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### Lawyering and its Discontents: Reclaiming Meaning in the Practice of Law

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# LAWYERING AND ITS DISCONTENTS: RECLAIMING MEANING IN THE PRACTICE OF LAW

*Marjorie A. Silver*<sup>1</sup>

## INTRODUCTION

On April 6-7, 2003, Touro Law Center hosted an extraordinary continuing legal education (CLE) conference entitled *Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law*.<sup>2</sup> The Conference brought together judges,

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<sup>1</sup> Marjorie A. Silver is a Professor of Law at Touro Law Center whose publications include *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999).

<sup>2</sup>At the outset, I would like to acknowledge and thank the many people who contributed to the planning and execution of my dream conference. I wish to especially acknowledge my partner in producing this Conference, whose commitment and enthusiasm were essential in making it a reality: Lynn Theresa Cahalan, Touro's amazingly energetic and creative Director of Continuing Legal Education. Lynn also organized and moderated the first plenary of the Conference. I thank my colleagues, Professors Hal Abramson and Barbara Swartz who participated in the conceptualization of the Conference, as well as in organizing and presenting the session on Alternatives to Litigated Dispute Resolution. Thanks also to Tom Maligno, our Director of Career Development and Public Interest Law, who organized and moderated the panel on the healing potential of *pro bono* work. We are all indebted to Dean Howard Glickstein and Judge Leon Lazer, Assistant Dean for CLE, for their encouragement and support (financial and otherwise!). And we could not have succeeded without the dedication and support of the administration and staff of the Law Center. In particular, I wish to acknowledge Assistant Dean for Administration, Linda Baurle, Building Coordinator, Carl Baurle, and, especially Patti Peters, Larry Drago and Alison Flor from our Office of Development, who dedicated countless hours and much creative thinking to help pull this off. Assistant to the Director and Coordinator of CLE Dreena Kutch insured that the wheels moved smoothly before, during and after the Conference. Thanks, too, to the many

interested practitioners, and academics involved in the Comprehensive Law Movement. The Comprehensive Law Movement includes therapeutic jurisprudence, collaborative lawyering, transformative mediation, and other approaches which aim to transform the practice of law into a humanistic and healing force rather than a confrontational and hurtful process.

Participants at this Conference explored factors that have contributed to lawyer distress and client disappointment, along with a variety of personal, professional and institutional approaches to dissipating that distress. The underlying premise for the Conference was that when lawyers find ways to practice law that optimize their own and their clients' well-being they can recapture the moral vision that originally attracted them to the law, and in so doing, find joy and meaning in their practices.

This issue of the Law Review includes contributions by several participants at the Conference. In this introduction, I hope to place those contributions in the context of the entire Conference and offer the reader a sense of what occurred over the course of the two days.<sup>3</sup>

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Touro law students who freely gave their time to be of service. I offer special thanks to the International Centre for Healing and the Law for underwriting conference expenses. I thank the Law Review for its interest and support in documenting the Conference. And, finally, thanks to all of our incredible speakers who donated their time out of a commitment to the importance of educating lawyers on how to find "joy and satisfaction" in their legal lives. *See* STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (2002).

<sup>3</sup> To prepare this introduction, I reviewed the videotapes of the Conference and, where available, written transcripts of the proceedings. I take sole responsibility for any errors in my reporting.

The genesis of the Conference was in large part a conversation that I had with Professor David Wexler<sup>4</sup> shortly after the Second International Conference on Therapeutic Jurisprudence in Cincinnati in May of 2001. The conference attendees were academics familiar with therapeutic jurisprudence and related movements, along with a number of local practitioners for whom this was all brand new. David and I discussed how wonderful it would be to have a series of regional conferences to introduce these exciting developments to practitioners who were out working in the trenches.

Another inspiration for the Conference was the work of Steven Keeva, a senior editor and contributing columnist to the ABA Journal. Steve's book, *Transforming Practice: Finding Joy and Satisfaction in the Legal Life*,<sup>5</sup> has had a major impact on my vision of the myriad possibilities for a healthy and healing approach to practicing law.

Although this Conference was a wonderful opportunity for like-minded academics to get together, the principal intended beneficiaries were the practitioners. When we conceived the Conference, we weren't certain whether there would be much interest among the practicing bar. We soon learned that there was a great deal of interest in this emerging field among practicing

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<sup>4</sup> Lyons Professor of Law and Professor of Psychology, University of Arizona College of Law; Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico School of Law. J.D., New York University School of Law, 1964; B.A., State University of New York at Binghamton, 1961.

<sup>5</sup> KEEVA, *supra* note 2.

attorneys. The registration for the Conference exceeded one hundred and fifty participants, more than for any previous Touro Law Center CLE program. Lawyers came from as far away as Puerto Rico, Seattle, Kansas City and Washington, D.C.. While some may have been attracted by the 14.5 credits we offered at a bargain basement price, many came because the topic resonated with them. There is tremendous discontent and disillusionment among the practicing bar. Many lawyers have found themselves unhappy or unfulfilled in their practices. Compared to other professionals, lawyers suffer disproportionately from excessive stress, substance abuse and other emotional difficulties.<sup>6</sup> Many find themselves demoralized or disillusioned about the practice of law. The vast majority of practitioners who attended the Conference had little, if any, familiarity with the various vectors of the Comprehensive Law Movement, or with the strategies and solutions that the Conference presenters offered. Our hope was that this Conference would provide practitioners with an introduction to an array of tools and strategies available to positively affect the way they practice law, thus improving their lives, and, derivatively, the lives of their clients.

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<sup>6</sup> See, e.g., Connie J. A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1996); Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997).

**SUNDAY, APRIL 6TH***The First Plenary*

The purpose of the first plenary, *The Practice of Law and Its Discontents: Individual and Systemic*, was to set the stage for the rest of the Conference through a discussion of the range of problems with and complaints about law practice and our legal system that would be addressed throughout the remainder of the Conference. Participants spoke from their own experiences in practice as members of their legal communities. Lynn Cahalan moderated this panel of practitioners that included attorneys Larinzo Clayton, an associate in the General Liability Group of Rivkin Radler; solo family law practitioner Janis Noto; and Howard Leff, also a solo practitioner who currently concentrates on labor and employment law litigation.

Leff started out presenting some of the “myths and realities” about being a lawyer. He addressed his remarks to several of these myths: “I thought that all lawyers were honest and I would never have to worry about being ‘submarined’ by my adversary.” “I thought that once I left the office I would be free of the worries and stresses of my practice.” “I thought I would get a lot of gratification out of winning because it would reinforce my belief that hard work pays off.” He bemoaned the fact that he wakes up thinking about his cases in the middle of the night and that he has to spend weekends preparing his witnesses for trial. He then spoke about the *realities* of being a lawyer: “Lawyers are

human, just like everyone else, and we don't have to pass an honesty test to become one." "Judges are human just like everyone else." "My golf game suffers due to the practice of law, not the other way around." "We start thinking about retiring long before we should want to." But he said the most important truth was this: "[E]very once in a while, I get a phone call, a letter or an e-mail from a client telling me that I've done something for them that nobody else could do or that I've changed their lives in a way never imagined and that they are grateful to me for being there. For that moment, everything seems worth it."

Janis Noto spoke of the ubiquity of lawyer-bashing and its demoralizing effect. Family court, she said, was a very unhappy place to practice (except on adoption day). In her case, a life-changing event, a seriously injured child, helped put things into perspective. She has since become more oriented to "lawyer as social worker" rather than "lawyer as legal-eagle litigator," and endeavors to enable litigants who share children to function as co-parents.

Larinzo Clayton learned about the gap between legal education and law practice early in his legal career. Young and eager, Clayton spent an entire week doing research in anticipation of litigation in which his firm represented a pharmaceutical company in an AIDS case. When his supervising partner returned from vacation, Clayton was excited to share the fruits of his research, but the partner was only interested in information on the biases of all of the judges from the targeted litigation venues.

