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# The Case for Forgiveness in Legal Disputes

Eileen Barker\*

## I. INTRODUCTION

Although the notion of forgiveness may seem far afield from the world of law, forgiveness is a powerful and important tool for conflict resolution. Litigants need legal solutions, but they also need peace, healing, and closure. Forgiveness provides a vehicle for achieving all of these.<sup>1</sup>

In an effort to win, well-meaning litigators sometimes counsel their client *against* forgiveness. In one incident, a woman was seeking compensation for serious medical injuries, but wanted to forgive the person responsible.<sup>2</sup> She was dismayed when her attorney told her: “Don’t forgive. It will hurt your case.”<sup>3</sup> While trying to achieve a legal victory and protect his client’s economic interests, the lawyer ignored his client’s other interests, such as being at peace with what had happened to her and having compassion towards the person responsible for her injuries.

The lawyer’s aversion to forgiveness was likely based on the unspoken dictates of an adversarial legal culture, which forces parties to exaggerate their differences. The legal system focuses on blame and denial, causing people to become even more polarized, distrustful, and angry than they were

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This article was written with the assistance of Nicole Diaz, a litigator in Los Angeles, California. Ms. Diaz graduated from Harvard Law School *cum laude*, and served as a district court clerk in the Central District of California. She contributed substantially to the research and editing of this article, and in drafting Section III, which addresses how forgiveness relates to the lawyer’s ethical duties.

1. While the subject of forgiveness has deep roots in many religious traditions, this article focuses on the secular use and practice of forgiveness.

2. The client in this story reported the incident to me. Throughout this article, the names of those involved in the case studies reported are omitted to safeguard confidentiality.

3. *Id.*

when they started. In doing so, it generally overlooks the tremendous suffering that litigants often experience. Instead, the legal system attempts to monetize pain and suffering based on the greatest legal fiction of all: that money can restore wholeness.<sup>4</sup>

Forgiveness has the potential to introduce an element of humanity and healing that has been absent from the legal field.<sup>5</sup> This is vital when many in society hold cynicism and mistrust towards the legal system, and many lawyers report great dissatisfaction with their jobs, wishing for careers more in line with their values.<sup>6</sup> By recognizing the larger issues implicated by conflict, lawyers have the opportunity to restore dignity and leadership to the legal profession. While litigation often amounts to little more than expensive gamesmanship, forgiveness provides an avenue of dispute resolution that can be both practical and transformative. It offers the parties the chance to be made whole beyond a judgment or monetary compensation.

In the face of conflict, forgiveness can be a powerful and empowering choice. As Gandhi said: “The weak can never forgive. Forgiveness is an attribute of the strong.”<sup>7</sup> Forgiving doesn’t mean an injured person must

4. See generally Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993).

5. With the introduction of mediation in civil litigation in the past twenty years, there has been increased awareness of the importance of addressing human needs in the service of achieving resolution, but only up to a point. Most lawyers prefer to focus on the legal and monetary issues. The predominance of lawyers amongst the ranks of mediators, particularly in legal disputes, reinforces this predilection. The interpersonal dimension of legal disputes, including the role of emotions, is often unaddressed. This is not entirely surprising since legal education does not generally include courses on the dynamics of conflict, emotional intelligence, or interpersonal skills required to address conflict on a human level. While there has been increasing recognition of the importance of training lawyers in alternative dispute resolution, see, e.g., U.S. NEWS & WORLD REPORT, *Best Law Schools: Dispute Resolution, Ranked in 2012*, available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/dispute-resolution-rankings>, litigation remains the primary focus of legal education.

6. Many report that they went to law school based on a desire to make a difference in the world. Kim J. Wright, *What Were Your Dreams About Being a Lawyer?*, available at <http://cuttingedgelaw.com/content/what-were-your-dreams-about-being-lawyer>. Yet many lawyers end up doing work that is “not aligned with their values. . . . There is nothing sustainable about spending the majority of your working hours feeling that you are not contributing to the world you want to live in.” JANELLE ORSI, *SHARING LAW: THE LEGAL LANDSCAPE OF THE NEW ECONOMY* (ABA Books) (2012).

7. “Interview to the Press” (in Karachi about the execution of Bhagat Singh (Mar. 23, 1931)), in *Young India* (Apr. 2, 1931), reprinted in COLLECTED WORKS OF MAHATMA GANDHI ONLINE VOL. 51, available at <http://www.gandhiserve.org/cwmg/VOL051.PDF> (last visited Dec. 17, 2012). Gandhi begins by making a statement on his failure “to bring about the commutation of the death sentence of Bhagat Singh and his friends.” He is asked two questions. First: “Do you not think it impolitic to forgive a government which has been guilty of a thousand murders?” Gandhi replies: “I do not know a single instance where forgiveness has been found so wanting as to be impolitic.” In a follow up question, Gandhi is asked: “But no country has ever shown such forgiveness as India is showing to Britain?” Gandhi replies: “That does not affect my reply. What is true of individuals is

condone what happened. Nor does it mean that he forgets what occurred. Rather, forgiveness is a decision to accept what cannot be changed, while changing the one thing that *is* within one's control: one's own story. At its essence, forgiveness is a decision to create a new story about what occurred. It is a means of releasing the past, empowering oneself, and moving forward.<sup>8</sup>

This article offers an overview of forgiveness. It is my hope that, with education and understanding, lawyers and mediators<sup>9</sup> will be better able to support clients in the area of forgiveness. It begins by discussing two types of forgiveness relevant to legal disputes: (1) bilateral forgiveness, in which forgiveness is exchanged for an apology or other act of remorse, and (2) unilateral forgiveness, in which forgiveness is undertaken by one party alone. It then examines common misconceptions about forgiveness, reasons for resistance to forgiveness, and how forgiveness relates to a lawyer's ethical obligations. Finally, it provides suggestions for how lawyers and mediators can add forgiveness to the menu of options available for their clients.

## II. UNDERSTANDING FORGIVENESS

The essence of forgiveness is the giving up of resentment, anger, and hatred.<sup>10</sup> Kenneth Cloke, a pioneer in championing forgiveness in mediation, emphasizes that forgiveness is a process and a way to release the pain of the past:

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true of nations. One cannot forgive too much. The weak can never forgive. Forgiveness is the attribute of the strong.”

8. EILEEN BARKER, *THE FORGIVENESS WORKBOOK* 14 (2009).

9. The term mediator, as used throughout this article, is used broadly to include all conflict resolution professions such as conflict coaches, ombudsmen, facilitators, and the like.

10. *See, e.g.*, WEBSTERS II NEW WORLD COLLEGE DICTIONARY (Houghton Mifflin Harcourt 2005) (“To forgive is to renounce anger or resentment.”); AMERICAN PSYCHOLOGICAL ASSOCIATION, *FORGIVENESS: A SAMPLING OF RESEARCH RESULTS* (2006) (“Forgiveness is a process (or the result of a process) that involves a change in emotion and attitude regarding an offender.”). Most experts reject the traditional dictionary definition insofar as it requires one to pardon their offender and give up all claims. *See, e.g.*, Oxford English Dictionary. *Cf.* ROBERT ENRIGHT & RICHARD FITZGIBBONS, *HELPING CLIENTS FORGIVE* 29 (American Psychological Association 2000) (“People, upon rationally determining that they been unfairly treated, forgive when they willfully abandon resentment and related responses (to which they have a right), and endeavor to respond to the wrongdoer based on the moral principle of beneficence, which may include compassion, unconditional worth, generosity, and moral love (to which the wrongdoer, by nature of the hurtful act or acts, has no right.”).

Forgiveness is not only a result, but a process of letting go of the past and opening to the future, of reclaiming energy from people and events we do not need in our lives, and of accepting ourselves more fully. It is a way of releasing ourselves from the past, from the burden of our own false expectations, and from the pain we have experienced at the hands of others. It is a release from judgment, including our judgments of ourselves.<sup>11</sup>

Notwithstanding the benefits of forgiving, experts caution against a mediator, or any third person, telling the parties that they *should* forgive.<sup>12</sup> Cloke writes that “[t]he ability to dispense, but also withhold, forgiveness is an ennobling capacity and part of the dignity to be reclaimed by those who survive the wrongdoing.”<sup>13</sup> Thus, the narrow path a mediator or lawyer must skillfully navigate is to explore the possibility of forgiveness with clients, when appropriate, while fully honoring forgiveness as a matter of personal decision.<sup>14</sup>

Forgiveness always is a choice, one the client is free to try or to reject. There should never be subtle pressure on the client to forgive. At the same time, however, some clients blanch at the idea of forgiveness at first but then change their minds. The person’s first pronouncement about forgiveness is not necessarily the last.<sup>15</sup>

#### A. *Two Kinds of Forgiveness*

In considering the role of forgiveness in legal disputes, it is helpful to distinguish between two of the primary approaches to forgiveness: bilateral forgiveness and unilateral forgiveness.<sup>16</sup>

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11. KENNETH CLOKE, *MEDIATING DANGEROUSLY* 94 (Jossey-Bass 2001).

