Therapeutic Mediation:
An Alternative to Costly Litigation

Susan Heitler, Ph.D.
4500 East 9th Avenue, Suite 660-S
Denver, CO 80220
(303) 388-4211

Submitted for publication to the Colorado Lawyer, 1998.

Psychologists and lawyers work in similar businesses. Helping people to resolve their conflicts is a central mission of both professions.

Psychologists like myself apply our skills primarily to personal realms--to individuals= struggles between conflicting fears, desires and values, and to the conflicts that bring tensions to couples and families. My own specialty is work with high-conflict couples. I work with married couples, and also with couples in pre-marital and post-divorce (co-parenting) relationships. My role as therapist is usually three-fold: to guide warring couples to settlement of the disputes that have driven them apart, to facilitate healing from their mutual past hurts, and to teach the skills that can enable them to dialogue more cooperatively in the future. Through this therapy process couples transition from fighting to comfortable partnership.

Lawyers tend to handle business and government-related conflicts, though many also address domestic, criminal, and other issues. Similar principles of conflict resolution pertain, however, whether the arena is personal, family, economic, or political, and whether the entities involved are intimate spouses, competing business people, corporations, or even nations. In all these realms, the pathway from hostility to mutually satisfying resolution requires similar steps.

I recently shared an enlightening conversation about similarities between psychological and legal professional work with a judge from New York. This judge=s reputation for effectiveness in settlement conferences, and for efficiently moving her cases through litigation, is legendary. The secrets to her success, she reported, lie in three basic principles:

- Make sure the litigants are present in the trial.
- Ask the lawyers to leave.
- Get the litigants to talk to one another.

For example in one trial, the judge explained, she postponed the case until both litigants, not just their lawyers, were present. She then went so far as to instruct the litigants to go out together for lunch before the trial would proceed. In this way she enabled the litigants to talk to each other, and in the cooperative tone essential to constructive dialogue.

Lawyers sometimes feed an adversarial climate, which is part of what prompts this judge to ask lawyers to take a back seat to direct litigant-to-litigant dialogue. On the other hand, lawyers can and often do facilitate conflict resolution. To help clients face their adversaries in settlement conferences in a manner that yields productive dialogue and satisfying outcomes, lawyers, like psychologists, need expertise in techniques of collaborative problem-solving.

The following case presents three such tools:

- *healing techniques*, so that hurt and anger are diminished. Only then can cooperative problem solving replace rancor, tensions, fault-finding, and blame.
- *a conflict resolution strategy* that can enable people in disagreement to talk directly with one another, and to end up with a mutually agreeable plan of action.
- *the rules of cooperative dialogue* that can enable adversaries to talk productively.

While these techniques come from the toolbox of a psychotherapist, they hopefully can prove equally useful for resolving disputes in legal settings.

A therapeutic mediation.

ATherapeutic≅ denotes a process that leads from emotional distress to emotional relief. The goal of a therapeutic process is restoration of a sense of well-being.

AMediation≅ refers to a process by which a third party assists two antagonistic parties to discuss and resolve issues in dispute. A resolution is an agreement upon a plan of action (a new or Are≅ solution) which is acceptable to both parties because it is fully responsive to the concerns of both parties.

The term therapeutic mediation thus implies a twofold goal: emotional healing plus agreement on a plan of action. In addition, therapeutic mediation needs to be Afair≅, i.e., responsive equally to both parties= concerns, and to the relevant law.

The case

The following case was referred to me by a lawyer[1] who wanted to see if the case could be settled without going to trial. The lawyer=s client, Mrs. A, had limited income, minimal social support, and significant emotional vulnerability. Her lawyer felt that a lengthy court process, whatever the outcome, would be too costly in time, money, and emotinal drain to be worth any potential gains. In addition, he intuited that even a ruling in his client=s favor might not adequately resolve the complex emotions the situation had aroused for her. The referring lawyer also expressed compassion for the other litigant, Mr. B., a young lawyer whose career would suffer if the case went to trial. The lawyer therefore had suggested that a therapist might be able to help the litigants come to a mutually agreeable settlement. If a therapeutic settlement process did not prove satisfactory, his client then could pursue traditional legal options.