Lynn Cahalan brought up the concept of “learned helplessness” to describe the experience of lawyers who feel defeated by the system. When one is in practice about eight or nine years, one learns that hard work, a good case, good facts, good law, and a good client who testifies well are all likely unrelated to the result. She mentioned experiments with rats that were subjected to electroshocks in confined spaces. Even when given the opportunity to escape, the rats merely lay there and gave up. Lawyers, too, tend to give up. Cahalan analogized their reaction to the “learned helplessness” of battered women. She proposed that there is likely to be some connection between this phenomenon and the disproportionate rates of alcoholism, substance abuse and depression among lawyers.

Cahalan mentioned the compromises that women attorneys who become mothers inevitably must make. Cindy Zatzman, a lawyer from Florida, responded from the audience about being empowered to make choices on how one spends one’s time. When one *chooses*, one no longer needs to make compromises. A lawyer in practice for twenty-six years disputed that view:

I . . . set my priorities . . . and the phone rings. Someone calls you at four o’clock in the morning, ‘my uncle, brother and I have just been arrested,’ or someone calls up and says ‘the cops are in front of my house.’

I don’t do criminal law. I do civil law, but I don’t turn my clients away. Or something comes up that somebody got subpoenaed, or they put an order to show cause out, or an appeal that suddenly comes up.



I find an idea that you can organize yourself is nice in theory, but in practice I get called constantly and get interrupted constantly so that when I look down at my desk I am not sure what I was doing because I have four different files and I only started with one. So I don't know how you get around that.

Leff agreed and lamented that there is never a good time to take a vacation. Something always comes up, or you go away for a week promising yourself you will only work for the first few days and relax for the last four, yet you can't seem to detach yourself from the goings on in your office. Noto suggested that this was a function of being a *professional*: professionals don't work nine-to-five, five day weeks. "I think the definition of the professional is you are the one who decides when to stop working for the day or the year."

From the audience, Professor Bruce Winick promised that over the course of the Conference, he and others would be able to show that therapeutic jurisprudence was not just a theoretical framework, but an approach with real relevance to the everyday practice of law. He expounded on learned helplessness, a term coined by psychologist Martin Seligman who later wrote a book entitled *Learned Optimism*.<sup>7</sup> Learned helplessness, hopelessness and despair come from a sense that one has no control over one's life, and never will gain such control. We can reframe our vision of the practice of law such that our mission is not about earning

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<sup>7</sup> MARTIN E. SELIGMAN, *LEARNED OPTIMISM* (1991).

money or winning cases, but about being a member of a *helping* profession; the practice of law is about *helping* people, and that is the ticket to finding satisfaction as a lawyer.

Also from the audience, Dr. Sanford Portnoy suggested that just because the practice of law has always been a certain way doesn't mean it has to remain that way. He referred to Keeva's book and the lawyers it profiles: people who made decisions that they wouldn't continue business as usual.<sup>8</sup> Some discussion ensued about what law schools could do to foster a more holistic approach to practicing law. Leff mentioned that he used to be "an animal in the courtroom." Once he realized the cost of this way of life to his health and well-being he changed course. Other members of the audience shared a variety of responses — positive and negative — to the various suggestions raised.<sup>9</sup>

### *The Second Plenary*

The second plenary, *Overview of the Comprehensive Law Movement*, was moderated by the originator of that term, Professor Susan Daicoff of Florida Coastal School of Law. Professor Daicoff was joined by Clare Connaughton, a lawyer with expertise in mediation and other alternatives to conflict resolution, as well as

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<sup>8</sup> KEEVA, *supra* note 2.

<sup>9</sup> There were several complaints about the unreasonableness of judges — especially federal judges — who allegedly had no appreciation of the realities and burdens facing single practitioners.

Professors David Wexler and Len Riskin. Professor Daicoff's contribution is included in this symposium.

Daicoff began her comments by responding to some of the concerns raised by the first panel. She discussed her research on lawyer personality traits and distress and how lawyers, on the whole, are driven, competitive and achievement-oriented. She proposed a redefinition of success that would focus on *intrinsic* rather than *extrinsic* rewards. By doing so, Daicoff argued, we would be less likely to experience the *learned helplessness* discussed by the earlier panel.

Daicoff then introduced the various vectors of the Comprehensive Law Movement. She suggested that the confluence of these vectors is explained, in part, by the emerging post-enlightenment notion that we are all connected to one another, as well as by an increasing interest in human growth and development. Though distinct movements, the vectors are all part of a "family" characterized by an interest in optimizing human well-being, whether individually, in relationship, or in community. These vectors include the *theoretical lenses* of therapeutic jurisprudence, procedural justice, holistic justice, creative problem-solving, and preventive law. They also include the *processes* of collaborative law, restorative justice, transformative mediation and problem-solving courts. What they demand from legal education is increased emphasis on the development of people skills. What they promise is alternative approaches to the practice of law and administration of justice that can be "exciting, invigorating,

positive, therapeutic, curative, restorative, creative, and inspiring.”<sup>10</sup>

Claire Connaughton then spoke about her increasing disillusionment with the practice of law in the years following law school. By her tenth year of practice, she began looking in the want ads for jobs outside of the law. Concluding there was nothing else for which she was trained, she went on automatic pilot, going through the motions, but without any heart or soul in her practice. It was only when she undertook to referee a particularly acrimonious matrimonial dispute that she was able to recapture her original purpose in going to law school — to *help* people. Seeking appointment to the mediation panel of the federal district court, she was led to Columbia University’s International Center for Conflict Resolution. She took the basic practicum at Columbia and learned that the skills necessary to be a lawyer are *not* the same skills one needs as a mediator.<sup>11</sup> As a mediator, she had to learn to *listen*; unlike in litigation, she was no longer going to be the main attraction. What a lawyer listens for when a client tells her story is very different than what a mediator listens for. Connaughton is still practicing law, but not the way she had before she discovered mediation. Her success is no longer contingent on her win and loss record. Most importantly, she feels like she *helps* people.

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<sup>10</sup> Susan Daicoff, *The Comprehensive Law Movement*, 19 TOURO L. REV. 848, (2004).

<sup>11</sup> Professors Swartz and Abramson made many similar comments about the distinctions between litigation and mediation.

Connaughton spoke briefly about the varieties of mediation, particularly, transformative and problem-solving mediation. The most prevalent form is problem-solving mediation, where the principal focus is on the conflict and on enabling the parties to resolve their dispute less expensively, more expeditiously and less antagonistically than is generally possible through traditional litigation. In addition, problem-solving mediation enables the parties to be the primary actors in the resolution of their dispute. Transformative mediation goes beyond resolving the immediate problem and is aimed at enabling the participants to actively listen, understand, and transform their ways of relating to one another.<sup>12</sup> This is especially efficacious in disputes among neighbors and others who hope to have ongoing relationships with one another. Connaughton shared an example of community mediation involving two couples of different cultural backgrounds whose dispute was resolved when they were able to communicate to each other their respective cultures' understandings of what it means to be a "good neighbor."

Professor David Wexler spoke about therapeutic jurisprudence and its relationship to the other vectors. Wexler started by describing the atheoretical origins of many of the process vectors, including collaborative divorce, restorative justice, preventive law and problem-solving courts. Something in the air — some increasing dissatisfaction with our culture of

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<sup>12</sup> See generally ROBERT BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

“contentiousness, argumentation, and adversarialness” — nurtured these developments at the same time that therapeutic jurisprudence evolved. Therapeutic jurisprudence’s underlying premise is that law, legal processes, and legal actors inevitably produce therapeutic or anti-therapeutic consequences, and that such consequences should be taken into account by decision makers. Wexler offered some examples of how the therapeutic jurisprudence lens has resulted in practical benefits when used to examine and suggest reforms to legal processes.