12. *See id.* at 87 (“It is difficult and dangerous for a mediator, or anyone outside a conflict, to suggest to those inside it that they should forgive what was done to them. The mediator may be thought to be advocating capitulation or surrender, or favoring the other side. It is possible, however, to approach the possibility of forgiveness subtly, powerfully, and steadfastly. . . .”).

13. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 17 (Beacon Press 1998).

14. CHRISTOPHER MOORE, *THE MEDIATION PROCESS* 341 (Jossey-Bass 2003) (Consideration of forgiveness may be raised by the mediator, but he or she can only open the door; the parties must choose to walk through it; pushing forgiveness or reconciliation when parties do not desire it violates one of the basic tenets of mediation: that the parties define and set their own goals.).

15. ENRIGHT & FITZGIBBONS, *supra* note 10, at 25. *See also* Everett L. Worthington, Jr., 27 *FORDHAM URB. L.J.* 1721, 1730 (2000) (“Unrestrained forgiveness . . . is giving a gift of grace not purchased by apology, repentance, and restitution—though such actions might occur.”).

16. A third approach holds forgiveness ultimately to be unnecessary. This is based on the idea that the need for forgiveness arises from the human tendency to judge people and events as right or wrong, good or bad. If instead, we can accept life as it is, then there is nothing to forgive. *See, e.g.*, BYRON KATIE, *LOVING WHAT IS* (2002); COLIN TIPPING, *RADICAL FORGIVENESS: A REVOLUTIONARY FIVE-STAGE PROCESS TO HEAL RELATIONSHIPS, LET GO OF ANGER AND BLAME, FIND PEACE IN ANY SITUATION* (2007).

*B. Bilateral Forgiveness*<sup>17</sup>

Bilateral forgiveness occurs when one person forgives another in exchange for an apology or other act of contrition. There is, at least implicitly, a *quid pro quo*: “If you apologize and show sufficient remorse, I will forgive you.”<sup>18</sup>

The importance of bilateral forgiveness is readily seen when there is to be a future relationship between the parties. Indeed, it is often described as a prerequisite for reconciliation.<sup>19</sup> But even if there is to be no future relationship, the benefits of bilateral forgiveness should not be overlooked. An apology offers a “restoration of moral balance—more specifically, a restoration of an equality of regard”<sup>20</sup> that is potentially healing for all concerned.<sup>21</sup>

As the following case study illustrates, bilateral forgiveness has its place in litigation, and mediation can provide the ideal conduit for its emergence. This case involved two parties litigating an employment contract. The employer resented the employee for abandoning him before the contract ended, while the employee resented the ensuing lawsuit.<sup>22</sup>

A well-established architect hired a junior architect just out of school, who was seeking apprenticeship. They signed a two-year contract. The two architects initially got along very well, but after approximately six months the junior architect gave two weeks’ no-

17. Bilateral forgiveness is also sometimes termed conditional forgiveness. See, e.g., TRUDY GOVIER, *FORGIVENESS AND REVENGE* viii (2002); MOORE, *supra* note 14, at 342.

18. Many experts have identified the elements of an effective apology. However, most make clear that a formulaic approach is not helpful and that an apology can do more harm than good if it is not perceived as genuine. E.g., AARON LAZARE, *ON APOLOGY* (2004); MOORE, *supra* note 15 at 335; Jennifer Brown, *The Role of Apology in Negotiation*, 87 MARQ. L. REV. 665 (2004); Carl Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 CONFLICT RESOL. QUARTERLY, no. 3, 265 (2000).

19. CLOKE, *supra* note 11, at 105; *Apology/Forgiveness*, Conflict Research Consortium, University of Colorado, [www.colorado.edu/conflict/peace/treatment/amnesty.htm](http://www.colorado.edu/conflict/peace/treatment/amnesty.htm) (last visited Dec. 30, 2012).

20. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1137–38 (2000) (“The offender demonstrates regard in his willingness to apologize, and the offended reflects regard when he chooses to forgive. In law this is a process that would often occur between strangers, so I do not envision that the restoration of regard would necessarily lead to a close interpersonal relationship. Rather, I envision a process in which the offender and the offended would each see and embrace the other’s humanity and would recognize that each occupies a place in the wider circle we call life.”).

21. *Id.* at 1137–38.

22. This case was reported to me by attorney and mediator Robert Berlin.

tice that he was leaving. The senior architect sued for breach of contract, claiming lost profits of over \$500,000.

Although both parties were very upset, they agreed to attend mediation with their attorneys. At the start of the mediation, the senior architect claimed he had lost the opportunity to build his firm and open a second office as he had hoped. The junior architect was angry about having to defend himself in an expensive lawsuit. He said he felt forced to leave after observing certain practices that he believed to be unethical.

Guided by the mediator, the junior architect was able to understand and empathize with the betrayal felt by the senior architect. Eventually, the junior architect offered an apology to the senior architect, acknowledging that he could have handled his departure better. The senior architect responded with his own apology. He disclosed for the first time that he had suffered a number of difficult personal losses within a short time of the junior architect's departure, including serious family illnesses and a divorce.

As the parties forgave each other, there were no dry eyes in the room. After further consultation with their lawyers, they quickly arrived at a settlement and parted ways amicably.

In the above case, mutual forgiveness flowed from reciprocal apologies. By addressing the human as well as the legal dimension of the conflict, the mediator helped the parties find understanding and empathy, which opened the door to an exchange of apologies. The parties benefited from having attorneys who encouraged their clients to do what felt right and were willing to show their own humanity.<sup>23</sup>

Mediation, owing to the confidentiality of the process, provides an ideal forum for the type of honest dialogue that can lead to apology and forgiveness.<sup>24</sup> Attorneys might assume that because clients are in litigation, there is no possibility of deeper resolution. Opportunities for apology and forgiveness can easily be missed if the attorneys treat mediation as a mere

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23. *Id.* Attorneys sometimes feel challenged by their own emotional responses, having been indoctrinated to believe that any show of emotion is unprofessional. See, e.g., DOUGLAS HARPER AND HELENE M. LAWSON, *THE CULTURAL STUDY OF WORK* 361–62 (2003); JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* (1995); JAN E. STETS AND JONATHAN H. TURNER, *HANDBOOK OF THE SOCIOLOGY OF EMOTIONS* 598 (2007) (four-step model used to help doctors normalize and effectively manage their emotions).

24. Despite the evidentiary rules barring admission of statements made in mediation, attorneys continue to fear that apologies will be exploited during litigation. One proposed solution is apology legislation that allows individuals and institutions to offer an apology without fear of legal liability. For discussion, see Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002). Such laws have been adopted in many jurisdictions and have proven successful in reducing claims in the medical malpractice field. E.g., Benjamin Ho and Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, JOHNSON SCHOOL RESEARCH PAPER SERIES NO. 04-2011 (Dec. 2010).

formality, assume an overly aggressive or defensive posture, or prevent their clients from interacting with each other.

As seen from the above case study, bilateral forgiveness can be very powerful in helping parties reach a settlement in litigated cases. Still, there are times when bilateral forgiveness during litigation is neither desirable nor possible, such as when:

- The offender<sup>25</sup> is not remorseful, not willing to apologize, or not able to demonstrate genuine regret;
- The offended person does not wish to have any contact with the offender;
- The offender is either unavailable or no longer alive; or
- One or both lawyers obstruct any meaningful exchange between the parties.

Indeed, a major drawback of bilateral forgiveness is the power it gives to the offender. If the offender is not remorseful, refuses to apologize, or is unavailable, bilateral forgiveness is not an option. This is often a source of frustration to the offended person, leading to private statements such as “if they had only said they were sorry, I might have dropped the case.”<sup>26</sup> This is where the broader applicability of unilateral forgiveness can come into play.

### *C. Unilateral Forgiveness*

Unilateral forgiveness is forgiveness undertaken solely for one’s own benefit.<sup>27</sup> Participation of the offender is not required. There are no prerequisites or conditions.<sup>28</sup> Unilateral forgiveness enables those who have experienced injury to free themselves of anger, blame, and resentment—whenever they are ready to do so. They are not forced to wait for an apology that may not be forthcoming. They are not forced to continue being victimized by someone else’s conduct or by past events. And, they do not need to make themselves vulnerable to the other side—a particular concern when

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25. Terms like “offended” and “offender” are relative and, as applied to any particular situation, judgment-laden. Typically, each person feels that he or she is the offended person, and that the other person is seen as the offender. These terms are used here simply for ease of description.

26. See *infra* note 74.

27. CLOKE, *supra* note 11, at 94; DR. FRED LUSKIN, FORGIVE FOR GOOD: A PROVEN PRESCRIPTION FOR HEALTH AND HAPPINESS, vii (2003).

28. BARKER, *supra* note 8, at 14–16.

the other side is perceived to be hostile or dangerous.<sup>29</sup> Thus, unilateral forgiveness is a powerful tool that enables parties to gain release, regardless of what the other person does.

