students, 20–40 percent also fell above this cutoff on symptoms relating to obsessive-compulsiveness, interpersonal sensitivity, anxiety, hostility, and paranoid ideation in addition to social alienation and isolation. A similar pattern was found in law school alumni two years post-graduation. On a global measure of distress (GSI), the authors found that 17.9 percent of these lawyers fell above the cutoff for the non-patient normal population mean. In comparing the students at their third year of law school and then two years post-graduation, the study found that symptoms present during the third year had not diminished significantly during the lawyers’ first two years of practice.”)

Id. at 4; Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 113 (2001–02). Additionally, Dr. Andrew Benjamin found that students

“[b]ecome much less healthy soon after entering law school. For example, our research data (and subsequent replications by others) have revealed that before entering law school, only four percent of students suffered from depression, a figure expected from any normal population. During the first year of law school, about 20 percent of the students developed depression. By the third year of law school, 40 percent of the law students had developed statistically significant levels of depressive symptoms.”

Benjamin contends that “[t]he adversarial nature of legal education and the legal system encourages the development of a world view that fosters suspiciousness, hostility, and aggression.”³⁷ The sense of competition inherent in the law school experience causes significant changes in students’ attitudes, values, and motivations, reduces students’ desire for cooperation, and diminishes overall personal well-being.³⁸ Law school pedagogy often involves a deprogramming of sorts, teaching students to think in different ways—to think like lawyers. This type of thinking is “fundamentally negative; it is critical, pessimistic, and depersonalizing. It is a damaging paradigm in law schools because it is usually conveyed, and understood, as a new and superior way of thinking, rather than an important but strictly limited legal tool.”³⁹ The common teaching style instills in law students the binary win/lose mindset that naturally gravitates towards the adversarial negotiation style.⁴⁰

It should come as no surprise that an educational system that breeds competitive, adversarial instincts results in a profession that holds the same qualities as the standard, rewarding those who exemplify the model moulded years before in law school. New lawyers are taught not “to dedicate, but to sacrifice their lives to the firm” where the motto is “live to work, rather than work [...] to live.”⁴¹

Andrew Benjamin, *The Role of Law School in Producing Psychological Distress Revisited*, available at http://www.law.fsu.edu/academic_programs/humanizing_lawschool/images/benjamin.pdf (Last visited on September 10, 2011).

³⁷ Benjamin, *supra* note 36.

³⁸ See generally Krieger, *supra* note 36; Lawrence S. Krieger, *What We’re Not Telling Law Students and Lawyers that They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession From the Roots*, 13 J.L. & HEALTH 1 (1998–99); Lawrence S. Krieger, *Psychological Insights: Why Our Students and Graduates Suffer, and What We Might Do About It*, 1 J. ASS’N OF LEGAL WRITING DIRECTORS 259 (2002); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004) (presenting and discussing empirical evidence of the psychological effect law school has on students).

³⁹ Krieger, *supra* note 36, 117.

⁴⁰ *Id.*

⁴¹ Patrick J. Schiltz, *Attorney Well-Being in Large Firms: Choices Facing Young Lawyers: On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 890 (1999). Schiltz further elaborated:

“Big firm lawyers are, on the whole, a remarkably insecure and competitive group of people. Many of them have spent almost their entire lives competing to win games that other people have set up for them. First they competed to get into a prestigious college. Then they competed for college grades. Then they competed for LSAT scores. Then they competed to get into a prestigious law school. Then they competed for law school grades. Then they competed to make the law review. Then they competed for clerkships. Then they competed to get hired by a big law firm.

Now that they’re in a big law firm, what’s going to happen? Are they going to stop competing? Are they going to stop comparing themselves to others? Of course not. They’re going to keep competing—competing to bill more hours, to attract more clients, to win more cases, to do more deals. They’re playing a game. And money is how the score is kept in that game.”