Wexler then spoke about the mutually advantageous relationship between therapeutic jurisprudence and preventive law. Preventive law offers techniques to lawyers wishing to practice therapeutically, and therapeutic jurisprudence offers an ethic of care, a humanistic, more psychologically-oriented approach that had previously been lacking in preventive law. Wexler presented an example of how that might play out in estate planning with a client who is gay and HIV-positive. Finally, Wexler spoke briefly about how therapeutic jurisprudence has contributed to problem-solving courts’ strategies to provide motivation for offender reform, a subject which was discussed in greater detail at a panel the next day.

Professor Len Riskin next spoke about his work on mindfulness meditation.<sup>13</sup> Mindfulness involves paying attention deliberately, without judgment, moment to moment. Meditation

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<sup>13</sup> See Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

helps develop the capacity for mindfulness, and this skill is transferable to one's law or mediation practice. An ancient Buddhist practice, mindfulness meditation is used today throughout the West in medical centers, law firms, and even by some sports teams. Most of the time, the human mind jumps all over the place, causing stress, dissatisfaction, and missed opportunities. Mindfulness allows us to notice our habitual reactions and make choices as to whether we will follow them. Riskin demonstrated by leading the audience in a short meditation exercise.

During the subsequent question and answer period, members of the panel identified numerous sources for lawyers who were interested in investigating the comprehensive law movement and discovering alternative approaches to practicing law. These resources include the website for the International Academy of Collaborative Professionals,<sup>14</sup> the Humanizing Legal Education Group,<sup>15</sup> the International Alliance of Holistic Lawyers,<sup>16</sup> the Renaissance Lawyer Society,<sup>17</sup> and the Therapeutic Jurisprudence website.<sup>18</sup> The Therapeutic Jurisprudence website contains numerous links to other related cites and list-serves. These resources offer models and examples for integrating these new strategies into individual practice.

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<sup>14</sup> <http://www.collabgroup.com> (last visited Mar. 5, 2004).

<sup>15</sup> [http://www.law.fsu.edu/academic\\_programs/humanizing\\_lawschool.php](http://www.law.fsu.edu/academic_programs/humanizing_lawschool.php) (last visited Mar. 5, 2004).

<sup>16</sup> <http://www.iahl.org> (last visited Mar. 5, 2004).

<sup>17</sup> <http://RenaissanceLawyer.com> (last visited Mar. 5, 2004).

<sup>18</sup> <http://www.TherapeuticJurisprudence.org> (last visited Mar. 5, 2004).

*The Luncheon Program*

Over lunch there were three short presentations. The first speaker was Carol Kanarek, a clinical social worker. A 1979 graduate of Michigan Law School, Kanarek obtained her masters in social work in 2000. She has provided career management services to lawyers and law firms for nearly twenty years. She works with lawyers contemplating a change of careers and helps develop individual strategies for lawyers seeking to enhance job satisfaction. Kanarek, who has her own consulting practice, identified a range of resources for outside guidance to which lawyers may turn. Search firms, according to Kanarek, provide access to only a tiny percent of legal jobs and specialize in servicing high-paying clients in finding specialized talent that cannot be identified through more traditional means. Thus, she suggested they were of little utility to the vast majority of lawyers seeking to make a change. For most of the audience, she suggested that the best source of guidance is finding one or more mentors.

For the many lawyers who don't have access to such mentors, Kanarek recommended consulting a career counselor or career coach. These trained professionals participate in helping lawyers explore options; like trained psychotherapists, they do not generally provide answers. She recommended employing those who work by the hour so that the lawyer/client has control of how little or how much she wishes to invest. She also stressed the importance of using someone who has extensive experience



working with attorneys and information about resources and options available to attorneys.

Career coaching is relatively new and focuses on problem-solving. While a mentor might serve this function, a career coach has the advantage of being an objective outsider, someone who can help a lawyer determine the source of his or her dissatisfaction and explore whether a change in positions or workplace is likely to resolve that dissatisfaction. Kanarek noted that through this exploration, lawyers frequently realize that the source of their unhappiness is that they have been living out someone else's dream rather than their own.

Geri Leon spoke next. A lawyer and educator, Leon conducts stress management training in workplaces and community organizations.<sup>19</sup> Leon has experienced real transformation among lawyers who are not afraid to admit, "I'm in a little agony here and I would like to find some creative solutions." The first step, said Leon, is to acknowledge the sources of stress. The second is to realize the rich fullness of what life is all about: joys and disappointments, pleasures and agony, compassion and corruption, justice and injustice. Leon noted that the first few years of the new millennium had been anything but easy: Y2K, the downhill economy, September 11, Anthrax, bioterrorism, the war in Iraq, weapons of mass destruction. She entreated the audience to consider the cumulative effects of all of

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<sup>19</sup> In her introduction, Lynn Cahalan claimed that Leon was single-handedly responsible for bringing stress relief to the Suffolk County Bar Association.

that stress that most of us never discuss. She then gave a brief demonstration of what she calls “mental martial arts,” the training of patients in self-induced relaxation developed by Dr. J.H. Schultz.<sup>20</sup> Through deep breathing, increased oxygen is sent to every part of the body. Leon led the audience through a sample deep breathing exercise.<sup>21</sup>

Lisa Yakobi, a professional development coach, was the final luncheon speaker. Founder and President of Explorer Coaches, Yakobi recommended “power daydreaming.” “What if lawyers were only here for one thing,” she asked, “to love and teach love, to help you open your heart?” Lawyers, Yakobi said, should be fearless, and she called the audience to new action: “You are our best, our brightest, who we come to when we have problems we can’t solve. I want to see the day when people come to see the word lawyer with awe.” As a coach, Yakobi said she helps people step into their dreams and into their power.

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<sup>20</sup> See, e.g., W. Linden, *The Autogenic Training Method of J.H. Schultz*, in *PRINCIPLES AND PRACTICE OF STRESS MANAGEMENT* 203-29 (P.M. Lehrer & R.L. Woolfolk eds., 2d ed. 1993).

<sup>21</sup> First, she had the audience sit with feet flat on floor, spine erect, hands on belly. We were asked to close our eyes and concentrate on her words, which consisted of three repetitions of each of the following: “Breathing in, I calm my body; breathing out, I smile.” “My arms and legs are heavy and warm; my breathing is free and easy.” “My heartbeat is steady and strong; my mind is steady and strong.” “My body is healthy and strong; I breathe this in, and I breathe this out.” “My decisions are filled with integrity; I am that, and that is me.” Observing that this simple exercise had transformed many faces from worry to laughter, Leon closed by reminding the audience that “this is your life, and it’s not a dress rehearsal.”

### *The Break-out Sessions*

After lunch, eight of the Conference presenters facilitated break-out sessions that offered participants a wide variety of demonstrations and discussions of techniques and strategies introduced in the plenaries. Clare Connaughton engaged participants in a simulated mediation in which participants played the roles of mediators, claimants and observers. The workshop explored the stages of mediation, the use of neutral questions and the practice of “reframing” issues. Participants were able to observe the differences between solving a problem by splitting it down the middle and finding a solution that met the interests of all parties.

Professor Susan Daicoff led a session on “Identifying Personality Traits.” Daicoff administered two instruments designed to identify the participants’ preferred general and ethical decision-making styles.<sup>22</sup> Participants then had the opportunity to discuss their individual decision-making preferences and relate them to job satisfaction and past and future choices of law practice.

Carol Kanarek conducted an interactive session on “Career Management for Attorneys: Strategies for Finding Success and Satisfaction in the Law.” Kanarek introduced principles of self-

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<sup>22</sup> One was the Keirsey Temperament Sorter (similar to the Myers-Briggs Type Indicator). See generally DAVID KEIRSEY, PLEASE UNDERSTAND ME II: TEMPERAMENT, CHARACTER, INTELLIGENCE (1998); David Mark Keirsey, *Personality: Character and Temperament*, at <http://www.keirsey.com> (last visited Mar. 5, 2004). The other was the Care-Justice decision-making preference based on Professor Carol Gilligan’s theories. See CAROL GILLIGAN, IN A DIFFERENT VOICE (1993).

assessment and market analysis and explored strategies for identifying practice settings and substantive focus that would be both satisfying and realistic for participants contemplating a change. Participants had opportunities to practice techniques for networking and informational interviewing. Discussion focused on achieving balance between work and family.