According to Fred Luskin, the founder and director of the Stanford Forgiveness Project, unilateral forgiveness is a skill that can be learned with measurable and lasting benefits.<sup>30</sup> He points out that one of the universal causes of suffering is identification of oneself as a victim.<sup>31</sup> He teaches a cognitive forgiveness process that enables an injured or offended person to change his story, shifting this identification so that he no longer sees himself as powerless.<sup>32</sup>

Forgiveness involves undoing the part of a grievance that casts you solidly as a victim. You grow attached to telling others how cruel the betrayal was. You would tell that story to anyone within ear-shot. What's missing from the story is any desire to learn from the incident and move on with your life. Forgiveness teaches us to change the story so we tell it from the point of view of moving on in a way that helps us learn and grow.<sup>33</sup>

If we are to fully understand forgiveness, we must clearly understand what it is not. According to Luskin:

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29. Some writers caution against the danger of forgiveness in continuing relationships that may be harmful, such as those marked by domestic violence. *See e.g.*, Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1983) (arguing mediation is not appropriate where domestic violence exists). Others maintain that forgiveness is appropriate, but should be deferred until the injured person's "basic physical and security needs are met." ELLEN WALDMAN & DR. FREDERIC LUSKIN, UNFORGIVEN: ANGER AND FORGIVENESS 436 (2006).

30. In several studies, Luskin worked with Catholic and Protestant mothers from Northern Ireland whose sons were murdered in the political violence. After taking forgiveness training, the women reported feeling less angry, less hurt, less stressed, more optimistic, more forgiving, more compassionate, more self-confident, and more vital, and the benefits were shown to continue over time. LUSKIN, *supra* note 27, at 94–101.

31. The two other universal causes are taking offensive conduct personally and blaming the offender for one's feelings. FREDERIC LUSKIN & DANA CURTIS, *Forgiveness*, CALIFORNIA LAWYER, Dec. 2000, at 24.

32. While forgiveness is a distinct process, the focus on creating a new story has strong links to narrative psychology and narrative mediation. *See, e.g.*, JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000). Forgiveness also overlaps with transformative mediation insofar as it involves empowerment (forgiving is an empowered and a self-empowering move for the forgiver and can be empowering for the forgiven person as well) and recognition (apology is certainly based on recognition). *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (1994). However, the term "transformative" is intended more broadly when used in connection with forgiveness. It means that the experience of a conflict can be fundamentally changed from something that was seen as a problem and obstacle into something that is understood as a profound opportunity for healing and growth.

33. LUSKIN & CURTIS, *supra* note 31, at 24.

- Forgiveness is not condoning unkindness;
- Forgiveness is not forgetting that something painful happened;
- Forgiveness is not excusing poor behavior; and
- Forgiveness does not mean reconciling with the offender.<sup>34</sup>

#### *D. Reasons to Forgive or Not Forgive*

Over the past twenty years, substantial scientific research has established that forgiveness is immensely beneficial to one's health and wellbeing.<sup>35</sup> Studies show that even thinking about an unresolved conflict causes the body to release damaging stress chemicals, triggers feelings of anger, increases resentment, and increases one's heart rate and blood pressure.<sup>36</sup> People who carry resentment and grudges are at higher risk for heart attacks, cardiovascular disease, high blood pressure, decreased lung function, muscle tension, stress, and depression.<sup>37</sup>

Forgiveness has been shown to ameliorate *all* these conditions. Forgiveness has been shown to reduce anger, hurt, depression and stress.<sup>38</sup> At the same time, forgiveness has resulted in greater feelings of optimism, hope, compassion, and self-confidence.<sup>39</sup> Significantly, forgiveness is one of two life practices that have been shown to consistently lead to happiness, with the other being gratitude.<sup>40</sup>

Despite these well-documented benefits, people often resist forgiveness. Sometimes this is due to habit, stubbornness, and identification with suffering and victimhood. "There is great beauty and power in forgiveness, yet there is also great resistance to pursuing it," as Cloke writes. "It often appears easier to remain stuck in a conflict than to give up our victim status, forgo our view of the other side as evil, surrender our most precious complaints, and forgive the person whose actions or behavior caused the pain."<sup>41</sup>

A common argument is that the seriousness of an offense renders it unforgivable. However, experts point out that in any situation said to be un-

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34. LUSKIN, *supra* note 27, at viii, 73–76.

35. *Id.* at 77–93.

36. *Id.* at 78–80.

37. *Id.* at 78–81.

38. *Id.*

39. *Id.* at 77–79.

40. MARTIN E.P. SELIGMAN, AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT (2003).

41. CLOKE, *supra* note 11, at 90–91.

forgivable, one can always find someone who has forgiven.<sup>42</sup> Considering that people have forgiven the killing of innocent school children, acts of terrorism, the holocaust, and apartheid (to name a few),<sup>43</sup> it is difficult to argue that any offense is unforgivable per se.<sup>44</sup> Rather, “like revenge, forgiveness is possible in every conflict, no matter how painful or serious.”<sup>45</sup>

#### *E. Timing of Forgiveness in Legal Disputes*

Forgiveness is possible at any stage of a dispute. Consider the case of a seventy-five-year-old patriarch who was struck and killed by a vehicle while walking near his home.<sup>46</sup>

The driver, apparently distracted, had lost control of his car and driven on to the sidewalk, striking the man. It was a clear case of negligence. Before their father’s funeral, his adult children went to the home of the driver. They told him they realized he did not intend to kill their father and that it had been an accident. They forgave him and asked him to forgive himself. They assured him they did not intend to take legal action against him or press criminal charges. They said they needed to grieve their loss, but they did not want guilt over their father’s death to contribute to any unhappiness in the driver’s life.

In this case, forgiveness occurred at any early stage and obviated the need for legal proceedings. Yet it would be a mistake to conclude that peo-

42. LUSKIN, *supra* note 27, at 107.

43. An Amish community stunned the world in 2007 by immediately forgiving a man who killed many of their children. *See, e.g.*, DONALD KRAYBILL, ET AL., *AMISH GRACE: HOW FORGIVENESS TRANSCENDED TRAGEDY* (2010); Joseph Shapiro, *Amish Forgive School Shooter, Struggle with Grief*, NPR (Oct. 2, 2007), <http://www.npr.org/templates/story/story.php?storyId=14900930>; *The Power of Forgiveness* (Journey Films 2007). A group of Americans traveling in India forgave the terrorists who attacked them and killed two members of their party. CHARLES CANNON, *FORGIVING THE UNFORGIVABLE: THE TRUE STORY OF HOW SURVIVORS OF THE MUMBAI TERRORIST ATTACK ANSWERED HATRED WITH COMPASSION: THE POWER OF HOLISTIC LIVING* (2011). A victim of Josef Mengele’s horrific human experiments at Auschwitz forgave Mengele and the Nazis. CANDLES HOLOCAUST MUSEUM, <http://www.candlesholocaustmuseum.org/> (last visited Dec. 31, 2012); *FORGIVING DR. MENGELE* (Select Books Inc. 2006). *See* SIMON WIESENTHAL, *THE SUNFLOWER* (1998) (discussing forgiveness of the Nazis). Nelson Mandela forgave after being harshly imprisoned for twenty-seven years by the apartheid government and then, when he came to power, instituted the Truth and Reconciliation Commission in order to promote truth telling, forgiveness and healing, rather than promoting retribution with war tribunals. *See generally* NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (1995); *see also* DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999).

44. According to Luskin, people often claim an offense is not forgivable in order to hide the fact that they are not motivated to forgive. LUSKIN, *supra* note 27, at 106–07.

45. CLOKE, *supra* note 11, at 87.

46. CURTIS & LUSKIN, *supra* note 31, at 23.

ple who forgive will automatically drop their legal claims or lose the motivation to litigate.<sup>47</sup> That may happen in some cases, but forgiveness does not automatically negate accountability or require the release of the party's claims, rights, or defenses.<sup>48</sup> Lawsuits can still be prosecuted and defended. Rights can still be vindicated, and in some cases, more effectively.

Forgiveness can render litigants more effective because less energy is wasted on angry tirades and irrational demands.<sup>49</sup> "We have all encountered people whose anger has become a force more powerful than their own self-interest or capacity to control it."<sup>50</sup> Forgiveness can help litigants achieve a more realistic and less emotional view of the case. A litigant who lets go of anger and other negative emotions is a higher functioning client, a client who can be more effective in participating in litigation strategy and preparation as well as in settlement negotiations.<sup>51</sup>

Forgiveness can be particularly useful when parties are preparing for mediation.<sup>52</sup> Several years ago, two business partners came to me for mediation of their partnership dissolution, but the hostility between them was so great, they could scarcely be in the same room. When one of them threw a document across the room, I told them candidly that they were *not* good candidates for mediation. Yet they very much wanted to avoid litigation. They asked if there was anything I could suggest. In response, I asked if they would consider doing forgiveness work. They agreed to this, and each completed a series of individual forgiveness coaching sessions. After the sessions, they were able to sit in the same room and speak civilly to each

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47. See *infra* note 79.

48. LUSKIN, *supra* note 27, at 75.

49. Unilateral forgiveness can also help flush out cases based primarily on emotional vendettas that do not belong in the legal system in the first place, and help smooth the way for early settlement. Peter H. Huang & Ho-Mou Wu *Emotional Responses in Litigation*, 12 INT'L REV. L. & ECON. 31 (1992) (anger and pride tend to obstruct settlement and increase the number of cases brought to trial).