Mrs. A wanted to file a malpractice lawsuit against her prior divorce lawyer, Mr. B. The charges would have included

X substandard professional performance

X sexual harassment

X a fee dispute; Mrs. A. was refusing to pay Mr. B=s bill for his legal services.

> *The dilemma* Mrs. A., a divorced mother of four, had struggled for many months with strong resentments. She felt that her divorce court proceedings had unfairly given her less than her due. Her current lawyer (the one who had referred the case to me) confirmed to me that while his client=s expectations for what she should have received in the settlement were

[1]My thanks to the referring attorney, Richard Wedgle, for referring the case and also for his review of this paper.

somewhat excessive, what she had received was in fact sub-standard. Most probably her substandard settlement had resulted from less than fully competent legal representation from her former lawyer.

To bring closure to her negative feelings about her divorce proceedings, Mrs. A wanted a way to reprimand Mr. B, her former lawyer. She also was refusing to pay his bill. Mr. B., meanwhile, was suing his former client (Mrs. A.) for non-payment for his services.

Treatment format and outcome

I seated the two litigants in identical chairs placed at right angles to each other with a small table between them. I sat facing them, the third point in an equilateral triangle. This arrangement feels circular rather than positioning any of us head-on or face-to-face, which would have a more combattive feel. Note that the mediator needs to be seated equi-distant from the two disputants, not closer to one than to the other. The architechture of the seating arrangement carries strong messages about fairness, power, and alliances and therefore merits significant attention.

I usually schedule psychotherapy sessions for 45 minutes. Therapeutic mediation cases generally need somewhat longer sessions, i.e., 60 minutes. By the end of one 60 minute session, however, the case had reached full closure. The case ended with full and mutually acceptable settlement of all the issues, emotional, financial, and legal. Furthermore, both parties left feeling fully Aresolved,≅ which meant there were no further court appeals or enforcement problems.

What happened in that 60 minute black box? Our discussions included two main processes:

X A ***therapeutic*** process. Healing is necessary after a wrongful action that has resulted in either party feeling victimized. A process of truth-telling, apology, and reconciliation relieves emotional distress in the injured party, and launches a process of repentance for the harm-doer.

X A ***conflict resolution*** process. A plan of action must be created that addresses and resolves the elements in dispute. Note that conflict resolution is synonymous with collaborative problem solving. Conflicts addressed cooperatively become problems to

solve.

Therapeutic techniques for facilitating emotional healing

Technique #1: Piecing together the puzzle.

This first technique in the healing process requires litigants cooperatively to piece together the full puzzle of what happened.[2] To accomplish a mutual clarification of what has happened, each participant needs to verbalize what s/he felt, thought, and did at each point during the controversial event.

Note how this process departs from adversarial dispute settlement. In an adversarial conflict parties cannot acknowledge what they have done that perhaps proved problematic, and especially cannot openly admit mistakes. Open disclosure of errors works against their best interests. Prudent litigants withhold and deny information. Anything they say about actions that with hindsight proved to have been misguided can be used against them. A collaborate process, by contrast, requires that both people offer full disclosure in order to build a consensual understanding of what has happened.