Dr. Sanford Portnoy led a session on “Working With Difficult Clients: How to Keep Clients Focused and Maintain a Solid Working Alliance.” Portnoy led a guided discussion with instruction on the fundamentals of effective client relationship management. Participants discussed how to convince clients to give up unrealistic expectations and the skill set necessary to keep both lawyer and client on track and satisfied. According to Portnoy, by knowing how to build a working relationship with the client and how to help the client stay calm and goal-directed even during the most stressful times, a lawyer can help produce more efficient and successful outcomes and thus reduce the risk of psychological burnout.

Building from his brief exercise at his presentation in the second plenary, Professor Len Riskin conducted several meditation exercises with his group and explored how those exercises might be useful to lawyers in their practices, especially in the face of stressful and upsetting situations. The program offered instruction and practice in mindfulness meditation, including mindful movement and exercises involving the application of mindfulness to listening and other professional activities. Participants

discussed how these practices might apply in mediation, law school and law practice.

Professors David Wexler and Bruce Winick led a discussion on "Therapeutic Jurisprudence and Practice," focusing on the integrative therapeutic jurisprudence/preventive law model of lawyering introduced by Wexler at the second plenary, a professional approach that considers the client's psychological issues which may bear on his or her legal concerns. The session explored the application of this model in differing areas of legal practice, including family law, criminal law, civil litigation and law office counseling generally. Wexler and Winick discussed how attorneys can identify and address "psycho-legal soft spots,"<sup>23</sup> aspects of law practice or legal involvement that may produce stress, anger, defensiveness, or other negative emotional reactions in the client.

Lisa Yakobi led an interactive workshop on "How to Put the Brakes on Overwhelm When There Aren't Any Breaks." Yakobi discussed and demonstrated techniques and strategies to enhance daily productivity, effectiveness and satisfaction with work and life.

Cindy Lenoff Zatzman led a workshop on "Restoring Balance and Setting Priorities." Zatzman began with the premise that attorneys have a tendency to expend extraordinary amounts of

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<sup>23</sup> See, e.g., Marc Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 440 (1998) reprinted in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 439 (Dennis P. Stolle et al. eds., 2000).

time on work, to the detriment of the rest of their lives. Zatzman stressed finding balance in one's life and scheduling time for family, spiritual, physical and health pursuits.

After the breakout sessions we reconvened in the auditorium to report briefly on what happened in each session, offering participants a rich taste of the possibilities available to them and their practices.

## MONDAY, APRIL 7TH

### *The Third Plenary*

The second day of the Conference began with a gathering snowstorm and the third plenary, *Stress, Burnout, Vicarious Trauma and Other Emotional Realities of the Lawyer-Client Relationship*. Because of my particular interest in psychological-mindedness and emotional competence, it was my pleasure to moderate this panel. With me were Dr. Sanford Portnoy, Professor Jean Koh Peters, and Eileen Travis. Dr. Portnoy is the author of *The Family Lawyer's Guide to Building Successful Client Relationships*,<sup>24</sup> and has developed a practice counseling matrimonial lawyers. His contribution about the importance of sensitivity and understanding to the emotional complexity of a matrimonial client undergoing a divorce is included in this

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<sup>24</sup> SANFORD PORTNOY, *THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS* (2000).

symposium. Professor Peters is a clinical professor of law at Yale Law School whose work inspired the original working title of this Conference. While that title — *Taking Care of Our Clients, Taking Care of Ourselves: An Ethical Responsibility* — changed as the Conference concept evolved, it remained the theme for this plenary. Professor Peters, whose contribution is also included in this symposium, introduced the concept of vicarious trauma and its threat to those who engage empathically with others who have suffered primary trauma. Professor Peters spoke of how vicarious trauma can undermine one's sense of self and discussed ways of preventing such damage.

Eileen Travis presented a brief overview of the origins of lawyer assistance programs (LAPs) both nationally and locally. The program in New York has assisted thousands of attorneys with problems of alcoholism, substance abuse and depression. Travis reported that while the incidence of alcoholism and substance abuse among the general population is approximately 7.5 to 10 percent, in the legal profession the incidence is 15 to 18 percent.<sup>25</sup> A study at Johns Hopkins in the 1990s that examined 104 occupational groups found that attorneys were 3 ½ times more likely to develop clinical depression than any other occupational

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<sup>25</sup> Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465 (Dennis P. Stolle et al. eds., 2000).

group.<sup>26</sup> Furthermore, lawyers often self-medicate with alcohol or drugs. At their inception, the LAPs only addressed problems of alcohol and substance abuse. Since then, the programs have expanded to cover depression and other “quality of life” issues lawyers or law students may suffer. LAP professionals meet with the individual — or perhaps the family member or colleague who initiated the contact — evaluate the problem, and make recommendations which may include referral to a treatment program or to a self-help meeting such as Alcoholics Anonymous or Narcotics Anonymous.<sup>27</sup>

Many attorneys resist seeking treatment as a result of the defense mechanism of denial and the perceived stigma associated with such problems. The first step is to enable the impaired persons to see that their problems are treatable diseases and that treatment can lead to recovery.

The backbone of the programs are volunteers — judges, lawyers and law students — most themselves in recovery from a variety of problems. Travis noted that through recovery these people have gained humility, dignity and spirituality that infuse their desire to help others with similar problems. Travis stressed

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<sup>26</sup> See generally G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers*, 13 INT’L J.L. & PSYCHIATRY 233 (1990); William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990).

<sup>27</sup> There are specific lawyer aid meetings throughout the country. Travis mentioned a specialized organization, the International Lawyers and Alcoholics Anonymous, who are a group of recovering attorneys that holds a large conference each October.



the confidentiality of the program, codified in Judiciary Law 499, which protects communications between an individual and LAP participants.<sup>28</sup>

In response to my questions regarding why anxiety and depression were more of a problem for lawyers than for others, Portnoy reported that the attorneys he had treated in his thirty-year-old practice demonstrated a kind of “stuckness” and resignation that was qualitatively different than that suffered by other patients. He believes this is a function of the “learned helplessness” discussed during the first plenary on Sunday. Portnoy suggested that the low esteem in which many members of society hold lawyers may exacerbate their tendency toward depression and substance abuse.

Travis suggested that additional factors at play included the expectations that others have of lawyers: that lawyers are experts, that they supposedly know everything, and that they are the people others turn to with their problems, both legal and personal. In addition, lawyers have the added pressure of always working under the scrutiny of other attorneys and judges. Institutional and individual “enabling” exacerbates the impaired lawyer’s problem,

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<sup>28</sup> N.Y. JUDICIARY LAW § 499 (1) (McKinney 2003) provides:

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privilege may be waived only by the person, firm or corporation which has furnished information to the committee.

while failure to confront the attorney about her problem allows the problem to progress.

A member of the audience asked whether criminal defense lawyers experience higher levels of substance abuse than other attorneys. Travis reported that her perception was that solo practitioners were more likely to develop such problems because of their isolation. Peters opined that any lawyers who are engaged empathically with clients who are struggling are at risk. However, shutting down compassion is not the answer. Rather, lawyers need to embrace their empathy to enhance their representation, to be on guard for any negative effects, and to attend to the damage that threatens one's sense of well-being.

An overarching theme of the panel was that lawyers need to recognize and understand the psychological and emotional impact of their work on themselves *and* their clients. A lively exchange among members of the audience ensued on whether and how to handle referrals of clients to appropriate mental health professionals. Portnoy made a number of recommendations in this regard. Travis mentioned that LAPs can assist lawyers who wish to refer clients. Members of the audience voiced concerns about malpractice exposure and confidentiality issues. Some lawyers felt unqualified to make a judgment as to whether a client needed psychotherapy. Professor Tim Floyd mentioned that he used to share those views, but his views changed when he began to work with family services personnel. He and others stated that lawyers *must* learn to deal with these problems. Arnie Herz echoed the

need for emotional sensitivity. The emotional realities for our clients will take their toll, he said, so we need to be prepared for them.