50. CLOKE, *supra* note 11, at 89. The legal culture seems to expect poor behavior from clients and tolerates conduct from clients and sometimes from lawyers, that we would not even accept from three year olds. See generally, Jonathan Cohen, *Advising Clients to Apologize*, 72 S. CAL. L.REV. 1009, 1010 (1998–1999) ("How different are the ways we counsel children and adults to act when they have injured others?").

51. PAULINE TESSLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 80 (2001).

52. Some mediators and conflict coaches choose to meet parties separately, prior to any joint meeting, to help them prepare for mediation. See, e.g., CINNIE NOBEL, *CONFLICT MANAGEMENT COACHING: THE CINERGY™ MODEL 190* (2012). This preparatory work can include forgiveness.

other. The relationship continued to be strained, but they were able to mediate and successfully resolve the partnership dissolution.

In another case, a probate matter, only one of the parties pursued forgiveness work, yet it still benefitted the mediation. The case involved a man who provided care to a terminally ill friend for many years. After the friend died, the caregiver was sued for undue influence. He had been embroiled in litigation for over two years, and was very angry and stressed. His lawyer recommended that he seek help. The caregiver contacted me, saying that he wanted to work on forgiveness before attending a court-sponsored settlement conference; the case went as follows:<sup>53</sup>

At our first meeting, the caregiver told me that he had been devoted to his terminally ill friend for several years. In the lawsuit, he was accused of having exercised undue influence to persuade his friend to sign a new will that left him a portion of his estate. The plaintiff—a life-long friend of the deceased man—was also a beneficiary; and as a result of the new will, the plaintiff would receive substantially less. Therefore, he was seeking to invalidate the new will.

There had been a prior mediation and prior efforts to settle the lawsuit, but to no avail. The plaintiff was adamant that the caregiver receive nothing from the estate. The caregiver told me he was willing to take less, as a compromise to end the lawsuit, but he was not willing to walk away with nothing.

The caregiver insisted he had in no way pressured the dying friend to change his will. He believed the friend created the new will to repay the caregiver for his tireless and selfless service. He was tormented by the plaintiff's accusations maligning his integrity, the viciousness of the plaintiff's attack, and the plaintiff's uncompromising stance. He felt powerless, and was dreading the mediation.

The caregiver told me his goal was to forgive the plaintiff because, no matter what happened with the lawsuit, he needed to find inner peace. He committed to undertaking a forgiveness coaching program with me, which he successfully completed. Throughout, he continued to work with his attorney, preparing for mediation and possible trial. By the end of our sessions, he felt as though a great weight had been lifted from him. He reported that he had found peace with the situation, no matter what the eventual outcome.

The caregiver was right: he was powerless over what the plaintiff would do and whether the plaintiff would be open to compromise at the mediation. Yet he had control over his response to the situation, and he had the wisdom to recognize this. He was fortunate to have an attorney who encouraged him

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53. This case study is taken from my forgiveness coaching practice.

to release his anger. In the end, he was able to use unilateral forgiveness to bring the litigation to a satisfying conclusion.<sup>54</sup>

Clients can also benefit from using forgiveness at the end of a lawsuit to achieve closure.<sup>55</sup> As discussed above, without emotional healing and forgiveness, even when a case is settled in mediation, parties are often left with more hostility and mistrust than when they began.<sup>56</sup> If the parties continue to tell the story of how they were wronged, think or speak negatively about each other, or carry feelings of anger or resentment, the conflict lives on. Forgiveness enables the participants to change the story, learn and grow from what has occurred, and achieve peace.<sup>57</sup> In this way, forgiveness enables the conflict to be *fully* resolved.

#### *F. Case Types Suitable for Forgiveness*

It is a mistake to believe that forgiveness is only relevant to a select few cases. Forgiveness can be applied in virtually any dispute. There are obvious advantages when a significant personal relationship is at stake—including those involving spouses, siblings, parents, children, neighbors, colleagues, co-workers, and business partners—which is not a small category of litigated disputes.<sup>58</sup> Forgiveness is also indicated in any dispute in which intense emotions are triggered, which once again can cover a large range of disputes. Even when litigation ostensibly revolves around an im-personal business transaction, key parties—including as corporate execu-

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54. About a month later, the caregiver reported that back that the mediation had gone well. For the first time the plaintiff was willing to compromise. The caregiver received approximately seventy-five percent of what the will provided. He was happy with the result, but equally important to him, this meant the lawsuit was over and he could move forward in his life.

55. MOORE, *supra* note 14, at 341.

56. These are cases where, even after reaching agreement, the parties refuse to be in the same room to sign the settlement agreement, or even shake hands.

57. See CLOKE, *supra* note 11, at 107.

58. Kathryn Bradley, *Knowing Law's Limits: Comments on "Forgiveness Integral to Close Relationships and Inimicable to Justice?"*, 16 VA. J. SOC. POL'Y & L. 322, 322 (2009); Frank Fincham, *Forgiveness Integral to Close Relationships and Inimicable to Justice?*, 16 VA. J. SOC. POL'Y & L. 357, 374 (2009) (discussing how commitment and closeness significantly helps the process of forgiveness). In my own practice, forgiveness has proven effective in employment disputes, personal injury cases, breach of contract cases, probate and trust litigation, sibling disputes, partnership disputes, and divorce.

tives and managers—may well harbor strong feelings by virtue of being forced to bring or defend legal claims.<sup>59</sup>

Furthermore, forgiveness works equally well for plaintiffs and defendants. For plaintiffs, it is an opportunity to accept the injury or loss that has occurred, and to reclaim their wholeness regardless of the outcome of their legal claims. In the following case, for example, the plaintiff forgave the other driver for the injuries she had suffered.<sup>60</sup>

A plaintiff was injured in a car accident in which the defendant was clearly at fault. During the discovery phase of the litigation, the defendant's insurance company told the plaintiff's attorney that the defendant had no assets above and beyond the policy limits.

The plaintiff eventually said she would consider a settlement of the case for the policy limits plus a \$1000 payment from the driver. But first she wanted to meet the defendant face to face, with lawyers for both sides present, so that she could tell the driver how the accident had impacted her life.

Defendant's attorney advised him against the meeting. Yet the defendant was herself an attorney-mediator, insisted that it go forward, and later commented: "As an attorney, I realized that this was a rare opportunity in a litigation process—the chance to talk with the other side—that is almost unheard of."

The meeting took place in the office of the defendant's insurance attorney about six months after the lawsuit was filed. The plaintiff tearfully spoke about her ongoing injuries, pain, and difficulties. She said that she did not want to take away the defendant's dreams by demanding a larger payment, and that she forgave her.

In response, the defendant made it clear to the plaintiff that she heard what the plaintiff said about her injuries. She said she was very sorry for what happened that day, emphasizing that it had not been her intention to cause harm to anyone, and thanked the plaintiff for forgiving her. Further, she expressed how grateful she was for the opportunity to meet, so that they both could find some closure to this unfortunate matter.

The plaintiff then agreed to the proposed settlement. After the release was signed, the defendant went over to the plaintiff and shook her hand. She promised, "I will pray for you every day," and reports that she continues to do so. The insurance lawyer said that in over thirty years of practice, he had never seen this kind of meeting.

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59. A prevalent legal fiction is that commercial litigation is not emotional. Most mediators would beg to differ. See, e.g., Kenneth Cloke, *Building Bridges Between Psychology and Conflict Resolution* (2008) <http://www.mediate.com/articles/cloke7.cfm>. Cloke writes that *all conflict is emotional* by definition. *Id.* ("It is possible for people to disagree with each other without experiencing conflict. What distinguishes conflict from disagreement is the presence of what are commonly referred to as 'negative' emotions, such as anger, fear, guilt, and shame. Thus, *every* conflict, by definition, contains an indispensable emotional element." (emphasis in original)).

60. This case study was reported to me by attorney and mediator Nancy Milton.

Several aspects of this case are striking. Parties in insurance cases usually do not meet in mediation; insurance representatives attend mediation, but the actual defendant does not.<sup>61</sup> What occurred here was possible only because the parties, in this case, both took charge and insisted on the face-to-face meeting over the objections of the lawyers. In addition, this case dispels the widely held belief that face-to-face exchanges are unimportant when the parties have no past relationship and will have no future relationship.