> Mr. B. and Mrs. A. agreed that their lawyer/client relationship had become too personally intimate. Mr. B and Mrs. A. had become quite fond of one another in the course of their legal work together. While they had not progressed to the point of sexual relations, Mr. B. had become emotionally involved with his client to a point of losing objectivity on the case. Mrs. A enjoyed their sessions together but gradually became anxious as she began to realize that her focus had been more on the lawyer-patient relationship than on the legal matters involved. Moreover, in enjoying their emotional closeness, Mr. B. had in fact fallen behind in his preparations for trial. Significant time in their sessions together had been siphoned from business to personal matters.
>
> As the trial date approached, Mr. B felt increasingly unready to represent his client in court. He suggested a settlement proposal at the last minute to prevent the case from going to

[2]In South Africa heinous acts perpetrated by both sides during the apartheid years are now being addressed by the court system in two ways, by traditional courts of justice, and by a Truth and Reconciliation Commission. A therapeutic healing process shares much in common with the work of the Commission. That is, litigants begin by uncovering the truth of what has happened. They then can proffer apologies, define restitutions of damages, and gradually proceed toward reconciliation.

> trial. His proposed settlement however dismayed his client. Mrs. A felt that the proposal sold short her needs, fell far below her expectations, and did not meet the standards to which she by law was entitled.
>
> Mr. B and Mrs. A. then began to argue. Rather than escalate the arguing, and feeling emotionally over-involved, Mr. B. withdrew from the case. A week before the trial, he asked one of his partners to take over the case.

Agreement on these facts completed the process of piecing together the puzzle of what had happened. Verbalizing and validating the truth is inherently therapeutic. Hearing Mr. B. acknowledge the attraction and affection he had experienced toward her felt reassuring. Interestingly, however, what brought Mrs. A. the most emotional relief proved to be hearing Mr. B acknowledge aloud the events that had transpired. As she put it, ANow I know I wasn=t in some never-never world.≅

Therapeutic Technique #2 Apologies

After Mr. B and Mrs. A had both agreed upon the facts of what had transpired, the next step was to issue apologies. Apologies remove the toxic sting from mistaken interactions.

A fully effective apology includes the following five elements[3]:

X *Acknowledgment* of the troubling action and its impact on the other.

In this case, this first goal was accomplished in technique number 1, putting together the puzzle pieces of what happened.

X *Expression of regret* for the suffering that was incurred.

Mr. B. needed to say, AI=m sorry that our relationship proved harmful instead of helpful. I=m sorry also that your case turned out to have a disappointing outcome, disappointing for both of us.≅

[3]For a more complete discussion of the ingredients of an effective apology see Chapter 7, ACleaning Up After Toxic Spills≅ in S. Heitler, **The Power of Two: Secrets to a Strong & Loving Marriage** (New Harbinger, 1997).

X *Statement of non-intentionality*, e.g., AI didn=t intent to hurt you.≅ Explanation of the circumstances can further help to clarify how and why the upsetting interaction unintentionally occurred.

> AI didn=t intend for your settlement to come out beneath what you had hoped for. I wanted only the best for y ou.≅

X *Restitution for damages*.

> The damages in this case involved primarily legal charges for work that Mrs. A felt had been substandard.

X *Learning*. A plan to prevent recurrences of similar events in the future turns the negative event into a positive opportunity for learning and for preventing similar or worse mishaps in the future.

Mr. B initially resisted offering an apology. While he did acknowledge that he had erred in becoming emotionally over-involved, in falling behind in his case preparation, and in succumbing to angry bickering with regard to his settlement offer proposal, the words AI=m sorry≅ felt beyond what he could offer. To help him, I asked Mrs. A to sit for a few moments in the waiting room while I spoke alone with Mr. B. In private we addressed Mr. B=s fears about acknowledging his mistakes.

Thoroughly trained in the adversarial system, Mr. B=s primary concern was that admitting errors might make him more liable to a grievance suit. We discussed the alternative view, that inability to admit errors would even more certainly bring about a grievance. He agreed.

Mr. B then admitted that in his personal life as well he did not feel that he knew how to apologize. I coached him. We practiced several attempts, the first several of which were in fact quite inadequate. By the time I invited Mrs. A to rejoin us, however, Mr. B was able to offer an apology-- stilted, but nonetheless adequately effective.