Portnoy voiced surprise at the quantity of discussion on the question of referrals and suggested this was a symptom of the general discomfort the legal profession has with issues involving mental health. He agreed that one cannot render competent legal advice if one *ignores* any emotional interference the client is experiencing.

At lunch, participants were treated to a unique presentation by Austin, Texas attorney and author Mark Perlmutter<sup>29</sup> and Professor Daisy Floyd, his *client*. Floyd chose Perlmutter to represent her in contemplated litigation *because* of his cooperative and humanistic approach to the practice of law. Floyd and Perlmutter discussed the opportunities and challenges this representation model presented for both client and lawyer.

The remainder of the day was divided into two “tracks” with two panels in each. The first track focused on *institutional strategies*; the second on *individual strategies*.

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<sup>29</sup> MARK PERLMUTTER, WHY LAWYERS (AND THE REST OF US) LIE AND ENGAGE IN OTHER REPUGNANT BEHAVIOR (1998).

***Track I: Institutional Strategies******First Panel***

Professor Bruce Winick moderated the panel on *Courts as Instruments of Healing*. Professor Winick, along with Professor David Wexler, recently published *Judging in a Therapeutic Key*.<sup>30</sup> Along with Winick on the panel were Judge Patrick Leis, Presiding Justice of the Integrated Domestic Violence Court of Suffolk County Supreme Court, and Valerie Raine from the Center for Court Innovation.

Winick introduced the concept of problem-solving courts. Drug courts and other problem-solving courts offer a new conception for the role of judges where courts operate as psychosocial agencies able to offer more than incarceration or probation. Rather than just dealing with the *symptoms* of the disease, these courts endeavor to address the issues that might *prevent* recidivism.

Valerie Raine described the work of the Center for Court Innovation. The New York based Center has developed designs for community justice centers, drug treatment courts, domestic violence courts, and the first mental health court. Working with the courts, the Center designs and implements pilot programs to test new models for courts with the goal of eventually achieving widespread court reform. At present, the most pervasive types of

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<sup>30</sup> BRUCE WINICK & DAVID WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (2003). Professor Winick is Professor of Law at University of Miami School of Law and one of the founders of therapeutic jurisprudence.

these problem-solving courts are the drug courts. Raine opined that problem-solving courts are here to stay.

Problem-solving courts began as a response to escalating and widespread frustration with the criminal justice system's failure to effectively address the drug problem other than through revolving door incarceration. The courts faced huge caseloads and increasing public dissatisfaction. The first drug court was in Dade County, Florida.

Raine noted that traditional courts focus on the *past*, while problem-solving courts seek a *future outcome*. They seek to use the coercive power of the courts to change the behavior that brings individuals into the criminal justice system in the first place. Offenders have the opportunity to elect treatment in lieu of incarceration. If the offender keeps his commitments, then the court will dismiss the charges. If the defendant rejects the offered program or fails to meet his commitments, then he would be incarcerated.

One difference between this program and offers of probation that are conditioned on mandatory treatment is that the problem-solving court stays in the offender's life over an extended period of time. The offender must frequently report back to the court. Recognizing that recovery involves setbacks, the drug courts employ a system of graduated sanctions and rewards, in contrast to traditional courts in which the defendant is given only one chance, after which probation is revoked and the offender incarcerated. Sanctions for falling off the program are graduated,

and they escalate until the point where the court concludes it can no longer work with the offender. Raine posited that this is a much more realistic approach to rehabilitation. The drug courts partner with educational and vocational agencies and mental health providers in order to provide the offender with the resources he will need to succeed. The enhanced role of technology has made it easier for the courts to keep track of the offender's activities. Raine noted that Judge Kaye<sup>31</sup> once stated that the cases may be simple, but offenders' lives are very complicated.

Finally, Raine mentioned that there are now more than 700 drug treatment courts throughout the country that have begun operation since the first drug court was created in 1989. Most of these are supported by federal funding. In addition, there are more than 200 domestic violence courts.

Judge Leis prefaced his remarks by thanking Wexler and Winick for giving a name — therapeutic jurisprudence — to what he has been doing for quite some time. Judge Leis began his judicial career in family court where he realized that there had to be more to judging than finding someone guilty or innocent. The traditional role of courts was that of neutral arbitrators, fact-finders or supervisors of juries and evidence. The thought of the court taking on a more empathetic role, engaging in dialogue with litigants to help resolve underlying problems, is alien to many participants in the system, including many judges. Many judges fear being transformed into glorified social workers without any

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<sup>31</sup> Judith Kaye is the Chief Judge of New York.

training. Those with a proclivity for a broader vision for judges are generally self-educated, using their free time to learn about the behavioral sciences. Judge Leis noted that judges have always played a wider role, even before “problem-solving” courts, specifically in guardianship, matrimonial and family court.

Now judges are systematically being called upon to take a more holistic approach, to use the law as a therapeutic tool to improve the emotional well-being of those affected and resolve the underlying social and behavioral problems that brought the offender to the court. Litigants are able to experience some catharsis in the controlled atmosphere of the courtroom with a judge who is willing to listen and has the resources to assist. Suffolk County’s is the fourth integrated domestic violence court in the state. The court has jurisdiction over all matters that bring a family into the court system where the underlying issue is domestic violence: one family, one judge. This eliminates the need for litigants to make multiple appearances in multiple courts.<sup>32</sup>

A good deal of controversy surrounds these courts, especially with respect to criminal justice. Judge Leis said that it is essential that the offender *speak* and that the judge *listen*. He noted that this can “try the patience of a saint.” The judge must acknowledge and then transcend her own strong emotional reactions in order to be effective. The offender needs to learn that attempting to control another human being through the use of

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<sup>32</sup> Judge Leis noted that otherwise a case could potentially be pending in five courts before nine different judges.

physical, psychological, emotional or economic abuse will not be tolerated by the judicial system. There needs to be a fair but firm penalty for this conduct, and the judge must inform the offender that further acts of violence will be dealt *severe* penalties. In contrast to the expectation that drug addicts will relapse during their recovery period, domestic violence courts tolerate *no* repetitions of this conduct. If injury occurs there will be significant incarceration. Judge Leis noted that placing a batterer in jail can be healing for offender and victim. The court also addresses the needs of the victim. She gets safety, security, sympathy, rather than blame, and support resources including *pro bono* legal services. The challenge for the court is to temper its concern for the plight of the complainant with the due process rights of the alleged offender and the presumption of innocence. Courts must be careful to remain neutral in setting bail and granting orders of protection.

Winick then spoke about mental health courts. Many psychiatric patients, often homeless and out in the community, discontinue taking prescribed medication. This results in yet another revolving door; many commit minor offenses. Jails are ill equipped to deal with the offenders' clinical needs. In fact, jail is the worst possible place for the mentally ill. Imprisonment is enormously stressful, and the offenders decompensate further. The mental health court seeks to divert individuals from the criminal justice system into the appropriate system for treatment. In the emerging model of the mental health court, the judge is a member



of the treatment team. Many of the key scenes in the drama are played out in the courthouse, with the judge playing the role of director.

Winick raised a number of questions for discussion. Is this an appropriate role for a judge? Does it corrupt the judge's ability to be a neutral fact-finder? Can the judge take off her therapeutic hat and become a traditional judge, or does the judge need to recuse herself and have another judge consider the issue? Does it raise considerations of due process? What about the role of the defense lawyer? Can that defense lawyer be part of a team effort designed to rehabilitate the client and still be a defense lawyer? Is that consistent with the defense lawyer's role of looking out for the client's liberty? Is there due process in this new model, or is due process going by the boards? What protections can we build in to prevent that from occurring? Do these new courts work? Do we have enough results to know? There have been accusations of paternalism — is this benevolent coercion?