In another case, involving an employment discrimination claim, the defendant initiated the forgiveness process:

In the mediation of an employment discrimination case, the plaintiff, a young woman, claimed that her former employer discriminated against her because of a disability. Before mediation, the lawyers for both sides told the mediator a joint session would be a waste of time and so the mediation started with private caucuses. But during these separate meetings, the owner of the defendant and employer company asked to meet with only the plaintiff and the mediator, without lawyers present. With the lawyers' consent, the mediator met with the two parties and learned that the parties had been close friends. The owner had acted as the young woman's mentor, and was angry and disappointed that she filed a lawsuit against the company. He wanted to better understand her reasons for filing the suit. The employee recounted company actions that seemed hostile and unfair, and talked about the hurt she had suffered. The owner said he understood her reasons, and was no longer angry that she had filed the suit. They apologized to each other and then returned to their separate rooms. Settlement discussions resumed with the lawyers taking the lead. After a few rounds of caucusing, the parties reached an impasse. The parties asked to meet with each other again, with only the mediator. This time, within about fifteen minutes, the parties found a number they could both live with, subject to approval of their lawyers. The plaintiff's lawyer felt the settlement was too low and the defendant's lawyer felt it was too high. But they saw their clients hugging and laughing, and turned their attention to writing up the agreement for their clients to sign.<sup>62</sup>

Arguably, the plaintiff could have pushed for more money, and the defendant could have insisted on less. But the value of restoring the relationship offset the extra dollars. The clients ended up feeling happy and satisfied, which reflected well on the lawyers.

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61. I have been told by knowledgeable attorneys that insurance companies routinely instruct the insured party not to have any communication with the other side.

62. This case study was taken from a case I mediated.

## III. FORGIVENESS AND THE ATTORNEY-CLIENT FRAMEWORK

Some might question whether counseling clients on forgiveness is consistent with an attorney's role as a zealous advocate. But zealous advocacy is not synonymous with combative, win-at-all-costs litigation. Rather, it requires the attorney to act in a client's best interests, which might well include things like peace, dignity, and maintaining long-term relationships. As will be shown in this section, counseling clients about forgiveness in appropriate cases is fully consistent with a lawyer's role and ethical duties.

A. *Zealous Advocacy*

Zealous advocacy is often said to be "*the* fundamental principle" of lawyering.<sup>63</sup> However, the exact meaning of this term has been the subject of debate. The Model Code of Professional Responsibility makes clear that zealous advocacy requires an attorney to identify and promote a client's best interests.<sup>64</sup> Equally clear, a client's "best interests" are not limited to narrow legal concerns.<sup>65</sup> "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."<sup>66</sup> Thus, zealous advocacy naturally encompasses forgiveness as an option for clients when circumstances warrant it.

The Model Rules recognize that in addition to legal or monetary concerns, a client may have other important interests.<sup>67</sup> To properly assess the

63. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAYWERING: A HANDBOOK ON THE RULES OF PROFESSIONAL CONDUCT* 17 (suppl. 1998); *see also* Jonathan R. Cohen, *Culture of Legal Denial*, 84 NEB. L. REV. 247, 251 n. 6 (2005) (citing MONROE H. FREEDMAN & ABBE SMITH, *ZEALOUS REPRESENTATION: THE PERVASIVE ETHIC, UNDERSTANDING LAWYER'S ETHICS* 71 (2004) ("This ethic of zeal . . . established in Abraham Lincoln's day . . . continues today to be . . . the dominant standard for lawyerly excellence.")).

64. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-9 (1983) (lawyer's commitment is to act in his client's best interests).

65. MODEL CODE OF PROF'L RESPONSIBILITY R. 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.").

66. *Id.* *See also* MODEL RULES OF PROF'L CONDUCT R. 2.1, cmt. 2 ("Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 ("Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint.").

67. MODEL RULES OF PROF'L CONDUCT R. 2.1 and comments.

full range of issues at stake, it is appropriate for a lawyer to consider the broader context of the dispute, including the relationships involved and the impact of litigation on the client's life. A lawyer may well observe that even though a client could win at trial, the client is better off in the long-term by seeking reconciliation with the other side. Or the lawyer might see that a client would benefit from unilateral forgiveness, particularly if anger, resentment, or sorrow were impeding the client's progress and wellbeing. Ultimately, a zealous advocate might counsel a client about forgiveness for the simple reason that it would benefit his client. To include forgiveness as an option in client counseling is consistent with zealous advocacy, but admittedly outside the current practice of most lawyers. It is particularly at odds with the brand of scorched-earth, hardball litigation that has become prevalent in recent years.<sup>68</sup> In that model, lawyers are fighters and every lawsuit is viewed as a battle to be won at all costs.<sup>69</sup> Because litigation is seen as a zero sum game, hardball litigators condone and even encourage antagonism with the other side.<sup>70</sup> They actively avoid delving into the human or ethical aspects of the dispute, because these are viewed as irrelevant. Even if a client expresses a desire to forgive, they likely would advise against it, fearing that the other side might view it as a sign of weakness.<sup>71</sup>

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68. This hyper-aggressive style of litigation is sometimes referred to as "Rambo" lawyering. See Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J. 79 (1988). Saylor identifies six characteristics of Rambo litigation, including: (1) "[a] mindset that litigation is war"; (2) "[a] conviction that it is invariably in your interest to make life miserable for your opponent"; (3) "[a] disdain for common courtesy and civility"; (4) "[a] wondrous facility for manipulating facts and engaging in revisionist history"; (5) "[a] hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding"; and (6) "[a]n urge to put the trial lawyer on center stage rather than the client or his cause."

69. Joseph Ortega & Lindsay Maleson, *Incivility: An Insult to the Professional and the Profession*, 37 A.B.A. 1 (Spring 2008). "Rambo" lawyering includes mindset that litigation is war, in your interests to make life miserable for opponent, disdain for courtesy and civility, facility for manipulating facts, unnecessary motions and discovery, put trial lawyer on center stage. *Id.* at 2-4.

70. See Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 203 (1994) ("Rambo lawyers are accused of employing sharp practices, offensive or excessive gamesmanship, uncivil litigation maneuvers, and hardball tactics.").

71. See Cohen, *supra* note 63, at 265. Cohen discusses how the "advocacy bias" inherent in Rambo-style lawyering reduces a lawyer's entire role to a partisan combatant in litigation. This ignores the role of lawyers as counselors and leads to "denial-based collusion" between the lawyer and the client, where the lawyer actively avoids learning any facts that might be at odds with the lawyer's chosen narrative for the case. *Id.* at 261. An example of this denial-based culture is seen when insurance companies routinely counsel motorists not to apologize if they get into an accident. *Id.* at 257 (citing Cohen, *supra* note 50, at 1012-12 n. 9).

Although hardball litigators claim to be operating in the service of zealous advocacy,<sup>72</sup> zealous advocacy does not require hyper-aggressive, combative behavior.<sup>73</sup> Hardball lawyers distort the concept of zealous advocacy by assuming adversarial battle is always in their client's best interest.<sup>74</sup> This naturally leads to a single mode of action: pursue victory at all costs, regardless of the consequences to either party. However, litigation is not always in a client's best interest, taking into consideration the impact of the battle on a client's physical, emotional, and psychological well-being. Even if a full-court press ultimately obtains a legal victory, the price paid may be irreparable harm to long-term relationships, impaired physical health, emotional exhaustion, and missed opportunities for deeper healing.<sup>75</sup>

Attorneys sometimes attempt to justify hardball tactics on the grounds that this is what clients want. And indeed, clients often do insist on a hard-fought legal battle—at first. However, as Integrative Law Institute founder Pauline Tessler<sup>76</sup> eloquently writes, this is an important juncture for client counseling:

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72. See Allen K. Harris, *The Professionalism Crisis—The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 569 (2002) ("The phrase 'zealous advocacy' is frequently invoked to defend unprofessional behavior and a 'Rambo,' or 'win at all costs,' attitude."); Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 579 (1996) ("Rambo lawyers claim that their obligation to zealously advocate for their clients justifies their behavior.").

73. The fiduciary duty that a lawyer owes her client arguably includes the duty to consider alternatives to aggressive litigation. See, e.g., Charity Scott, *Doctors as Advocates, Lawyers as Healers*, 29 HAMLINE J. PUB. L. & POL'Y 331, 353 (2008) ("referring to an attorney as a 'fiduciary' more fully captures the range of her professional and ethical obligations today than calling her a 'zealous advocate.'") This is consistent with the brand of zealous advocacy suggested here, which emphasizes the client's ultimate interests beyond the legal battle, and above the attorney's own interest in litigating or even winning. See Fred C. Zacharias, *Pre-employment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries*, 49 WM. & MARY L. REV. 569, 605–06, 607–08 (2007) ("Common law defining fiduciary duties limits the ways in which lawyers may pursue their own interests to the detriment of clients . . . . Fiduciary law requires a lawyer to place the interests of his client above the attorney's own interests . . . .").

74. See Cohen, *supra* note 63, at 265 (lawyers often wrongly assume that the client's only interests are financial, failing to address other interests such as psychological ones).

75. Many clients may be waiting for an apology, consciously or not. In a survey of members of the State Bar of Georgia, eighty-three percent of respondents agreed that apology alone could settle many disputes. See Erin Ann O'Hara & Douglas Yarn, *On Apology and Conscience*, 77 WASH. L. REV. 1125 n.14 (2002) (citing Douglas Yarn, *Survey of Lawyers' Attitudes Toward ADR*, conducted on behalf of the Georgia Supreme Court's Commissions on Dispute Resolution and Professionalism (on file with author)). In an experiment conducted by Russell Korobkin and Chris Guthrie, tenants were more likely to accept a settlement offer from their landlord when it was accompanied by an apology. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 148 (1994).