Mr. B admitted, AI feel sorry that my affection for you ended up interfering with the work I did for you. I=m especially sorry that you ended up feeling like the settlement suffered as a result. I feel badly about all of it.≅ This apology, even more than the acknowledgment of

what had happened, proved intensely powerful for Mrs. A.

Next, Mrs. A needed to be able to take responsibility for her part. AI wasn=t a total victim in our interactions,≅ Mrs. A acknowledged. AEven though you were the professional, I see now that both of us became over-involved emotionally in each other. I kept coming to our meetings even though I knew you weren=t taking adequate care of my case. I kept scheduling meetings with you because I was getting something out of our relationship. After so many years in an abusive marriage I soaked in your affections. I felt renewed by our time together. I wasn=t just a victim. I chose to continue our contacts.≅

Note that while both parties acknowledged and apologized for their errors, the errors and apportionment of responsibility were not presumed to be equal. It may be true that it takes two to tango, but in many interactions the damaging event is less like a tango and more like the interaction between a robber and a bank teller. A professional such as Mr. B., a lawyer, bears a higher proportion of responsibility than the client for what transpires in a professional/client interaction. One vital role of the judge or mediator is to insure that apportionment of responsibility is proper.

In this regard, a mediator needs an understanding of the relevant law. Mediating does not mean meeting in the middle. Fair does not mean attributing equal responsibility. Fair means encouraging each party to take appropriate responsibility for his/her parts in the problem. And fair means in accordance with the relevant law.

So far we have seen the following therapeutic (healing) elements of this mediation:

X **Truth** via the *puzzle making technique* for agreeing on the facts of what happened in the distressing event.

X **Reconciliation** via acknowledging mistakes and expressing *apologies* for suffering that resulted.

Conflict resolution

Collaborative conflict resolution is a process of finding mutually agreeable outcomes to situations

in which apparent differences spark tensions. This process involves three main steps.[4]

X *Express initial positions*

X *Explore underlying concerns*

X *Create win-win solutions.*

Step One: Express initial positions

Conflict resolution begins by clarifying the differences, that is, by stating the initial positions of each party.

Positions generally are expressed as a preferred course of action, that is, as the outcome solutions that each party initially believes that s/he wants. Mrs. A wanted Mr. B punished. Mr. B. wanted his fees paid.

Step Two: Explore the underlying concerns.

In a therapeutic mediation (or other collaborative settlement process) neither side needs to convince the other of the rightness of their position or to establish domination in any fashion. Instead, after expressing their initial positions both sides join together to explore the underlying concerns which have given rise to each of their respective positions.

It can be helpful to picture the underlying concerns of both parties as being listed on one list--not on a Party A list and a Party B list, which fosters either/or, mine versus yours, thinking . The problem will be considered resolved when a solution has been devised that is responsive to all of the concerns, so both parties need to be thinking from the outset of solutions responsive to the other person=s concerns as well as to their own.

---

[4]The book **Getting to Yes** (Fisher, R., Ury, W. and Patton, B., 1991. NY: Penguin Books) describes a similar three steps, although with different terminology. I am going to use my terminology, set forth initially in my book **From Conflict to Resolution** (Norton, 1993) because I think it more helpfully guides us as mediators

This second step, exploring underlying concerns, departs significantly from what typically occurs in adversarial dispute settlement. In an adversarial dialogue, the parties= discussion tends to remain focused on positions. Parties engage in a tug of war over their positions, each insisting on the rightness of their own viewpoint and the wrongness of the other. APositional bargaining≅ is a term coined by Fisher and Ury to describe this adversarial dispute process.

Locked in battle over initial positions.--≅My way.≅ ANo. My way.≅--participants in positional bargaining generally end up settling the fight on the basis of power. Coercive power determines which side will win. Power to convince the other to relinquish their position or to convince a third party to declare one side the victor decides the outcome. The power that enables one side to prevail can come from any number of sources--for instance, ability to argue more persuasively for one side and against the other, more potent financial or other resources, or ability to threaten enough damage that the other gives up.. War is the ultimate expression of positional bargaining.