B. EFFECTS OF AN ADVERSARIAL APPROACH ON THE CLIENT

There are many aspects of the legal process which may produce a strong negative reaction in the client. These aspects are called psychological soft spots.⁴² For example, sometimes the legal issue confronted by the client—which brought her to seek an attorney’s services in the first place—or the process of reminiscing and openly discussing the issue can cause the client to experience anger, anxiety, fear, depression, stress, or sadness.⁴³ These feelings may manifest themselves in the form of psychological resistance, minimization, rationalization, denial, or a host of other psychological defence mechanisms,⁴⁴ inhibiting the attorney/client relationship, preventing the attorney from learning the full extent of the client’s concerns, goals, and needs, and consequently preventing the attorney from proposing an appropriate course of action to resolve the issue.⁴⁵

Clients are typically in the midst of extremely stressful and inimical circumstances when they seek attorneys’ counsel, whether regarding contract disputes, medical malpractice claims, divorces, child custody suits, etc., and often experience physical or emotional pain, guilt, regret, remorse, frustration, anger and hatred of their circumstances.⁴⁶ The adversarial perspective fails to address these feelings and concerns because it operates in a competitive, binary win/lose fashion.⁴⁷ This failure may result in less than optimal results and decreased client contentment with the services rendered.⁴⁸

C. EFFECTS OF AN ADVERSARIAL APPROACH ON THE ATTORNEY

The adversarial mindset is extremely prevalent amongst lawyers, and although many find it well suited to the American legal system’s adversarial nature, this frame of mind has many disadvantages as well. This approach to law tends to promote egocentric behaviour and a lack of balance between personal and professional lives. This often leads to unhealthy levels of stress,

Id., 905.

⁴² Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 610–11 (2006).

⁴³ *Id.*, 610.

⁴⁴ *Id.*, 610–11.

⁴⁵ *Id.*, 610.

⁴⁶ See Leonard L. Riskin, *Mindfulness in the Law and ADR: The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Students*, 7 HARV. NEGOT. L. REV. 1, 13 (2002).

⁴⁷ See Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103, 118–19 (2005).

⁴⁸ See Schneider, *supra* note 24, 128–29.

feelings of isolation, emptiness, absence of meaning, and ultimately to the rendering of inadequate or inappropriate legal counsel.⁴⁹ In fact, a large percentage of lawyers experience high levels of depression (as well as other symptoms of mental illness).⁵⁰ Lawyers also have higher rates of anxiety, divorce, and substance abuse than both the general population and members of other professions.⁵¹ Furthermore, lawyers experience lower levels of work satisfaction than other professionals.⁵² Professor Susan Daicoff notes that attorneys' sense of dissatisfaction with their profession may be due to an overall decline in professionalism fostered by an increasingly adversarial ideology in the legal community:

“[t]he vast majority of commentators generally agree that the level of “professionalism” displayed by attorneys has declined dramatically in the last twenty-five years. They point to the following as evidence: (1) a decline in civility and courteous conduct between lawyers, an increase in unethical or uncivil behaviour among lawyers and judges, frequent lapses of appropriate ethical and professional conduct, and increasingly aggressive, competitive, and money-oriented legal battles, fought with a “win at all costs” approach; (2) increased competition and pressure to win—and the underlying theory that law has become a “business” rather than a profession, placing a heightened emphasis on materialism and money; (3) a decline in attorney and client loyalty to the law firm; (4) frequent and abrupt dissolutions and reconstitutions of large law firms; (5) an increase in aggressive lawyer advertising; and (6) a perceived general decline in lawyers' values, ideals, and morals.”⁵³

These feelings of unhappiness and professional dissatisfaction unsurprisingly affect attorneys' quality of work as well, impairing work productivity and interfering with relationships with colleagues and clients.⁵⁴ This may explain study data finding that the general public harbours “a surprising level of mistrust and dislike of lawyers and the legal profession in general.”⁵⁵

⁴⁹ See Riskin, *supra* note 46, 8. Approximately 20 percent of attorneys are extremely dissatisfied with their jobs. Moreover, 19 percent of attorneys suffered from depression (as opposed to 3–9 percent in the general population), and 15–18 percent suffered from substance abuse (as opposed to 10–13 percent in the general population). Daicoff, *supra* note 35, 1347.