76. Tessler also co-founded the International Academy of Collaborative Professionals.

Many . . . lawyers find themselves vulnerable to the appeal of clients who want them to jump on a white horse and attack the other party, who is seen as embodying all evil, just as the client embodies all good. In that mode of black-and-white adversarial practice, attention is rarely given to advising clients fully about the hidden emotional, relational and financial costs involved in legal battle, nor is much time typically spent advising clients about the growing spectrum of low-conflict dispute-resolution choices available to clients.<sup>77</sup>

Counseling clients about the dangers of the client's preferred legal strategy is nothing new. A lawyer often serves as a "gatekeeper," preventing the client from pursuing legal strategies that would ultimately cause them harm.<sup>78</sup> Even if a client insists that they want war, a good lawyer will consider whether a hostile legal battle will actually benefit the client in the long run. She will take time at the beginning of the engagement to identify the client's various needs and interests and, having identified those interests, have the courage to counsel the client on *all* available options, including the possibility of forgiveness when appropriate.<sup>79</sup>

### B. Counselors at Law

A more expansive consideration of client interests naturally heralds a broader understanding of a lawyer's role in conflict resolution.<sup>80</sup> As a lawyer's purview widens to encompass the client's underlying needs and interests, the lawyer's role shifts to become more human and less technical.<sup>81</sup>

77. TESSLER, *supra* note 51, at 81.

78. Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1389–90, 1405 (2004) (discussing the famous Elihu Root quote that "half of the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop" and commenting that "Elihu Root was an aggressive, ultra-partisan lawyer. Yet he warned us that the lawyer's job consists as much of standing in the way of misguided client pursuits as of implementing client desires . . . . We are gatekeepers, and we should never forget it.").

79. Another source of attorney resistance to forgiveness might be the fear that if clients forgive, there will be fewer hours of legal services to bill, or that a forgiving client might accept a lower settlement resulting in a lower contingent fee for the attorney. While many lawyers seem to turn a blind eye to these sorts of conflicts of interest, the ethical requirements are clear. A lawyer must put the client's interests ahead of her own. *See e.g.*, Zacharias, *supra* note 73, at 607–11 ("Fiduciary law requires a lawyer to place the interests of his client above the attorney's own interests . . . .").

80. Lawyers have traditionally worn many hats including those of advisor, advocate, negotiator and evaluator. *See e.g.*, MODEL RULES OF PROF'L CONDUCT, pmbl. (2010).

81. Lawyers who avoid any discussion of the emotional aspects of the case, tend to "mask" their own humanity and create a formal distance between themselves and their clients. *See* Jonathan

Rather than simply functioning as gladiators-at-law, lawyers have an opportunity to serve as counselors-at-law and conflict resolution specialists.<sup>82</sup> A counselor-at-law might view her ultimate goal as healing conflict, rather than just winning legal disputes.<sup>83</sup> Because healing is not a zero-sum game, the counselor may be more willing to explore cooperative or conciliatory legal strategies. This broader, more constructive model of lawyering is gaining popularity, as frustration with hardball lawyering grows.<sup>84</sup> Dissatisfaction with the current state of the profession is so acute that many commentators have championed a more human, integrated approach to practicing law not only to better serve clients, but also as a measure of self-preservation.<sup>85</sup>

Still, the suggestion that lawyers assume a broader, more humanistic role inevitably raises some objections that can be roughly grouped into two categories. First, critics fear that lawyers who embrace cooperative strate-

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R. Cohen, *When People Are the Means: Negotiating With Respect*, 14 GEO. J. OF LEGAL ETHICS 739, 764 (2011) (discussing how negotiators and lawyers tend to deny humanity in others by “masking” them in formal legal roles) (citing JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976) (arguing that lawyers frequently impose masks on people to hide their fundamental humanity); *see also* Walter Otto Weyrauch, *Law as Mask: Legal Ritual and Relevance*, 66 CAL. L. REV. 699 (1978)). Zealous advocacy is arguably enhanced when lawyers can relate to their clients, opposing counsel, and judges as a real person rather than as a disembodied advocate.

82. There is a large field of study that encompasses conflict, conflict theory, and the dynamics of conflict, including causes of escalation and de-escalation. *See, e.g.*, BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION* (2000); DEAN PRUITT, JEFFREY RUBIN, & SUNG HEE KIM, *SOCIAL CONFLICT, ESCALATION, STALEMATE AND SETTLEMENT* (2003). This body of work would seem highly relevant to the practice of law and yet, is inexplicably absent from standard legal education. According to Noam Ebner, Assistant Professor at the Werner Institute for Negotiation and Dispute Resolution at Creighton University School of Law, “ADR textbooks have made the material accessible and reframed it into legal terms, style and referencing familiar to legal educators and students—and still, this has not made it a cornerstone of legal education.” *See* JULIE MACFARLANE ET AL., *DISPUTE RESOLUTION: READINGS AND CASE STUDIES* (2011); CARRIE J. MENKEL-MEDOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2010).

83. *See* STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN LEGAL LIFE* 102 (1999) (“It has often been said that the law is one of the great healing professions, that while medicine heals the body and the clergy heals the soul, the law heals societal rifts.”); *see also* Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1 (2006); MARJORIE A. SILVER, *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* (2007).

84. The move away from Rambo-style advocacy has spawned a variety of alternative legal models centered on a more humane approach to solving conflict. *See generally* Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1 (2006); Charity Scott, *Doctors as Advocates, Lawyers as Healers*, 29 HAMLINE J. OF PUB. L. & POL’Y 331, 362–63 (2008).

85. *See, e.g.* STEVEN KEEVA, *supra* note 83 (discussing lawyers who found satisfaction by transforming practices); HOWARD GARDNER ET AL., *GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET* (2001) (emphasizing importance of ethics to job satisfaction).

gies will place clients at a disadvantage vis-a-vis clients with combative lawyers. Second, critics object that lawyers are not trained to act as counselors or address extra-legal aspects of the conflict. We will address these objections here, with particular focus on forgiveness.

### C. Strategic Impact of Forgiveness

Even if lawyers appreciate the idea of forgiveness, they may doubt its viability in the real world of adversarial litigation.<sup>86</sup> In particular, it is commonly assumed that forgiveness (and its cousin, apology) require surrendering negotiating leverage without anything in return.<sup>87</sup> Because of this fear, some lawyers adhere to the familiar cycle of denial and blame, rather than risk cooperative or conciliatory approaches.<sup>88</sup>

However, research shows that cooperative strategies that include forgiveness are not only effective, they are consistently *more effective* than competitive strategies. This was proven in a now-famous series of game-theory tournaments based on iterated versions of the Prisoner's Dilemma.<sup>89</sup> Researchers pitted *thousands* of different strategies against each other to see test which strategy would be the most effective, one based on cooperation, one based on competition, or a blend of the two. The winning strategy was a very simple one called Tit for Tat.<sup>90</sup> This program always began by cooperating, and then continued to cooperate as long as the opponent cooperated. However, if the opponent made a competitive move, then the program matched the move, Tit for Tat. At the same time, the program was forgiv-

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86. See Cohen, *supra* note 67, at 265 (discussing the common error of assuming that a combative style is necessary for effective advocacy).

87. Allen K. Harris, *Increasing Ethics, Professionalism and Civility: Key to Preserving the American Common Law and Adversarial Systems*, PROF. LAW 91, 99 (2005) (noting that Rambo-style advocates wrongly assume that "a lawyer cannot be professional and civil on the one hand while being loyal to the client and a strong advocate on the other hand.>").

88. E.g., JAY FEINMAN, *DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT* (Portfolio/Penguin 2010).

89. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (2006). In the *Prisoner's Dilemma*, each player has a choice of either cooperating or competing in each round. If both players cooperate, they do well, and if both players compete they do poorly. However, the maximum gain to a player is realized if, in any round, she competes and the opponent cooperates. *Id.* at 78.

90. *Id.* at 19–20.

ing: if the opponent resumed cooperation, it responded in kind, thereby permitting mutual cooperation to be restored.<sup>91</sup>

In addition to showing the strategic value of cooperation, the discussion above shows how forgiveness can be a central element of a cooperative strategy. The Tit for Tat model demonstrates that cooperative strategies *increase* negotiating leverage by building trust and understanding between potential adversaries. This maxim holds true for lawyers. Research shows that, far from being eaten alive, cooperative lawyers are generally perceived as more effective advocates than lawyers without those traits.<sup>92</sup>

Cooperative strategies are already being successfully employed in the legal field.<sup>93</sup> For example, in the field of medical malpractice, a number of pilot programs have shown the efficacy of early apology in response to medical errors. One of the first programs mandating full disclosure was adopted by the Veteran Affairs Medical Center in Lexington, Virginia in 1987. In the past, the VA in Lexington, Kentucky, like many medical institutions, routinely employed a “deny and defend” response to claims of medical error. It decided to switch to a practice of taking responsibility, which involved admitting fault, apologizing, and offering fair compensation. After seven years, the result was that the VA settled most of the claims and ended up in the lowest quarter of Veteran Affairs medical centers for malpractice payouts, even though it was in the top quarter for the number of tort claims filed.<sup>94</sup>

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91. *Id.* at 176–77; see also DOUGLAS R. HOFSTADTER, METAMAGICAL THEMAS (1985) (chapter twenty-five, *Prisoner's Dilemma Computer Tournaments and the Evolution of Cooperation*, addresses this point).

