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Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting

JEAN R. STERNLIGHT*

I. INTRODUCTION

Many believe that lawyers' adversarial methods and mindsets are inherently inconsistent with mediation.¹ Lawyers' emphasis on advocacy and winning is seen as ill-suited to mediation's nonadversarial, problem-solving approach to dispute resolution. Yet, as mediation grows increasingly common,² lawyers are frequently accompanying their clients to

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¹ See *infra* Part II.A. A popular poster in the 1970s stated that "a woman without a man is like a fish without a bicycle." Some might say the same simile applies to the relationship between mediation and lawyers—i.e., that a mediation without a lawyer is like a fish without a bicycle.

² The increasing reliance on mediation is due both to some states' requirements that parties mediate certain disputes before taking them to court and to parties' voluntary acceptance of mediation. Florida, for example, currently permits judges to require mediation in all but a very few cases, see FLA. STAT. ANN. § 44.102 (West 1998); FLA. R. CIV. P. 1.710, and requires mediation of "custody, visitation, or other parental responsibility issues" in "circuits in which a family mediation program has been established." FLA. STAT. ANN. § 44.102(2)(b) (West 1998). See generally Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or*

mediation and often play a critical and direct part in the process.³ Particularly where disputes are complex or involve relatively large sums of money, it is likely that one or both disputants will be represented by an attorney at the mediation.

Although lawyers are participating in mediation in record numbers, little has been written regarding what role such lawyers are or should be playing in the mediation process.⁴ Two fundamental and interrelated normative questions must be addressed.⁵ First, should an attorney representing a client in mediation serve as an advocate for that client, or should the attorney play a different, less adversarial role when representing a client in mediation? Second, how active should the attorney be in the mediation process, and how should she relate to her client in the mediation? For example, should the lawyer play the role that many play in court, by doing most of the talking for her client and also serving as a buffer between her client and other mediation participants? Or, should a lawyer take what some have called the "potted plant approach" and basically sit quietly in the room and allow the client to be the primary participant in the mediation?⁶

Required? A New Ethic, 38 S. TEX. L. REV. 575, 577 (1997) (discussing an increase in statutorily mandated mediation from 1989 through 1995); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1398-1400 (1995) (detailing which jurisdictions now either mandate or allow voluntary participation in mediation); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 31 (1982) ("But in the last decade, mediation programs have proliferated at a breathtaking rate in this country.").

³ The extent to which lawyers attend mediations varies according to both the nature of the dispute and the culture of the jurisdiction. See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 883 nn.205-207 (1997). Lawyers are far more likely to attend those mediations in which a great deal is at stake than they are, for example, to attend mediations of small claims type disputes. See also McEwen et al., *supra* note 2, at 1359-1360 (observing that in Maine lawyers are more likely to attend divorce mediations than they are in some other jurisdictions).

⁴ See *infra* Part II for a review of the literature discussing the appropriate role of the lawyer/representative in the mediation process.

⁵ This Article focuses primarily on the lawyer's role during the mediation session itself and does not attempt to address such related questions as how an attorney ought to decide whether mediation is appropriate, how the attorney ought to prepare a client for mediation, or how the attorney should review a tentative agreement that has been reached in mediation.

⁶ See JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 370-371 (2d ed. 1996) (discussing alternative potential roles of lawyers as

Are there other options? Although mediators may often attempt to control the attorney-client relationship by asking the client to play a direct role in the process, attorneys often have a critical impact in determining how they and their clients should behave in mediation.

This Article argues that attorneys need not and ought not to abandon their advocacy or even their adversarial approach in mediation. Properly understood, attorney advocacy and even "adversarialness" are entirely consistent with mediation.

Nonetheless, this Article crucially contends that attorneys must redefine their method of advocacy or role to fit the mediation forum. Lawyers should seek to serve their clients' best interests, but they should recognize that traditional hard-nose, uncooperative litigation tactics may often harm rather than help their clients in mediation.⁷ They should work with their clients to choose an approach which best serves the clients' needs and interests in the particular dispute.

To structure their appropriate role in a particular mediation, lawyers should draw upon work that has recently been done by economists and psychologists in analyzing "barriers to conflict resolution."⁸ Focusing, in particular, on the principal-agent relationship between clients and their lawyers, lawyers ought to understand how their own economic incentives and psychological makeups may diverge sharply from those of their clients, sometimes causing harm. These disparities between the perceptions and incentives of lawyer and client may at times impede settlements that would serve the best interest of the client or principal.⁹

"silent advisor," "co-participant," or "dominant or sole participant" and noting lawyers' "I'm not a potted plant" tendency to interject themselves unnecessarily into the mediation process).