Raine shared data while admitting that until recently, the research on drug courts has not been sufficiently rigorous. Some of the work that has been done strongly suggests that these courts have had a statistically significant impact on reducing recidivism and substance abuse. For those who participate in the drug court program, the rate of recidivism has been about 13%, compared to 35% for drug offenders in other courts.<sup>33</sup> Those who complete the

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<sup>33</sup> Steven R. Belenko, *Research on Drug Courts: A Critical Review*, 2 NAT'L DRUG CT. REV. 1 (1999). The 35% figure includes those who fail to "graduate" from drug treatment court. *Id.*

court-mandated treatment program are two to six times more likely (60% compared to 10-30%) to remain in treatment a year later as compared to others who voluntarily enter treatment.<sup>34</sup> Raine mentioned that evaluations of other problem-solving courts are underway but that these courts have not been in existence long enough for the collection or analysis of any meaningful data about their results.

Judge Leis admitted to being less concerned with due process issues than many of the defense attorneys who appear before him. A judge has the responsibility to disregard evidence or information that is inadmissible. The judge need not recuse himself because he has learned information in the course of supervising a drug offender that would be inadmissible at trial. If juries can be expected to do that without any training or sophistication, why can't judges? A good judge does not pre-judge. At trial, judges often have to disregard information that they have heard previously, for example, when setting bail or conducting suppression hearings. In addition, the judges are hand picked for these specialized courts based on their affinity for a therapeutic style. Furthermore, the offender is not coerced. Rather, the offered program is a carrot, an incentive. If the offender prefers to go to trial he is entitled to do so. In Judge Leis' experience, the court's retention of jurisdiction over the offender does motivate behavioral changes. Winick added that perhaps we

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<sup>34</sup> *Id.*

need to develop a different canon of judicial ethics for judges in the therapeutic courts.

The role of the defense attorney, Raine said, is a tough issue. How do we define effective lawyering? What is it, and is it changing? Raine spent years as a criminal defense attorney begging judges for treatment for her clients. Then, when drug treatment courts were created, her reaction was, "Over my dead body."

Raine emphasized that the drug courts have not done away with the panoply of existing constitutional rights. In the traditional system, a defendant may waive any number of his rights. We make choices all the time within the context of the criminal justice system. We advise our clients to waive their rights if we believe it is in their best interests to do so. The issue of whether the client should submit to the jurisdiction of the problem-solving courts is similar. Raine suggested, however, that it is important for defense attorneys to be included in the *planning* of the problem-solving courts, in order to maximize protections of clients' rights.<sup>35</sup>

A member of the audience asked whether victims are asked whether they favor this approach. Judge Leis stated that the district attorney speaks to the complaining witness before an offer is made to the offender to have his case diverted to the integrated domestic violence court.

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<sup>35</sup> See generally Martin Reising, *The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process*, 38 CRIM. L. BULL. 216 (2002).

One member of the audience was troubled by what he perceived to be a new role for lawyers. "I didn't go to law school to become a social worker. We studied the *adversarial* system, and that's what we studied to practice. Has the definition of effective lawyering changed since I graduated from law school thirty-five years ago? No one asked me to vote!" The panel responded that most lawyers and judges are still practicing in the same system in which the gentleman was trained. Judge Leis said that at first, attorneys are extremely reticent about the integrated domestic violence court, but when they see their clients *not* recidivate, their views tend to change. Another member of the audience suggested that this approach increased the alternatives available to clients. Raine commented that although she had been a zealous advocate, at the end of the day she often felt she was part of a mill and had achieved little of lasting benefit for her client. Winick emphasized that practicing before problem-solving courts required some new skills and that this need for different skills had been the message of the entire Conference.

### ***Second Panel***

The second panel in the institutional strategies track was *Alternatives to Litigated Dispute Resolution*, moderated by Touro Law Center Professor Barbara Swartz. She was joined by Touro Law Professor Hal Abramson, John Buonora, Chief Assistant District Attorney for Suffolk County, and Elizabeth Reingold, a practitioner of collaborative law.

Frustrated with the traditional adversary system, Professor Swartz first took a mediation course in 1983. She noted that she better understood her frustration after having taken the personality inventory Professor Daicoff had administered the previous day. She had scored highest on feeling and caring — and people with those attributes are the lawyers who feel most alienated from the legal system. What Swartz, then a patients' rights advocate, sought was a way to level the playing field for the underdog and help her clients make decisions that worked for them. How could she best help them do this? How could she empower them to work through power imbalance and find their voice? At the end of the day, the professional gets to walk out of the room, but the parties have to continue to live with their decisions. If individuals are making their own choices they are more likely to adhere to their agreements.

Swartz discussed the qualities that make a good mediator. What special qualities does a lawyer/mediator bring to the table? First, one needs to have a proclivity for it; this is a matter of personality. Another essential qualification is good listening skills; one is listening for the interests and motivations behind what the disputants are saying. Furthermore, it is important for the mediator to remain sensitive to both sides and respectful of their needs.

Mediation allows a client the *time* to be heard. Its advantages include that it doesn't channel the disputant's complaint into a legal box. It isn't necessary to define it as a tort

or breach of contract. But mediation does demand legal as well as non-legal creative problem-solving skills.

Swartz noted that good lawyers already have many of the skills necessary to be a successful mediator. Lawyers are used to dealing with conflicts, especially conflicting facts. Lawyers are skilled at interviewing and digging for information. They are used to preserving confidences. Furthermore, lawyers are trained to listen carefully and ask good questions, even though the listening of a mediator and the kind of questions mediators might ask could be different. Lawyers know how to negotiate and appreciate the importance of understanding the other side's point of view in order to negotiate successfully.

Professor Abramson then spoke about the role lawyers can play *as lawyers* in mediation. Abramson, an expert on alternative dispute resolution, recently completed a book on representing clients in mediation.<sup>36</sup> Abramson showed a clip from the movie, *Erin Brockovich*<sup>37</sup> to demonstrate positional negotiation. In the typical negotiation, the dispute is generally focused on money, and only money. The parties make offers and counteroffers, often backed by threats. The difficulty is that positional negotiation leaves little space for finding creative solutions. There is pressure to move toward the middle, to split the difference; this positioning is symptomatic of not only lawyering, but of our culture in general.

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<sup>36</sup> HAROLD ABRAMSON, *MEDIATION REPRESENTATION - ADVOCATING IN A PROBLEM-SOLVING PROCESS* (2004).

<sup>37</sup> ERIN BROCKOVICH (Universal Studios 2000).

Abramson then spoke about how lawyers can develop different kinds of negotiation strategies. When he trains litigators, Abramson asks them to put aside their courtroom skills. If one wants to get the full benefits of mediation, one must have a strategy applicable to this form. It is very hard work for lawyers to make this shift and to look at possibilities for resolving a problem other than splitting the pie. These possibilities may yield integrative solutions. One starts by asking different questions. What do the parties *really* want at the end of the day? What's the client's *goal*, rather than his *position*? For example, an employee who complains that he was wrongfully laid off may claim he wants back pay. But perhaps his underlying *interest* is financial security, and maybe that can be obtained another way. The client is generally fixed on a *position*. In the matrimonial arena, the client's position may manifest itself as, "I want visitation rights *every* weekend." But the client's, underlying *interest* may really be, "I want a quality, sustained relationship with my children." Approached from this perspective, the solution might look very different. Lawyers in mediation can help their clients brainstorm options and find one that best meets the needs of both parties.

Elizabeth Reingold, the next speaker, discovered after only a few years of practice that she didn't want to fight anymore. She had been trained to fight; she had practiced in the U.S. Attorney's office, the District Attorney's office, and in a large litigation firm. At first, it didn't even occur to her that she wanted an alternative way to practice law. But then she found mediation and became

happily ensconced as a mediator for several years, mostly handling matrimonial disputes. Still, there were cases that troubled her, cases that, for various reasons, she believed inappropriate for unrepresented mediation. At the time, however, she knew of no other alternative to litigation. Some couples were so emotionally intermeshed that they were incapable of reaching a resolution and letting go. She found herself unable to disentangle them, and the parties refused to take any other path. It ended up costing them more time and more money than if the parties had had lawyers. She realized the process would work better if there were lawyers involved.