92. While combative lawyering is often glamorized, most lawyers prefer a cooperative style, and believe that other lawyers who display those traits are more effective. See Jonathan R. Cohen, *When People Are the Means: Negotiating With Respect*, 14 GEO. J. OF LEGAL ETHICS 739, 779 (2011) (Discussing Gerald Williams's study in which lawyers were asked to assess other lawyers as negotiators. Williams found that sixty-five percent of the assessed lawyers had “cooperative” negotiating styles. Thirty-eight percent of these lawyers were seen as effective negotiators. Only twenty-four percent of the lawyers had “competitive” negotiating styles. Of these lawyers, only six percent were seen as effective.); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, HARV. NEGOT. L. REV., 143 (2002) (Negotiators who are assertive and empathetic are perceived as more effective. Ineffective negotiators are more likely to be stubborn, arrogant, and egotistical. Problem-solving behavior is perceived as highly effective.)

93. There has been a significant move towards legal practice in the divorce field. A model called “collaborative law” was developed in the 1980s by Minnesota attorney Stu Webb. The model has continued to evolve and gain traction, and is now espoused by the International Academy of Collaborative Professionals and other professional groups. There is a growing parallel movement to bring collaborative law into civil practice. See, e.g., David A. Hoffman, *Collaborative Law in the World of Business*, 6 THE COLLABORATIVE REV. 3 (2003); Sherrie R. Abney, *The Evolution of Civil Collaborative Law*, 15 TEX. WESLEYAN L. REV. 495 (2009).

94. DOUG WOJCIESZAK, SORRY WORKS! SPECIAL EDITION: DISCLOSURE APOLOGY AND RELATIONSHIPS PREVENT MEDICAL MALPRACTICE CLAIMS 80 (Google ebook 2008). It is important

The University of Michigan adopted a similar program in 2001 under which patients were given full disclosure and early offers of compensation in response to claims of medical error.<sup>95</sup> There too, the program resulted in substantial decrease in claims for compensation (including lawsuits), time to claim resolution and liability costs.<sup>96</sup>

In the field of general civil suits, the Toro Corporation, a manufacturer of lawn care products used to rely on an aggressive “litigate everything” approach to the 125 annual personal injury claims arising from the use of its products.<sup>97</sup> In 1991, it switched to a conciliatory approach, mediating cases when possible and making fair offers of compensation.<sup>98</sup> Following this switch, the total cost per claim fell from \$115,620 to \$30,617. By 1999, Toro had saved over \$75 million. This case study illustrates how a defendant’s unilateral decision to acknowledge harm can set the wheels of forgiveness in motion, allowing defendants to reduce claims and settle more favorably.

#### *D. Reluctance to Address Non-Legal Issues*

The other common objections are that lawyers are not trained to offer counseling, nor are they qualified to address non-legal issues.<sup>99</sup> These objections conflate two distinct functions: incorporating people skills into the practice of law and acting as a psychologist.<sup>100</sup>

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to note that in the field of medical malpractice, doctors and medical institutions have the protection of apology legislation. Arguably, apology legislation should be extended to all disputes.

95. See *supra* note 93.

96. Allen Kachalia et al., *Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program*, 153 ANNALS OF INTERNAL MED. 213–22; Bhavani S. Reddy, *Apology and Medical Error Full Disclosure Programs: Is Saying “I’m Sorry” the Answer to Reducing Hospital Legal Costs?* University of Houston Law Center, available at [http://www.law.uh.edu/healthlaw/perspectives/2006\(BR\)ApologiesFinal.pdf](http://www.law.uh.edu/healthlaw/perspectives/2006(BR)ApologiesFinal.pdf).

97. Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L. J. 1447, 1460–61 (2000).

98. *Id.*

99. The aggressive, hardball litigation model discourages lawyers from grappling with emotional or relational aspects of the dispute, viewing those issues as outside the scope of a lawyer’s engagement. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 8 (1999) (“Professional responsibility, on this account, is a technocratic value. It emphasizes skill and competence, but also stresses moral distance between lawyer and client.”).

100. MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 22 (“It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”).

If a lawyer is to truly assess a client's best interests, he would naturally consider a range of factors in addition to a legal analysis, including how litigation will impact the client's wellbeing, and possibly, the client's views on apology and forgiveness.<sup>101</sup> This may require some lawyers to gain new skill sets, including training in emotional intelligence and communication.<sup>102</sup> But these skills do not turn a lawyer into a therapist.<sup>103</sup> The lawyer's focus remains on conflict resolution, not on psychological diagnosis or processing. To discuss forgiveness as one of many dispute resolution options is well within the bounds of a lawyer's role to explore all relevant aspects of the dispute, and to consider the impact of those factors in deciding on a legal strategy.<sup>104</sup> In cases where a client needs additional support for forgiveness, the lawyer can refer the client to a qualified forgiveness coach or therapist.<sup>105</sup>

Nor does attorney counseling regarding forgiveness interfere with client autonomy.<sup>106</sup> Ultimately, the lawyer must defer to the client's objectives. Suggesting or even encouraging forgiveness is different than forcing it. In

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101. See Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm Into the Clinical Setting*, 11 CLIN. L. REV. 15 (2004) (discussing the range of skills lawyer employ when counseling clients, including logical-mathematical, linguistic, narrative, interpersonal, intrapersonal, categorizing, and strategic); see also Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem-Solver*, 28 HOFSTRA L. REV. 905, 912 (2000) ("Legal analysis is a necessary, but not sufficient, condition of good problem solving").

102. See, e.g., Peter Reilly, *Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence*, 21 NEGOT. J. 301 (2005); Eileen Barker, *Emotional Literacy for Mediators* (March 2003), available at <http://www.mediate.com/articles/ebarker1.cfm>; MARSHALL ROSENBERG, *NONVIOLENT COMMUNICATION* (2003); SHARON ELLISON, *TAKING THE WAR OUT OF OUR WORDS: THE ART OF POWERFUL NON-DEFENSIVE COMMUNICATION* (2002).

103. See, e.g., Cohen, *supra* note 63, at 280 (for legal counseling be effective, "addressing the client's emotions to a certain degree is often important, if not essential" and does not constitute therapy). For cases in which clients agree it would be helpful to address the emotional and psychological components of their dispute, another option is for professionals to work as interdisciplinary teams, such as a lawyer and mental health professional. According to Stephen Sultmeyer, J.D., Ph.D., this is already occurring in Marin Superior Court, California, which in 2007 adopted an Interdisciplinary Settlement Conference program, and in 2011 an Early Mediation Program, that pair lawyers and mental health professionals trained in dispute resolution for family law cases. Based on the success of these programs, Sultmeyer recently founded a group called Integrative Mediation Marin to offer similar interdisciplinary teams for the private mediation of family, elder, probate, employment, and other cases.

104. MODEL RULES OF PROF'L CONDUCT R. 2.1 and comments.

105. *Id.* ("[I]t is well within the scope of the lawyer's role to recommend that the client consult with mental health experts or other professionals when needed."). Comment 4 to the Rule states: "Matters that go beyond strictly legal questions may also be in the domain of another profession. . . . Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."

106. As with any personal counseling, the goal is to have a conversation that helps the client understand the ramifications of his choices. "The choices are fundamentally the client's. The lawyer's essential role remains that of service." Cohen, *supra* note 63, at 280-81.

truth, forgiveness cannot be forced. Lawyers can point out the ways in which continued hostility harms clients physically, emotionally and financially.<sup>107</sup> Lawyers can also encourage their client to consider the many benefits of forgiveness, even if it means giving up some financial gain. But it remains the client's decision whether or not he wants to forgive or apologize. Counseling a client about forgiveness does not change this basic model; it simply widens the scope of the discussion.

The adversarial system has been seriously questioned.<sup>108</sup> In the past twenty-five years, numerous alternatives, including mediation and collaborative law, have come into wide use.<sup>109</sup> Clients increasingly understand that a great many legal disputes can be resolved without adversarial tactics, including cases previously thought to require litigation. As these shifts take place, lawyers will find themselves at a crossroads. They can be combative litigators who escalate conflict, or they can be lawyers who excel at constructive problem solving and promote long-term resolution.<sup>110</sup> For some, this may be a welcome change.<sup>111</sup> For others, it may well require conscious effort and

107. Some lawyers avoid these discussions because they are worried that they will alienate their clients. *Id.* at 269. While these conversations can be difficult, honesty is often what best serves clients, even if there is a risk that it alienates some clients and lose revenue for attorney. *Id.* at 276–77. It is also possible that this candor appeals to clients, and positively distinguishes the lawyer as a trusted advisor.

108. *E.g.*, Carrie Menkel-Meadow, *The Trouble with the Adversarial System in a Post-Modern, Multicultural World*, WM. & MARY L. REV. 5, 5–6, 11 (1996) (“adversary system may no longer be the best method” for dealing with legal disputes. “Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies . . . . A culture of adversarialism, based on our legal system, has infected a wide variety of social institutions.”).