By contrast, in collaborative dispute settlement, participants benefit most by striving to understand each other=s concerns. Parties need not insist on their concerns, and need not convince the other of the rightness of their concerns, because both parties define successs as finding solutions responsive to all of their concerns. Similarly, parties do not benefit from the adversarial positional bargaining strategy of disparaging or dismissing the other=s concerns. The more fully the opposing parties attain mutual understanding, the more effectively they will then, in step three, be able to create mutually acceptable solutions.

For Mrs. A and Mr. B, what were each party=s underlying concerns?

> Mrs. A >s underlying concerns proved strongly emotionally potent. Two questions in particular concerned her.
>
> X Had Mr. B really thought that she was as attractive and likeable as he had seemed to indicate?
>
> X Did he still find her attractive and likeable?

These concerns focused on issues that could not have been explored in an adversarial court

process. For closure and healing, however, these questions were of prime import
,.

> Mrs. A then tensed again, indicating a further concern. As she began to speak, she needed guidance in order to maintain a focus on her own fears, not on what she didn=t like about Mr. B. Initially angry, as she refocused on verbalizing her concerns rather than on criticizing Mr. B, her tone of voice switched from accusatory to tentative.
>
> AI feel I was done a disservice. I=m afraid I wasn=t represented adequately.≅
>
> Mr. B was able to respond by acknowledging the validity of Mrs. A=s concern. AI probably didn=t do enough preparation on the case.≅ he said sadly. AI feel terrible that I probably did cause stress for you by withdrawing at the last minute. At the same time, withdrawing felt like the most professional action I could take at that point.≅

Mr. B=s heartfelt response to these concerns again engendered significant relief for Mrs. A. His success in part was due to his use of the words AAt the same time.≅ These words, like the word Aand,≅ signal addition. If instead he had said, ABut,≅, he would have erased his validation of Mrs. A=s concerns. In that case, his explanation of his reasoning in withdrawing would have sounded like an excuse rather than like additional information.

> Mrs. A continued, listing one other major concern. She had felt abandoned. Abandonment, like attachment, raises potent emotions.
>
> Fortunately, Mr. B again was able to acknowledge the truth in Mrs. A=s experience, even if he did also see his Aabandonment≅ of her as having been the best choice he could make at that time. AIn a sense I did abandon you. I did drop out of the case. At the same time I want you to know that the reason I dropped out is because I was off track. I couldn=t represent you adequately because I was so emotionally involved. Our arguing felt more like a fight between a married couple than like counsel advising a client. That=s why I dropped out. I was hoping to get you more objective representation.≅

By validating Mrs. A=s concerns about having been abandoned, and then adding information about his thinking in withdrawing from the case, Mr. B. lifted a last emotional burden from Mrs. A. Mrs. A felt relieved, accepting Mr. B=s distinction between abandonment and his having

departed as an action taken with her best interests in mind.

Mr. B=s then explained *his* primary remaining concern.

> Mr. B felt that while he had erred in many ways, he also had put many hours of genuine legal work into the case and wanted remuneration for these. Mrs. A in turn was able to acknowledge that while he had not succeeded in obtaining a positive outcome for her, Mr. B had accomplished significant hours of pre-trial fact-finding.

Thus Mrs. A and Mr. B succeeded in expressing each of their concerns, and also in conveying to each other that the concerns had been heard and understood.

Step Three: Creating win-win solutions.

The third and final step in the three step conflict resolution process, creating solutions, often proves the simplest, provided concerns have been fully delineated in the prior step.

> Most of the necessary solutions in this case had already occurred via information sharing, apology, and the building of new understandings (e.g., of why the abandonment had happened). Most of the more potent emotions had already eased.
>
> The fee dispute was about the only issue that remained. With so much mutual understanding and a resumption of at least some good will, the fee issues turned out to be fairly easy to resolve. Mrs. A and Mr. B each expressed their views of the fee situation. Within a matter of minutes, and with very little guidance from me, they were able to come up with a fee agreement that both of them felt would be fair. The agreement took into consideration Mr. B=s concerns--the time that he had put into the case--and also Mrs. A=s-- the reality that he had not completed the task.