At about the same time, Reingold discovered collaborative law, developed by Stuart Webb of Minneapolis, Minnesota. One day, Webb got tired of his family law practice and decided he would not go to court any more. Joined by a couple of colleagues, he created what is now known as the collaborative law model. When committing to this model, parties agree from the outset that they will not go to court *with these particular lawyers*. If a settlement cannot be reached, these lawyers withdraw and the parties have to find other representation. The value of this approach is the commitment of the attorneys *not* to litigate. All parties know they are all pulling for the same result — no litigation. The lawyers are there to support their clients in reaching that result. Everyone is committed to candor in disclosure of financials, to using neutral experts, and to interest-based negotiation.



The last panelist was John Buonora, who characterized his contribution as “how to teach old dogs new tricks.” Buonora was a prosecutor from 1968-1980. He returned to the District Attorney’s Office in 2002 after twenty-two years in general private practice with his own firm. In 1978, he helped establish a community mediation center in Coram, one of the first of its kind in the United States. He found that as a businessperson in his private practice, he never had the time to do all that he needed to do. The easiest part of trial practice was the trial; the rest was preparation, adjournment, preparation, adjournment, preparation, adjournment, until you don’t prepare, and that’s the day the case would be on. Although Buonora loved private practice, he doesn’t miss its stress.

Buonora noted that many lawyers see alternatives to litigated dispute resolution (ADR) as a threat to their livelihood and view court-annexed ADR programs as a threat to their freedom to practice law as they see fit. But these alternatives are typically less restrictive, less expensive, and more expeditious than traditional litigation. We are a profession that is slow to accept change. The ADR community must convince the private bar that it is a good thing for their clients and their practices. “It’s not harder,” he concluded. “It’s just different.”

*Track II: Individual Strategies**First Panel*

The first panel in the individual track was *Lawyering & Spirituality*, featuring Professor Tim Floyd, practitioner Arnie Herz, and Fred Rooney, Director of the Community Legal Resources Network Program at the City University of New York Law School (CUNY). The panelists discussed the ways in which their spiritual and religious beliefs have informed their work and ways that practitioners can integrate their belief systems into their relationships with clients and adversaries to enhance the meaningfulness of their professional lives. Professor Floyd is a professor of law at Texas Tech University School of Law. Over the years, Floyd interviewed numerous practitioners on how their faith informs their legal practice. Out of this work came a symposium issue of the Texas Tech Law Review on faith and the law.<sup>38</sup> Floyd solicited personal essays from lawyers and judges about their religion, their spirituality and their faith. He originally sent out four or five inquires, requesting that recipients forward the inquiry to others who might be interested in writing. He received forty-six responses that included a wide range of lawyers of various faiths. By and large, the answers he received affirmed that it is possible to be true to your faith and be a successful lawyer. The writers discussed the ways in which their faith informed their

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<sup>38</sup> Symposium, *A Symposium Precis*, 27 TEX. TECH. L. REV. 911 (1996).

day-to-day law practice by engendering qualities of courage, humility, empathy, balance, and forgiveness.

Floyd noted that all over the country, groups of lawyers meet and discuss the relevance of their religion to their work. Who you truly are, said Floyd, needs to be consistent with the work you do. For one whose beliefs and actions are in conflict, the dissonance is likely to create psychological problems.

Fred Rooney offered that this was the first time he had ever had the opportunity to talk about spirituality in front of an audience. He was raised with the message that religion is something one just doesn't talk about with others. Rooney was encouraged by recent developments that have allowed us to talk about the relationship of our spiritual lives to our work as lawyers.

A member of the first graduating class of CUNY law school in 1986, Rooney recently returned to his alma mater from his home in Bethlehem, Pennsylvania as director of the newly formed Community Legal Resource Network. The Network provides financial, informational, and emotional support to approximately 120 lawyers trying to sustain the ability to do *pro bono* work and modest income practice. It also assists members in integrating their roles as lawyers and spiritual beings. Generous support from the Nathan Cummings and B.A.U.M. Foundations enabled the creation of a program of contemplative practice at CUNY. It offers twice weekly classes on meditation and yoga which are available to the network lawyers and the entire law school community. Faculty, students, and staff practice together.

Through their practice, participants are able to significantly decrease the stress they experience in their lives.

The last panelist, Arnie Herz, spoke of the role of lawyers as healers. Herz stated that we are here — consciously or unconsciously — to help people, to help them heal. Inspired by Gandhi, who took four years between university and law school to develop his spiritual understanding, Herz embarked on his own journey, seeking deeper access to his spirituality. This journey inspired him to become a lawyer in order to help others. After law school, Herz went to work at a large, prestigious law firm, all the while endeavoring to maintain his practice of daily meditation. After he developed his own practice and his life became even busier, Herz continued to maintain his daily practice of yoga and meditation.

Herz relayed a story about a client who was a very successful businessman. The client had sold his business to a competitor, executed an agreement not to compete, and retained a substantial financial interest in the newly merged business. But things had not gone as the client envisioned, and he was furious with what the competitor had done to the business. He came to Herz insisting that he wanted to “destroy these people,” and he was willing to pay \$100,000 in legal fees to do so. Herz believed the client had a strong case, but before agreeing to bring suit, asked the client a question: “If you could have anything you want out of your life, what would your life look like six months from now?” The client didn’t hesitate: “I’d be free of these idiots. I could make a

lot more money elsewhere.” Herz told the client that as his lawyer, he wanted to support the client in achieving this goal and that bringing a lawsuit was certainly not the way to achieve it. The client, irate, insisted he was unwilling “to let them get away with this,” and was prepared to find another lawyer. As he was packing up to leave, Herz said to him: “You are one of the weakest people I have ever met. You don’t have the strength to hold your own anger, and you are sabotaging yourself. I’m here as your lawyer to support you to get *what you want*. And,” he added, “I bet this shows up in all areas of your life.” The client stopped and sat down again. Herz succeeded in freeing him from his agreement not to compete, and the client went on to make millions of dollars. Meanwhile, the other company went into bankruptcy, so if the client had sued and won, he wouldn’t have collected anything. Even more significantly, the client became committed to not letting his anger control his life.

How do you find the time to have a contemplative practice? How do you integrate that into your practice? Herz realized he needed to re-prioritize his life after being told that he needed open heart surgery. His priorities went from (1) work, (2) family, (3) health, and (4) spirituality to (1) spirituality, (2) health, (3) family then (4) work. He stressed how critical it was to keep perspective and maintain balance.

A member of the audience who wrote a book on ethics and spirituality said that many of his clients come to him to represent them because they see him as honest and ethical. Another member

of the audience who declared her commitment to represent the *whole* person voiced her frustration at the resistance she faces from other lawyers and the system. Members of the panel suggested strategies for dealing with that resistance.

Lynn Cahalan asked about whether one should raise the subject of spirituality with one's client. Floyd responded with a story about his representation of a death row inmate who had recently been executed. He believes that both he and the client were better able to face the client's death because of the spiritual sharing he had done with this client. Herz responded that he doesn't wear his spirituality on his sleeve. Clients are interested in results. He is able to deliver results that consistently exceed his clients' expectations because of his spiritual understanding. He does, however, sometimes do some "nondenominational" exercises with clients to bring them into a posture of clarity.

From the audience, Jean Koh Peters spoke of the importance of finding places in our lives where we find our true selves. It need not be yoga or meditation; it might be gardening, journaling or baking. Lawyers also might do visualization exercises: imagine your future self, ask advice or support from your future self.

Another member of the audience asked what happens when your professional obligations conflict with your personal moral beliefs. Floyd said that he frequently hears this concern from his students. In his own practice, however, he hasn't found such a direct conflict. As a producer of lawyers, he chooses not to

believe that most people who graduate from law school are in it for bad reasons. Rooney responded that such concerns had dictated what kind of law he chose to practice and what clients he chose to represent. Herz said that once he gets his client clear on what he or she really wants, it is invariably something good, so, therefore, he experiences no moral conflicts.