⁵⁰ Amiram Elwork & G. Andrew Benjamin, *Lawyers in Distress*, 23 J. PSYCHIATRY & L. 205, 206 (1995).

⁵¹ Daicoff, *supra* note 35, 1347.

⁵² *Id.*, 1346-47.

⁵³ *Id.*, 1334-45.

⁵⁴ See Riskin, *supra* note 46, 13.

⁵⁵ See Daicoff, *supra* note 35, 1346. Ironically, the antagonistic characteristic that the general public finds distasteful may be the very quality they look for when hiring an attorney, believing that such qualities are necessary to best protect their interests due to the way they view the legal system—the problem may be self-perpetuating in this way.

The adversarial mindset can cause attorneys to misread their clients' needs; "[o]ften clients have needs and interests that cannot be addressed through litigation or through an adversarial perspective."⁵⁶ The adversarial approach encourages attorneys to "transform complex, human situations into a dry set of facts that fit into legal rules."⁵⁷ Locked into a win/lose mentality, the adversarial attorney is incapable of assessing the client's true needs, maximising value, or addressing the underlying sources of dispute.⁵⁸

V. DEVELOPMENTS IN NEGOTIATION

Negotiation need not be a deleterious process. In fact, it has the potential to be a healing process which brings disputing parties together to discuss and analyse their differences, resolve conflict, and reconcile disagreement.⁵⁹ Numerous alternatives to the adversarial approach have developed in the field of negotiation, many of which appear to be evolving towards a more therapeutic result for all parties involved. Among these approaches are the cooperative style, integrative bargaining, and collaborative lawyering.⁶⁰ Most of these styles are not mutually exclusive, and different styles can be used in combination during a negotiation to achieve optimal results. A good negotiator should be adept at alternating between various styles to accommodate particular issues that arise during a negotiation or to most effectively counter the negotiation style adopted by her counterpart.

A. COOPERATIVE STYLE

The cooperative style is distinguished by its approach towards the opposing side. Cooperative negotiation can be described as an exploration searching for a mutually acceptable resolution (a win-win solution).⁶¹ The cooperative negotiator "communicates to establish a common ground, emphasizes shared values and objectives, and demonstrates a genuine interest in the other

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*, 16–17.

⁵⁹ See Winick, *supra* note 30, 112–13.

⁶⁰ A related yet uniquely Indian process which combines "mediation, negotiation, arbitration and participation" called Lok Adalat has gained popularity in India. Sinha, *supra* note 1, 12. Similar to a therapeutic jurisprudence approach,

"[t]he true basis of settlement of disputes by the Lok Adalat is the principle of mutual consent, voluntary acceptance of conciliation with the help of counsellors and conciliation. It is a participative, promising and potential ADRM. It revolves round the principle of creating awareness amongst the disputants to the effect that their welfare and interest, really, lies in arriving, at amicable, immediate, consensual and peaceful settlement of the disputes.", *Id.*

⁶¹ COLLEEN M. HANYCZ, TREVOR C. W. FARROW & FREDERICK H. ZEMANS, *THE THEORY AND PRACTICE OF REPRESENTATIVE NEGOTIATION* 254 (2007).

side.”⁶² Generally, cooperative negotiators exhibit a reassuring, even-toned voice, frequent eye contact, and quiet self confidence.⁶³

A cooperative negotiator generally presents realistic and reasonable opening demands, offers concessions equal to or greater than those offered by the other side, readily shares information, asks many questions to ascertain the other side’s needs, interests, and concerns (through open questioning and active listening), and makes fair, objective statements of facts.⁶⁴