⁷ Nor, of course, are such tactics necessarily desirable in litigation.

⁸ The phrase, "barriers to conflict resolution," is taken from the title of one of the leading books in the field. *BARRIERS TO CONFLICT RESOLUTION* (Kenneth Arrow et al. eds., 1995). See *infra* Part IV for further discussion of this literature. Whereas Jennifer Brown and Ian Ayres argue that it is the caucusing aspect of mediation which is most important in overcoming barriers to a negotiated agreement, this Article focuses on the group sessions as critical to surmounting problems that exist between attorneys and their own clients. See Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325-326 (1994). The approaches are not inconsistent, in that both the group sessions and caucuses employed in mediation may possibly prove useful in surmounting negotiation barriers. See *infra* note 223 for further discussion of this distinction.

⁹ As many practicing attorneys, including this Author, have observed, these disparities may render the internal negotiation between a lawyer and her own client

Psychological or economic divergences between lawyers and their clients will also sometimes cause a settlement to be reached that is inappropriate in that it does not serve the client's best interests.¹⁰ Attorneys who are not conscious of these divergences will sometimes engineer settlements that their clients would not have accepted if they had full information.¹¹ Negotiated agreements are not always preferable, per se, to litigated solutions.¹²

At the same time, not all divergences between lawyers and their clients are undesirable. In several recent articles, Professor Robert Mnookin and others have suggested that attorneys' participation in negotiation may lead to mutually beneficial settlements that would not otherwise have been possible.¹³ Professors Russell Korobkin and Chris Guthrie have presented

more difficult than the negotiation the lawyer is conducting on behalf of the client with the opposing party or her attorney. *See, e.g.*, ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION 283-284, 346-347 (1990) (discussing attorney-client conflicts and also discussing the attorney's ego-involvement in negotiations); GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 59-69 (1983) (discussing conflicts that occur between attorney and client in the negotiation context and citing a study showing that disputes frequently fail to settle despite the attorney's recommendation); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 24-25 & n.75 (noting that cases often fail to settle not because attorneys fail to reach agreement amongst themselves but rather because lawyers fail to "bring . . . along" their clients, and emphasizing the importance of attorneys' negotiations with their own clients).

¹⁰ A rich literature also argues that negotiated agreements often may not serve the public interest. *See, e.g.*, Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

¹¹ *See infra* Part IV.B. Of course, the mere fact that lawyers become aware of divergences with their clients does not ensure that the lawyers will set aside their own selfish interests to better represent their clients. But, knowledge of such divergences will at least increase the likelihood of improved representation.

¹² While court administrators or thrifty legislators may seek to eliminate costly trials in favor of negotiated solutions, it is wrong from a public policy standpoint to assume that negotiated agreements are always preferable. At times parties may seek the publicity and precedential value of litigation. Moreover, a particular settlement may be less valuable to a party than the expected value of a litigated solution. Thus, the goal should not be settlements but rather "appropriate" settlements, those that serve the best interests of all parties. Some might argue that parties' interests in precedent or publicity must be sacrificed to the public weal. However, it is hard to see how this interest would be strong enough to favor *all* negotiated solutions over *all* litigated solutions.

¹³ *See, e.g.*, Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 J. LEGAL STUD. 331 (1997)

experimental evidence showing that attorneys are less subject to certain "irrational" psychological phenomena than are their clients, and thus may be able to encourage their clients to enter into beneficial settlements that they might not reach without assistance.¹⁴

Mediation is an extremely valuable dispute resolution technique precisely because it can potentially help to overcome problems created by the conflicts of interest and divergent psychologies between lawyers and their own clients. Mediation differs from unfacilitated negotiations by allowing clients to play an active in-person role¹⁵ and also by using a neutral third party to help bring the disputants to an agreement. Both aspects of mediation can allow parties to achieve settlements that serve their

(summarizing an experiment confirming the hypothesis that use of lawyers as agents may enhance rather than detract from clients' reliance on a cooperative approach); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 510, 512 (1994) (arguing that although most economic literature has modeled litigation "as a two-person game between principals," this model "abstract[s] away the legal system's central institutional characteristic—litigation is carried out by agents," and also suggesting that clients' reliance on attorneys as agents in negotiations may allow clients to cooperate more often than they could without such a mechanism); see also Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 238–247 (1993) (discussing the following four barriers to negotiation: strategic barriers arising out of game theory and economic analysis, principal-agent problems, cognitive barriers, and reactive devaluation); Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295, 315 (1989) (asserting that the disparities between interests of Pennzoil directors and officers on the one hand, and shareholders, on the other delayed settlement of that company's costly dispute with Texaco).