### *The Second Panel*

The second panel in the individual strategies track was *Pro bono & Healing*. The panel was moderated by Tom Maligno, Director of Career Development and Public Interest Law at Touro Law Center. He was joined by Sandra Covington, a lawyer with Cowen, Liebowitz and Latman, and Joe Genova, the partner at Milbank, Tweed, Hadley & McCloy who is in charge of the firm's *pro bono* program. Before coming to Touro, Maligno was Executive Director of Nassau/Suffolk Law Services. He also serves as a consultant to the ABA on *pro bono* issues and was previously the *pro bono* coordinator on Long Island.

In the course of my work on the emotional experiences of lawyers doing September 11th *pro bono* representation,<sup>39</sup> I learned that in profound ways, taking on September 11th cases was helping lawyers heal from their own traumatic experiences. Sandra

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<sup>39</sup> Marjorie A. Silver, *September 11th, Pro Bono, and Trauma*, CONTEMP. ISSUES L. (forthcoming 2004).

Covington was one of the attorneys I interviewed and I found her story incredibly moving.

Ms. Covington shared that she was raised in a culture of volunteerism and began volunteering her time in junior high school, and continued in college when she worked with AIDS patients at a women's health initiative in the Bronx. She went to law school assuming she would continue with volunteer work as a lawyer. However, she found it extremely difficult to find the time to do so once she was engaged in practice.

Before September 11th, Covington had done no *pro bono* work, and did not feel competent to take on the kind of *pro bono* work of which she was aware. After September 11th, she answered the call of the Association of the Bar of the City of New York (City Bar) and undertook the representation of a man who would take her on an emotional roller coaster. Her client had lost his domestic partner and had an array of problems, only some of which were legal. The City Bar provided support and training that enabled her to appreciate the applicability of the legal skills she had developed as a trademark attorney to her new undertaking. The support and mentoring she received were invaluable; for example, when her client needed a financial planner, the City Bar gave her a list of CPAs who were volunteering their time to help survivors with tax issues. In addition, she received advice from her client's psychiatrist regarding ways to speak with her client when his emotionalism interfered with his ability to attend to his legal matters.



Maligno and Genova discussed how the overwhelming response to September 11th was a manifestation of the *need to do something*. Lawyers responded strongly, as did members of society at large. Unfortunately, it was Genova's perception that the ethic of *pro bono* that was so strong after September 11th has not translated into other areas of extreme need as some had hoped. Maligno perceived the same to be true on Long Island. While there were some individuals who have continued doing *pro bono* work unrelated to September 11th because of their September 11th experience, the levels of volunteerism had substantially returned to what they were before September 2001.

Genova confessed that he did not enter into *pro bono* work based on altruistic motives. Rather, he felt the only relevant experience he had in law school was the work he had done in a clinic representing prisoners. He continued to do work that focused on helping individuals — in contrast to his corporate litigation practice — and because of this, almost by accident became the firm's *pro bono* point person. Although he began by trying to make his academic pursuits more relevant, the *pro bono* work continues to be what keeps him going: "One of the things that continues to sustain me is the relationship with clients. Very few multi-million dollar corporations will give you a hug at the end of the transaction. Very few people will say through their tears that without you I would be sleeping in the street." He mentioned an asylum case he had successfully won the week before the Conference: "I didn't know who was going to stop

crying first, my two lawyers or the clients who sustained a very long-shot asylum case.”

Genova reported that contrary to much belief, most *pro bono* work in New York is done by small firms and solo practitioners, not large law firms. This may be so for many reasons, including the willingness of such practitioners to earn a more modest income. In addition, they tend to be more integrated into their communities. There is no way to generate large incomes for partners without enormous *billable* hours, and big firms are less likely to be involved with their local communities. “Big firms like mine with an international practice,” Genova said, “with clients that are global, don’t hang out at the Little League games.”

Some of the members of the audience shared their reasons for doing *pro bono* work. One who had attended City University for free said he wanted to give back. Another who described her practice as “a small mom and pop solo practice,” frequently gives free consultations. She spoke about the difference she was able to make for many tenants and applicants for bankruptcy that didn’t require her to commit a great deal of time. She estimated that she spent about ten to fifteen hours a week on this work and that it didn’t take away from her practice.

Maligno noted that Long Island has long had a strong *pro bono* ethic. He discussed formal and informal efforts by religious and other organizations, individual law firms and numerous practitioners that have donated thousands and thousands of hours.

Maligno cited the bankruptcy clinic as one of many successful *pro bono* programs.<sup>40</sup>

A member of the audience asked about the availability of *pro bono* training. Maligno noted the hundreds of programs offered on Long Island and elsewhere that provide training for lawyers lacking the requisite experience. He cited family law and matrimonial litigation in particular. Incentives often include a free coupon for a CLE course for every completed case and waiver of the annual registration fee for retired attorneys. Also, many programs carry their own malpractice insurance, removing another barrier for many uninsured lawyers who want to do *pro bono* work.<sup>41</sup>

What about a negative *pro bono* experience? What if a lawyer discovers that her client had been lying from day one? Genova suggested that a lawyer may then feel not only abused, but concerned that her own integrity had been compromised. It is important for the attorney to be able to fix what went wrong and to receive support in trying to get her “back on the horse” as soon as possible.

Genova said that he is often asked about the difference between *volunteerism* and *pro bono*. While Genova acknowledged the importance of other kinds of volunteerism — for the

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<sup>40</sup> The *pro bono* bankruptcy clinic is a joint project of the New York, Nassau, and Suffolk County Bar Associations and Nassau/Suffolk Law Services.

<sup>41</sup> The website <http://www.probono.net> was cited as an important resource for interested attorneys.

symphony, for example — the focus of *pro bono* legal work is to address the unmet legal needs of the poor.

### *Taking the Conference Back Home*

The last segment of the Conference was a wrap-up session designed to help the attendees assimilate what they had learned over the course of the two days and identify what tangible steps they planned to take to effectuate positive change in the way they live and practice law. It also was intended to give those of us who planned the Conference feedback on what kinds of follow-up programs would be of interest.

I asked participants to share — either vocally or in writing — answers to the following questions: What can you take out of this Conference and take back to your practice and your clients? What topics have resonated for you? Over the course of the two days we had perceived a hunger for what the program had offered. Did you originally come to the Conference because it was a convenient way to get CLE credit? If so, would you choose to attend a similar program because of the topic itself in the future? What are the most important things you learned from this Conference? We asked participants to identify and share one *action step* they would take away with them.

Most participants were reticent to share their thoughts aloud, but we received many written responses. These identified actions including the following: engage in active listening with clients; see whether active listening will change how I practice

law; be more attentive to client's goals; help the client understand his/her goals; pursue mediation; be less aggressive with adversaries; be more available to people I work with; regain my inner spirituality; get over fearing that by being sensitive I will be perceived as weak or a poor advocate; use the qualities that are inherently me; make more time for myself to *de-stress*: that is, take care of myself so I can better take care of my clients; pursue meditation and yoga to reduce stress; develop empathy; take a vacation; smell the roses, go home earlier; get another perspective; find another profession. Others shared that because they weren't their own bosses they felt their options for change were limited. I repeated something one of the presenters had said at lunch the previous day: life is ten percent what happens and ninety percent what we make of it.

With that, the Conference concluded, and the participants departed into a late April snowstorm. But the Conference lives on in these pages and in the memories of those who gathered for two intensive days of exploration of alternative ways of living one's life in the law. On a personal note, the success of the Conference has reinforced my commitment to continue this work in my writing and my teaching. This was my dream conference. Now my dream for legal education is to insure that our students have access to the myriad possibilities explored at the Conference and to offer them the widest possible alternatives for finding joy and satisfaction in their own legal lives.