While the cooperative style lends itself to a less confrontational process, it is vulnerable to exploitation. If matched against an adversarial negotiator, the cooperative party will openly share information, including the weaker aspects of their position. The adversarial opponent will gladly accept this information, offer nothing in return, and use those confessed weak points against the cooperative party.⁶⁵ When presented with a cooperative opponent, adversarial negotiators will often “increase their demands and expectations about what they will be able to obtain.”⁶⁶

B. INTEGRATIVE BARGAINING

The development of integrative bargaining is generally attributed to the work of Mary Parker Follett in the early 1900s.⁶⁷ It was popularized in the seminal work by Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*. It is most commonly associated with the objective of expanding the bargaining zone (also referred to as “creating value” or “expanding the pie”). The integrative negotiator focuses more on “interests” than “positions,” using both competitive and cooperative tactics to expand the pool of resources available to the negotiation, in her attempt to capitalize on “opportunities to create additional value in a phase of the negotiation that will satisfy parties in addition to the negotiator and the client,”⁶⁸ essentially allowing all parties to reach a more advantageous resolution than might have been previously possible. The integrative style requires versatility and creativity to help create possible solution beyond the distributive mindset.

Some critics, however, view the value of the integrative style as frequently overstated and limited in practice.⁶⁹ In negotiations of more lim-

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*, 255.

⁶⁵ JULIAN WEBB *et al.*, LAWYERS’ SKILLS 2007–2008 154 (2007).

⁶⁶ *Id.*

⁶⁷ MICHAEL L. MOFFITT & ROBERT C. BORDONE, THE HANDBOOK OF DISPUTE RESOLUTION 16 (2005).

⁶⁸ HANYCZ *et al.*, *supra* note 61, 45.

⁶⁹ Russell Korobkin, Professor of Law, University of California, Los Angeles, Presentation at the Third Annual Centre for Interdisciplinary Study of Conflict and Dispute Resolution Distinguished Scholar-in-Residence Lecture (October 3, 2007).

ited scope, such as those with primarily distributive issues of contention, often value-creating options do not exist. In such situations, “rigidly adhering to an integrative framework despite situational factors that do not promote the generation of added value is potentially done to the detriment of the client.”⁷⁰ This results in wasted time and money due to unnecessarily protracted negotiations. Similarly to the cooperative style, there also exists in integrative bargaining the vulnerability of exploitation and suboptimal outcomes.⁷¹

C. COLLABORATIVE LAWYERING

The collaborative style of negotiation directly involves both attorneys and their clients, and sometimes incorporates other relevant professionals (e.g. financial advisors or accountants, social workers, counsellors) in the process.⁷² A relatively new approach, collaborative lawyering began in the family law context, pioneered by Minneapolis attorney Stuart Webb in the early 1990s.⁷³ The objective of collaborative lawyering is “to change the context for negotiation itself, and to provide a strong incentive for early, collaborative, negotiated settlement without resorting to litigation.”⁷⁴

Although each party retains separate, independent counsel, the process differs from traditional negotiation in a number of ways. First, negotiations (referred to as “four-way meetings”) actively involve *all* members—both attorneys and clients, who actively participate in the process and retain ultimate decision-making authority. Attorneys may speak with their own client as well as the opposing client (without needing opposing counsel’s approval). Second, both parties openly and in a timely manner share all information relevant to the dispute. Third, both parties agree that their current attorneys (as well as the firms they work for) will be disqualified from representing them in litigation should negotiations break down or fail to reach resolution. Any litigation pending at the time collaborative negotiation is commenced must be suspended during the process. Also, the threat of litigation may not be used to coerce settlement. Fourth, any necessary experts (e.g. financial advisors, accountants, counsellors, etc.) are jointly retained by the parties. Finally, both parties must agree to act in good faith to reach a mutually beneficial settlement.⁷⁵ Similarly, the participating attorneys, though remaining advocates for their clients, are committed to “keep[ing] the process honest, respectful, and productive on both sides.”⁷⁶

⁷⁰ HANYCZ *et al.*, *supra* note 61, 46.