A solution is a plan of action. Because most disputes involve multiple concerns, the solution generally turns out to be a Asolution set≅ rather than a simple one-dimensional plan. The solution to this dispute, for instance, included

X acknowledgments from both parties of their mistakes

X apologies, particularly from the professional, the lawyer, to his client

X validation from the lawyer to his client of positive regard for her

X agreement on decreased but not totally eliminated fees

Rules of Procedure

The rules of cooperative procedure differ significantly from those of adversarial dispute settlement. Both processes do, however, rely upon distinct rules.

Collaborative dialogue requires the following procedural guidelines:

X *The rule of talking*: T*alk about yourself, or ask about the other; but do not talk about the other.*

Each person needs to express his or her own feelings and thoughts. Each can ask about the other person=s feelings and thoughts. Neither is allowed to speak about what the other thinks, feels, is trying to do, or about their character. Instead participants are to use their air time to express their own thoughts, feelings, and concerns.

In adversarial dialogue, by contrast, significant air time goes to accusations, interpretations, and misinterpretations of the other person. These Acrossovers,[5]≅ that is, verbalizations about the other instead of about themselves, escalate ill will, defensiveness, and divisiveness. They are totally contrary to a spirit of cooperation.

Fisher and Ury[6] state a related rule when they advise ATalk about the problem, not the person.≅ Finger-pointing of any kind is almost invariably counter-productive.

The rule for talking contrasts distinctly with procedure in adversarial settings. There blame, accusation, criticism, and attribution of negative motives to the other are generally considered fair play. In collaborative settlement, these negative tactics are out of bounds.

---

[5]I coin this term in my book, **The Power of Two**.

[6]Fisher, R., Ury, W. and Patton, B., 1991. **Getting to Yes**. NY: Penguin Books.

X *The rule of listening*: *Listen to learn.*

Listening for what is useful, for what makes sense in what the other says, leads to consensus building. By contrast, listening to criticize what the other says increases tensions and halts cooperative problem-solving.

This rule may sound rather like a kindergarten rule. Doesn=t everyone listen to learn? Not so, particularly in an adversarial settlement system. In adversarial legal argument, participants listen primarily for what is wrong with what the other person has said in order to discredit the other=s input.

A key sign of listening in critical rather than cooperative fashion is the word Abut.≅ As suggested above, a sentence that starts with the word Abut,≅ or with it=s close cousin AYes, but≅, is going to express disagreement. ABut≅ indicates that the prior speaker=s points are being pushed aside, not integrated into a shared data base. ABut≅ indicates that a dialogue is polarizing, not building additively toward consensus.

.

X *The rule of climate control: If either party=s emotions begin to escalate, both parties need to briefly disengage. Each needs to be responsible for regaining a state of relative calm before resuming the dialogue.*

While expressing feelings is important, angry dialogue almost always leads away from resolution. To stay on pathways that lead to increased understanding, participants need to express their angry feelings in words, following the rule of talking. They need to verbalize, AI am feeling frustrated,≅ not dramatize, their feelings. Acting out feelings with loud voices, critical voice tones, or accusatory language generally dooms cooperation.

Anger often results from violation of the rules of talking and listening. When someone speaks accusatively, or shows no evidence of listening, the other party is likely to feel irritation rising. At the same time, anger increases the risks of further talking and listening violations. Inflammatory comments and poor listening escalate emotion; escalated emotions invite more inflammatory comments and blocked listening.

When tempers warm up, pausing the discussion momentarily so that everyone can cool down is essential. Emotional escalations are incompatible with cooperative dialogue because as anger increases listening, analytic ability, and creative thinking all decrease. A heated environment consequently almost always proves unproductive.