109. Thomas Stipanowich, *ADR and the Vanishing Trial*, 1 J. OF EMPIRICAL LEGAL STUD. 843–912 (2004) (citing “unprecedented efforts to develop strategies aimed at more efficient, less costly, and more satisfying resolution of conflict, including more extensive and appropriate use of mediation and other “alternative dispute resolution.””).

110. The Honorable D. Brooks Smith, *The Lawyer as Peacemaker*, 63 U. PITT. L. REV. 909, 910, 914 (2002) (“[W]e need to be peacemakers—people who assist others in resolving conflicts rather than reflexively following a course that will only add pain to pain. . . . But you, as lawyers who are also peacemakers, can be a genuine moral force. You can bring your judgment to bear on helping people to solve their problems. You can be the voice that urges people to come together.”).

111. As lawyers seek more constructive and fulfilling approaches to legal practice, there is a growing international movement to explore new models of law. *See e.g.* SUSAN DAICOFF, *COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION* (2011); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); CENTER FOR CONTEMPLATIVE MIND IN SOCIETY, [www.contemplativemind.org/programs/law/](http://www.contemplativemind.org/programs/law/) (sponsors mindfulness retreats and other programs for lawyers and law students); CUTTING EDGE LAW, [www.cuttingedgelaw.com](http://www.cuttingedgelaw.com) (calls upon

resolve to break away from the familiar patterns of adversarial litigation. Either way, change is upon us. According to Professor Julie McFarlane, who has written extensively on dispute resolution and the evolving role of lawyers:

Legal practice is showing signs of the evolution of a new professional identity for lawyers which is responsive to new dispute resolution processes with an emphasis on just and strategic settlement. . . . Effective negotiation and settlement skills are becoming increasingly central to the practice of law.<sup>112</sup>

One lawyer who broke away from the adversarial mold was Mohandas Gandhi, who said this about his legal career:

I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.<sup>113</sup>

#### IV. INCORPORATING FORGIVENESS IN PRACTICE

Ultimately, the biggest obstacle to incorporating forgiveness into the legal field is not the intractability of the other side, the seriousness of the offense, or the limitations of the adversarial system itself. The true obstacle to forgiveness is the lack of professional education and training.<sup>114</sup> For professionals interested in including forgiveness in their practices, here are some suggested steps:

1. Put forgiveness on the menu of topics that might be discussed with clients. By introducing the idea, it gives clients permission to talk about forgiveness if and when they are ready.<sup>115</sup>

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lawyers as leaders of social evolution); INTEGRATIVE LAW INSTITUTE, [www.integrativelawinstitute.com](http://www.integrativelawinstitute.com) (dedicated to reclaiming law as a healing profession); SHARK FREE WATERS, [www.sharkfreewaters.com](http://www.sharkfreewaters.com) (calling for a conscious and integrative approach to transformation in law).

112. Julie McFarlane, *The New Lawyer: Moving from Warrior to Conflict Resolver*, *ADR BULLETIN*: Vol. 10: No. 8, Article 5 (2009).

113. MOHANDAS K. GANDHI, *AN AUTOBIOGRAPHY* 134 (Mahadev Desai trans., 1993).

114. Regarding motivation to forgive, Luskin says the obstacle “is our tendency to continue reacting to hurt in ways that do not work.” LUSKIN, *supra* note 27, at 108. On the flip side, motivation can be found in the fact that forgiveness allows people to regain their power and restore peace of mind. *Id.*

115. After presenting this suggestion at a conference, a colleague reported back to me one year later that this single act had made a significant difference in his mediation practice. He found many

2. If a client is very stressed or angry, the lawyer or mediator might talk about such topics as healing anger, letting go of grudges, keeping things in perspective, and accepting past events that cannot be changed. These are valuable steps for the client, whether or not the word “forgiveness” is used.
3. Be receptive to and supportive of a client’s initiative to forgive. Understand the value and benefits of forgiveness.
4. Encourage honest and open communication between those in conflict. Allow each person to say what he most needs to say in order to end the conflict.<sup>116</sup>
5. Ask whether there are any circumstances under which the client would consider forgiving the other person, or asking to be forgiven, for what occurred.<sup>117</sup>
6. Even though we are told from childhood that we *should* forgive, rarely are we taught *how* to forgive. When appropriate, refer clients to a forgiveness class or qualified forgiveness coach.
7. The lawyer or mediator might learn about forgiveness and practice forgiveness in his own life. This will take him a long way towards being able to guide clients in this area.
8. Remember that it is not appropriate or helpful to impose a sense of obligation or pressure to forgive on another or on one’s self. Above all, forgiveness is a choice.<sup>118</sup>

## V. CONCLUSION

In over thirty years of practice as a lawyer and a mediator, I have observed how consuming and debilitating conflict is for most people. As a lit-

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more clients stepping up to forgive just by virtue of the fact that he had started mentioning forgiveness in his introductory remarks.

116. Some of the most outstanding mediators have as their central goal helping the parties have an honest conversation that enables them to better understand each other. *See, e.g.*, GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT* (2009). They encourage parties to identify what they most want or need to hear from the other party, apologize for their role in the conflict, acknowledge the other person’s positive intention, clarify what is most difficult for them, and acknowledge what they have learned from the situation. KENNETH CLOKE, *CONFLICT REVOLUTION: MEDIATING EVIL, WAR, INJUSTICE AND TERRORISM* 323 (2008).

117. *See* MOORE, *supra* note 14, at 341–42 (“[T]he mediator can explore whether there are any conditions that might merit consideration for forgiveness to occur.”).

118. LUSKIN, *supra* note 27, at 63 (“[F]orgiveness is a choice. Neither you nor I have to forgive anyone who has hurt us. On the other hand, we can forgive all who have done us harm. The decision is ours to make.”).

igator, I saw clients go through years of litigation, only to win victories that seemed hollow compared to the time, money, and energy spent in achieving them. As a mediator, I witnessed people settle lawsuits, only to continue mistrusting and hating those on the other side. Above all, I have seen how our legal system and our culture glorify adversity and encourage blame and retribution. Rarely do we consider the price we are paying for those attitudes, or the greater possibilities offered by truth, healing, and forgiveness. This needs to change.

It is time for the legal field to expand. It is time to include forgiveness as an option for parties in legal disputes. This can begin with dialogue about the role forgiveness can play in legal disputes. It can start with lawyers and mediators opening their hearts and minds to the idea of forgiveness. As they explore ways to bring forgiveness into conflict resolution, eventually the best practices will emerge.

For lawyers, learning about and practicing forgiveness offers the opportunity for greater career satisfaction. It releases lawyers from the limited role of single-minded aggressors and defenders, disconnected from their own needs and feelings. It allows them to align their work with their core values, and make the difference they want to make in the world. It enables them to render the highest service for their clients, and contribute to bringing about a more peaceful society.<sup>119</sup>

According to David Link, former Dean of Notre Dame Law School, “Lawyers need to know that their clients want peace and harmony in their lives, and that they need to facilitate that, rather than exacerbate the problems.”<sup>120</sup> Understanding the value of forgiveness and supporting clients who wish to forgive are ways lawyers can help their clients achieve dignity, peace, and healing. In this way, lawyers become heroes. They become positive agents for change, as well as peacemakers.

As far back as 1850, Abraham Lincoln, a preeminent lawyer and peacemaker himself, advised lawyers as follows: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity to being a good man. There will still be business enough.”<sup>121</sup>

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119. One attorney who has admirably embodied this role is Robert W. Plath, a leader in the forgiveness movement. Plath is the creator of International Forgiveness Day and the founder of the Worldwide Forgiveness Alliance, dedicated to evoking the healing power of forgiveness worldwide. See WORLDWIDE FORGIVENESS ALLIANCE, [www.forgivenessday.org](http://www.forgivenessday.org).

120. Steven Keeva, *Once More, With Healing*, A.B.A. J. (May 1, 2004, 4:19 PM), [http://www.abajournal.com/magazine/article/once\\_more\\_with\\_healing](http://www.abajournal.com/magazine/article/once_more_with_healing).

121. Abraham Lincoln, *Notes for Law Lecture* (July 1, 1850), in COMPLETE WORKS OF ABRAHAM LINCOLN 140, 142 (John G. Nicolay & John Hay eds., 1894).

As Gandhi once said about truth and nonviolence, forgiveness is “as old as the hills.” Yet until now, it has scarcely been recognized in the field of law. Whatever the reasons for this, and surely there are many, incorporating forgiveness into the resolution of legal disputes is an idea whose time has come. Lawyers and mediators can render an invaluable service by learning about forgiveness and guiding clients who want to undertake forgiveness work. Lawyers and mediators who support clients who wish to forgive will soon observe that, far from weakening their clients, it strengthens them beyond measure, and can restore them to wholeness far beyond a legal victory or monetary reward. This is not to say that forgiveness will be appropriate for every case. It will not. Nor is it meant to suggest that forgiveness is easy. It is not. But the potential rewards of forgiveness—for lawyers, for clients, and for society—are enormous.