⁷¹ *Id.*, 47–48.

⁷² Macfarlane, *supra* note 6, 180.

⁷³ Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, 45 B.B.J. 12, 27 (2001).

⁷⁴ Macfarlane, *supra* note 6, 186.

⁷⁵ Reynolds & Tennant, *supra* note 73, 12.

⁷⁶ PAULINE H. TESLER, *COLLABORATIVE LAW* 7 (2001).

Proponents of the movement suggest that it expedites resolution, reduces legal costs, leads to more integrative resolutions, and enhances both personal and commercial relationships.⁷⁷ Lawyers who practice collaborative lawyering derive more satisfaction from their work, experience less stress, and have more satisfying relationships with their clients.⁷⁸

Collaborative lawyering is not without its disadvantages, however. There are concerns that the process may violate the ethical requirement to zealously represent a client's interests; in relation to an attorney representing a client in negotiations, the ABA Model Rules of Professional Conduct appear to represent an attempt to strike a balance between "zealously assert[ing] the client's position," and adhering to the "requirements of honest dealings with others."⁷⁹ Because the collaborative method is based on communication and trust, parties are vulnerable to deception and manipulation. Also, because the attorneys participating in collaborative negotiation are disqualified from representing those same clients in litigation of that disputed matter, there are two potential sources of coercion to settle: First, the clients may exert pressure on themselves to settle, knowing that should their collaborative efforts fail to produce a resolution they will have to effectively start over in litigation (a costly and time consuming prospect). Second, the attorneys may exert the pressure to settle. This may be due to a learned proclivity for settling cases, an altruistic desire to efficiently resolve the issue and repair the clients' relationship, or a paternalistic mentality imposed upon the client. The possibility also exists that parties' focus on the process may diminish their concentration on the content of their disagreement—parties may discuss and dispute minute procedural details at the expense of more important, substantive issues. The parties may also suffer from an overly-positive relationship; the two parties, who until now may have been entangled in an embittered and contentious dispute, may become so enamoured with their newfound cooperation that they inadvertently prolong the process by exhausting settled or unimportant issues.⁸⁰

VI. THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence is a legal movement introduced in the early 1990s by Professors David Wexler and Bruce Winick.⁸¹ It is the "study of the role of the law as a therapeutic agent," focusing on "the law's impact

⁷⁷ Macfarlane, *supra* note 6, 186.

⁷⁸ *Id.*, 190–92.

⁷⁹ Model Rules of Professional Conduct pmb1. 2 (2002).

⁸⁰ For further examples and explanations of disadvantages of the Collaborative process, see Oregon Sch. Bd. Ass'n, *Negotiators Notebook: Examining Collaborative Bargaining Techniques*, 6 (June, 1995), available at <http://www.naen.org/CB%20Systems/EXAMININ.pdf> (Last visited on September 10, 2011).

⁸¹ Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193 (1995).

on emotional life and psychological well-being.”⁸² The movement represents the idea that the law—including the rules of law, legal procedures, and the roles of legal actors—serves as a social force, producing both behaviours and consequences, the effect of which may be interpreted as therapeutic or anti-therapeutic. The therapeutic jurisprudence movement acts merely as a lens

“designed to shed light on interesting and important empirical and normative issues relating to the therapeutic impact of the law. . . . The therapeutic jurisprudence perspective sets the stage for the articulation and debate of those questions, and hence has the potential for reinvigorating the field, but it does not itself provide any of the answers.”⁸³