With these three basic rules of collaborative procedure--one rule of talking, one rule of listening, and one rule of emotional tone--what results can participants expect? Combined with therapeutic elements like mutual truth-telling and apologies, plus passage through the three steps of collaborative conflict resolution, the three rules of collaborative procedure almost guarantee;

X a streamlined dispute resolution process.
X a sense of closure within both participants
X a feeling that justice has been done.

Justice

What does the word justice mean in this context? In the legal system, the word Ajustice≅ too often has become synonymous with punishment, particularly after misbehavior. By contrast, Mrs. A. left with a strong sense of justice having been done, but not because any punishment had been levied. Rather, her sense of justice came from

X having received recognition that she had been correct in her understandings of what had transpired between her and Mr. B
X Mr. B=s admission that he had erred in his professional responsibilities
X his having apologized for and even learned from these errors
X restitution. Reduction of her lawyer=s fee, the remainder of which Mrs. A now would willingly pay, served as restitution for Mrs. A.

A brief look at what skilled parents do when their children misbehave may help to clarify the ineffectiveness of equating justice with punishment. Skilled parents regard discipline as a process for teaching their Adisciples.≅ Punishment is a tempting response to wrong-doings. Wrong-doings elicit anger, and anger engenders an impulse to strike out to hurt the other. Punishment, however, is relatively ineffective as a teaching device because it creates anxiety, low self-esteem, and resentment--all of which generally impede learning. Problem-solving and

promoting learning are more effective as well as equally just responses to misbehavior.

Thus if the purpose of justice is to set the stage for better behavior for the future, not simply to obtain an eye for an eye, we need to be wary of too simply equating justice and punishment.

Risks

Utilizing therapeutic dispute settlement poses several risks to clients.

For therapeutic mediation to succeed, both parties (and their lawyers) need enough emotional maturity to be able to abide by the procedural rules. They need to be able to acknowledge their errors, not lock into a blaming stance. They need to be able to express genuine regret for the outcomes of their mistakes. They also need to be motivated by basically good intentions, not by greed or other impulses that impel them to seek more than their fair due. Without these capabilities and/or firm guidance from the mediating professional, a therapeutic process will not succeed.

Second, some litigants tend to ask for more than they deserve; others may be too quick to give up on matters of import to them so as to end the conflict as quickly as possible. A mediator needs sensitivity to unfinished emotional agendas and skills at flushing these out. Mediators also need always to bear in mind legal standards of what would constitute a fair outcome, lest an agreed-upon settlement in fact be less than fair by law.

Lastly, if therapeutic mediation should work out poorly in a given case, the adversarial system would be the fall back alternative. Can admissions of guilt established in a failed therapeutic mediation endanger a client=s case? This question needs to be monitored by the legal community to be certain that adequate safeguards protect clients who chose to attempt therapeutic settlement.

Limitations

Therapeutic mediation only works with parties who are seeking a fair settlement. Parties who have all-or-nothing, I-win/you-lose, goals, those who hold rigid unrealistic expectations of what

justice should look like in their case, or those who are using the court system to bludgeon less powerful opposition into submission to their demands are unlikely to be willing participants in cooperative procedures.

Litigants who are locked in an AI=m right/You=re wrong≅ mode will find this system of justice unsatisfying. People who are locked in a blaming stance escalate their anger when asked to take responsibility for any portion of the distressing event. With these individuals, this method is likely to increase hostilities instead of proving therapeutic.

Closing Overview

The vast majority of dilemmas that clients bring to lawyers are addressed by settlement processes rather than going to court. For these cases it is hoped that the therapeutic mediation techniques described in this paper will prove useful.