It strives to maximize awareness of this fact and attempts to apply the law in a more therapeutic fashion- reducing the negative, anti-therapeutic effects and enhancing the positive ones- while maintaining the integrity of other legal values such as due process and justice.⁸⁴ Incorporating theories and treatment ideas from such fields as psychiatry, psychology, clinical behavioural sciences, social work, and criminology, *inter alia*,⁸⁵ therapeutic jurisprudence encourages lawyers to “attempt to create the most beneficial and emotionally satisfactory solution given a particular client’s interests and circumstances,” thus providing a therapeutic outcome.⁸⁶ It reduces the adversarial nature of legal practice, encouraging lawyers to utilize an “interdisciplinary, psychologically-oriented perspective and enhanced interpersonal skills.”⁸⁷ The movement grew out of mental health law, originally with regard to insanity defences and determinations of competency to stand trial.⁸⁸ Therapeutic jurisprudence was designed to “look [...] at the way in which a system that is designed to help people recover or achieve mental health often backfires and causes just the

⁸² David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000).

⁸³ David B. Wexler & Bruce J. Winick, *Patients, Professionals, and the Path of Therapeutic Jurisprudence: A Response to Petrila*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 708 (1996).

⁸⁴ Wexler, *supra* note 82, 125; BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 4 (1997) summarized the impetus behind the therapeutic jurisprudence movement, stating that:

“[o]nce it is understood that rules of substantive law, legal procedures, and the roles of various actors in the legal system such as judges and lawyers have either positive or negative effects on the health and mental health of the people they affect, the need to assess these therapeutic consequences . . . thus emerges as an important objective in any sensible law reform effort.”

⁸⁵ Wexler, *supra* note 82, 129.

⁸⁶ Schneider, *supra* note 24, 120.

⁸⁷ Winick & Wexler, *supra* note 42, 607.

⁸⁸ Wexler, *supra* note 82, 128.

opposite.⁸⁹ Since its original application to mental health law, therapeutic jurisprudence has also been applied to family law,⁹⁰ tort law, criminal law, and contract law.⁹¹

VII. A THERAPEUTIC JURISPRUDENCE APPLICATION TO NEGOTIATION

The emerging styles in negotiation and the practice of law generally, may be viewed as an evolution towards a more therapeutic process for the parties involved. A therapeutic jurisprudence approach produces more propitious outcomes, reduces conflict and stress experienced by clients and attorneys, and creates a more efficient process, saving clients both time and money.⁹² Taking into consideration clients' interests, needs, and concerns, coupled with a dedication to problem-solving, professionalism, and civility increases the probability of success in negotiations (and the practice of law in general): When lawyers are able to maximize their problem-solving skills balancing assertiveness and empathy, they are more effective on behalf of their clients. They are able to enlarge the pie through creativity and flexibility. They are able to understand the other side with listening and perceptiveness. They argue well for their clients with confidence, poise, and zealous representation.⁹³

Clients also play a more substantial, participatory role in the negotiation process under the therapeutic jurisprudence model.⁹⁴ Attorneys more frequently consult with their clients during the process, exchanging information and devising strategies.⁹⁵ Also, rather than dictating whether a settlement offer is optimal, attorneys advise whether the proposed offer is fair compared to the expected outcome at trial (or opposed to the client's BATNA⁹⁶), and reasonable in light of the previously-ascertained interests and needs of the client. This effort can have a significant impact on the client's satisfaction with the resolution and the legal counsel received.⁹⁷

By having more influence over the negotiation strategy, clients experience greater satisfaction in the process, as opposed to when strategic

⁸⁹ *Id.*

⁹⁰ Schneider, *supra* note 24, 120.

⁹¹ Slobogin, *supra* note 81.

⁹² Efficiency is a substantial concern for litigators in India, where cases can persist over the lifetime of the participants, and in some situations, span generations. Sinha, *supra* note 1, 1. In fact, as of September, 2005, the number of cases pending consideration by the Supreme Court of India totalled 253,587,003. *Id.*, 3.

⁹³ Schneider, *supra* note 20, 197.

⁹⁴ Winick, *supra* note 30, 117–18.

⁹⁵ *Id.*

⁹⁶ The term BATNA is an initialism for “best alternative to a negotiated agreement”.