Therapeutic dispute settlement exchanges blaming, fault-finding and punishing for truth-telling, reconciliation via apologies, and cooperative resolution of differences. Therapeutic mediation can relieve emotional injuries, settle disputes, and bring justice to aggrieved parties-- with added bonuses of dramatic efficiency and long-lasting effectiveness. For lawyers and judges to add therapeutic mediation to their repertoire, however, they need to make a major cognitive switch from adversarial to cooperative thinking, and to change significantly their rules of procedure.

Two Settlement Processes

A Comparative Analysis

	Therapeutic Mediation	Adversarial Settlement
1	Defines the dilemma as a problem to be solved and/or injuries that need restitution and healing.	Defines the dilemma as a question of who is right and who is wrong.
2	Assumes that both sides are basically well-intended and have legitimate concerns.	Assumes wrong-doing and negative intentions on the part of at least one party.
3	Expects to conclude with a win-win mutually agreeable plan of action.	Expects to conclude each issue with one side winning and the other losing.
4	Regards feelings as keys to understanding underlying concerns.	Regards feelings as intrusions into a rational process, or as a means to manipulate the court to obtain a specific outcome.
5	Focuses on clarifying what happened in order to better understand X the initial positions X both sides= underlying concerns X a plan of action optimally responsive to all of these concerns.	Invites participants to present their view of what happened to convince the court to choose their preferred solution. Skips clarifying underlying concerns; instead encourages positional bargaining.
6	Expects participants to speak for themselves, articulating their own thoughts, feelings, and preferences.	Expects lawyers to speak for their clients. Clients watch.
7	Expects empathy to increase as participants air their feelings and hear	Perpetuates blaming and fixed viewpoints. Does not expect participants to be open to

	Therapeutic Mediation	Adversarial Settlement
	the other=s feelings. Information exchanges result in decreased polarization.	new information or to experience increased empathy. Information exchanges result in increased polarization.
8	Helps participants to piece together a shared and non-blaming understanding of what happened.	Expects judge/jury to guess a middle ground explanation between two opposing air-brushed and extreme versions of what happened.
9	Fosters agreement. AYes, that=s what happened.≅	Fosters argument. AI=m right.≅ ANo, you=re wrong and I=m right.≅
10	Expects a process of taking responsibility. Encourages each side to own responsibility for its contribution to what happened rather than to attribute fault to the other.	Expects a process of attributing fault. Encourages each side to present itself as the victim and the other as the villain. Each side exonerates him/herself and blames the other.
11	Blames mistakes, misunderstandings, misperceptions, etc. rather than the people.	Blames people.
12	Utilizes apologies for healing and reconciliation.	Fosters denial of responsibility rather than acknowledgment of mistakes or concern for the other=s injury.
13	Expects participants to create solutions so that outcomes are tailored to their specific needs. Emphasizes healing and problem-solving.	Expects the judge to create solutions. Emphasizes burdens and punishments.
14	Fosters learning, re-instatement of cooperation, and resumption of	Fosters defensiveness, blaming, and continued resentments.

	Therapeutic Mediation	Adversarial Settlement
	business.	
15	Responsive to the emotional needs of litigants as well as to factual, monetary and legal issues.	Responsive primarily to factual, monetary, and legal issues.
16	Yields emotional relief and closure.	Leaves reservoirs of ill-will.
17	Expects process to be brief.	Expects process to be long, with extensive preparation, delays from the filing of unlimited number of motions, subpoenas, etc, plus lengthy wait for court date.
18	Minimizes expenses. Uses one mediator and two consulting lawyers. Minimal court costs.	Engenders high expenses in time, money, bad publicity, and negative impact on ability to do business during the period of dispute.
19	Requires close adherence to rules of constructive collaborative dialogue.	Requires close adherence to rules of evidence and courtroom procedures.
20	Results in a decision that feels fair to all participants.	Results in a decision that feels fair to the judge/jury, with one or more litigants likely to feel unhappy with the outcome.
21	Yields a plan of action with high likelihood of fulfillment. Further court involvement unlikely to be requested.	Yields significant likelihood of non-compliance and/or appeals, both necessitating further court involvement.