⁹⁷ Winick, *supra* note 30, 118.

decisions are imposed upon them by their attorney.⁹⁸ This exercise of self-determination and control, with regard to such a significant conflict during the client's life, may also be an "important ingredient of psychological well-being."⁹⁹ If parties can play an integral role in crafting a solution to their controversy, they will likely be more content with the outcome, than if the resolution is created without their input.¹⁰⁰

Moreover, the resolution of the conflict provides the parties with closure, enabling them to let go of any feelings of anger, resentment, frustration, or hatred.¹⁰¹ "Helping clients to understand the emotional value of settlement and to achieve it can thus be an enormous contribution by lawyers to their clients' psychological well-being."¹⁰²

Therapeutic jurisprudence does not, however, represent a catholicon for the field of negotiation. As a relatively new methodology, there are still many uncertainties and problems surrounding its application. For example, Professor Christopher Slobogin has identified five conceptual problems with therapeutic jurisprudence,¹⁰³ asserting that: 1) it is susceptible to being so broadly defined and is so closely related to other legal theories that it lacks identity and fails to add any significant value to modern jurisprudence; 2) the terms "therapeutic" and "well-being" are inadequately defined; 3) there is a scientific inability to measure accurately any "therapeutic" effect;¹⁰⁴ 4) therapeutic jurisprudence may circumvent or undermine the rule of law; and 5) there

⁹⁸ *Id.*, 112–13.

⁹⁹ *Id.*, 113.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See generally, Slobogin, *supra* note 81.

¹⁰⁴ Slobogin contends that

"to measure the therapeutic effect of a given rule . . . therapeutic jurisprudence relies on social science theory and research—in particular, mental health and behavioral work . . . [These disciplines] may frequently be unable to provide [therapeutic jurisprudence] with much useful information for two reasons, one which is general in nature and one which is more specific to [therapeutic jurisprudence]. First, social science has often proved inadequate to the task of investigating legal assumptions. Second, even if this general concern can be overcome, the types of empirical questions [therapeutic jurisprudence] asks may be particularly difficult to answer. Consequently, [therapeutic jurisprudence] may be confronted with another dilemma: To the extent it grows dependent on social science data it may rest on shaky foundations, but to the extent it does not it loses its allure."

Id., 204. There are also additional concerns that reliance on social science data and standards of evaluations may be misapplied: those attempting to apply the research may not be abreast of newly emerging, relevant literature; users of social science may misinterpret the findings or apply them in the wrong context; lawyers and judges may unduly emphasize social science findings to justify their arguments or conclusions; and social science findings may become a superficial, pseudo-authoritative justification used to mask political or value-laden decisions). Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 *IND. L.J.* 775, 796 (1997).

may arise a conflict in balancing therapeutic jurisprudence with other important factors such as the client's constitutional concerns, the attorney's ethical concerns, avoidance of paternalism, respect of client autonomy, and attaining therapeutic outcomes for a client without producing anti-therapeutic outcomes for others.¹⁰⁵

- Additionally, a therapeutic jurisprudence approach suffers similar vulnerability to ethical issues as does collaborative lawyering. Issues of confidentiality, conflicts of interest, and zealous representation are major concerns for proponents of the movement. Other ethical questions that must be resolved include:
- If an attorney will be acting as a therapeutic agent in addition to her role as legal counsel, what should the applicable level of competence be in the social sciences?
- At least some legal complaints are initiated as a result of anger or as a pursuit of revenge for a physical, emotional, or psychological injury. Some of these emotions, while authentic, may still have the effect of hindering efficient resolution of the issue. Should therapeutic jurisprudence respond to such potentially anti-therapeutic interests—which are nonetheless very real and important to the client—at the expense of a more efficient and overall therapeutic treatment?
- What are the attorney's responsibilities to the client after the conclusion of the negotiation? If the attorney was serving in a therapeutic capacity, should some sort of follow-up or continued counselling be ethically required?
- In what ways and to what extent may judges expand the scope of the law, weigh pieces of evidence, and balance legal versus therapeutic information to arrive at a conclusion, without abandoning our established body of law?¹⁰⁶

VIII. CONCLUSION: A MEASURED APPROACH

As this paper has attempted to convey, therapeutic jurisprudence is not a cure-all for the ills of the adversarial system of negotiation. And a complete transformation to a therapeutic jurisprudence model might prove

¹⁰⁵ Slobogin, *supra* note 81, 211–18.

¹⁰⁶ These, and other pertinent ethical issues can be found in The Third International Conference on Therapeutic Jurisprudence, *Ethical Conundrums in Therapeutic Jurisprudence and Preventive Law: A Call to Identify Issues*, available at <http://www.iadtc.law.ecu.edu.au/pdfs/Call%20for%20Papers.pdf> (Last visited on September 10, 2011).

inefficient, wholly ineffective, and ultimately contrary to our traditional notions of justice. It is important to consider that therapeutic jurisprudence need not be an all-or-nothing endeavour; small, measured changes to the current lexicon of technique could significantly affect the field of negotiation in positive ways. To have the greatest impact and stamina, this change must be initiated early. The incorporation of therapeutic jurisprudence principles, to be most influential to the practice, must start in law schools. While American law schools may be strong in teaching legal analysis and doctrine, they suffer from a problematic weakness in providing students with foundational knowledge they will later need as negotiators, problem solvers, and counselors.¹⁰⁷

An excellent opportunity to “test the waters” of a therapeutic jurisprudence approach to negotiation exists in law school clinical programs. A separate program, or a division of a pre-existing negotiation clinic, could be dedicated to the approach. Data from the outcomes and experiences of the participants would be of great assistance to legal scholars seeking to refine or better determine the contours and applicability of the therapeutic approach on modern negotiation theory. Additionally, courses related to psychological well-being, cooperative learning, reinforcement of ethical behaviour, and personal value assessment could prove a beneficial supplement to the traditional legal curriculum, aiding in disarming the adversarial metamorphosis.

Within the professional legal community, CLE programs, trade magazines/papers, and professional associations (such as local bar organizations) could disseminate information about the disadvantages of the adversarial style, promulgate more therapeutic approaches to negotiation, and report feedback from participating practitioners.

Given the limited effectiveness of the adversarial style, and the trend in negotiation (and legal practice) towards more therapeutic processes, it appears inescapable that subsequent approaches will incorporate elements of the social sciences. While the integration of law and social science leaves many questions, the interdisciplinary concept does not necessitate that social science theories immediately assume the authoritative position of legal doctrine. Such theories may simply aid attorneys in tempering their approach and shifting their focus at times in order to represent clients more effectively. Clients in turn will benefit from a more satisfactory experience, efficient service, and more appropriate, long-lasting resolutions of conflict. Consequently, attorneys may experience increased job satisfaction, lower levels of stress, and improved

¹⁰⁷ Schneider, *supra* note 24, 134.

morale, and the public perception of the legal profession may return to the level of prestige it commanded in earlier times.¹⁰⁸

¹⁰⁸ See Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J. L. & PUB. POL'Y 835, 850 (1998). In noting the degradation of public opinion towards lawyers, the authors stated that: “[p]olls conducted by Louis Harris and Associates, for example, reveal a decline in public perception of the prestige of the legal profession. For decades, pollsters at the Harris organization have asked random samples of adult Americans to rate the prestige of a variety of occupations. Each profession is slotted as having “very great prestige,” “considerable prestige,” “some prestige,” or “hardly any prestige at all.” In 1977, almost 75 percent of respondents believed the legal profession had either very great or considerable prestige. . . . Twenty years later, public opinion has changed dramatically. A near majority (47 percent) of respondents to the same question in an April 1997 survey ranked the legal profession as having either some or hardly any prestige at all.”), *Id.*