¹⁴ See Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82, 84 (1997). The authors observe, however, that so-called "rationality" is not necessarily better and that lawyers do not necessarily serve their clients' best interests by encouraging them to accept settlements that make sense from a rational standpoint. See *id.* at 125; see also *infra* text accompanying notes 212–215.

¹⁵ In litigation, when parties are represented by attorneys, settlement negotiations are typically conducted between the attorneys by phone or by mail. Clients generally play a role only in ratifying or rejecting the agreement reached between the attorneys. See Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: You Can't Always Get What You Want*, 12 OHIO ST. J. ON DISP. RESOL. 253, 256 (1997); Williams, *supra* note 9, at 24 (noting that historically lawyers have negotiated without their clients being present).

mutual interests and also prevent parties from entering into agreements that do not actually serve their interests.

The extent to which mediation can prove useful in bridging economic, psychological, and strategic gaps between attorneys and their own clients is crucially dependent on the roles played by the attorney and client in the mediation.¹⁶ No single lawyer's role is always best in mediation. Rather, the attorney's appropriate role in mediation should vary depending on which barriers seem to be impeding the appropriate settlement of a particular dispute. That is, while the attorney should remain an advocate for her client at all times, she should adjust the manner in which she attempts to further her client's interest depending upon which barriers are preventing the fair settlement of the dispute. For example, given many of the barriers, the attorney should frequently stop herself from dominating the mediation, instead allowing the client to play an active role in the process. In other situations, however, the attorney must be active and assertive to ensure that her client is not coerced by the opposing party or client. The attorney should not herself determine these relative roles, but rather should in most circumstances consult with the client regarding this issue.

While no single lawyer's role in mediation is always proper, lawyers need to be particularly vigilant in guarding against their own tendencies to behave in mediation exactly as they would in litigation. Instead, to serve their clients' interests, and in light of the conflicts of interest and perception between lawyers and their own clients, attorneys should often encourage their clients to play an active role in the mediation, allow the discussion to focus on emotional as well as legal concerns, and work toward mutually beneficial rather than win-or-lose solutions. Those lawyers who, seeking to advocate strongly on behalf of their clients, take steps to dominate the mediation, focus exclusively on legal issues, and minimize their clients' direct participation, will often ill serve their clients' true needs and interests. Such overly zealous advocates are frequently poor advocates.

Part II summarizes the existing literature regarding the role attorneys ought to play in representing their clients in mediation. It suggests that this literature has failed to consider adequately the economic and psychological underpinnings of the lawyer-client relationship in mediation. Part III then

¹⁶ The extent to which mediation is successful in overcoming such barriers may also depend on other factors which are beyond the scope of this Article, including the approach taken by the mediator. The "barriers" analysis outlined in this Article may prove helpful to mediators and policymakers seeking to determine the extent to which mediators should play an evaluative rather than purely facilitative role. This is another project.

addresses the fundamental question of whether lawyers should be advocates for their clients in mediation, or whether the nonadversarial mediation process ought to require lawyers to play a different role altogether. It concludes that while lawyers ought still to represent the interests of their clients, and in that sense serve as advocates, that it may well be appropriate to re-examine the nature of advocacy in the mediation process. Part IV then summarizes the economics and psychology literature regarding barriers to negotiation, focusing particularly on how these barriers may affect negotiations in which clients are represented by attorneys.¹⁷ Part V next shows how mediation can be used to overcome many of the barriers to negotiation that were discussed in Part IV. Specifically, subpart V.A shows how mediation can overcome economic barriers; subpart V.B discusses how mediation can overcome psychological barriers; and, most importantly, subpart V.C explains how mediation can surmount barriers to settlement that are caused by divergences between the attorney or agent and her client or principal. Part V makes clear that the client herself must typically play an active role in the mediation in order for the mediation to be successful in overcoming these various barriers to negotiation. Part VI next sets out a countervailing set of concerns, arguing that in certain cases attorneys must play a very active or even dominant role in the mediation in order to protect their clients from being tricked, abused, or taken advantage of in the mediation process. Part VII, finally, attempts to reconcile these competing concerns by offering attorneys a set of guidelines on how to determine their appropriate role in a mediation. It argues that attorneys should determine their appropriate role in consultation with their clients on a case-by-case basis and should carefully consider the economic and psychological factors that may be blocking amicable resolution of the dispute in determining what roles they and their clients ought to play in the mediation.

II. LITERATURE REGARDING HOW ATTORNEYS SHOULD REPRESENT THEIR CLIENTS IN MEDIATION

Surprisingly little has been written about what the role of the lawyer either is or should be in representing her client in a mediation. While a vast literature now describes, critiques, and praises various aspects of the

¹⁷ The Part also discusses how divergences between the interests and psyches of attorneys and their clients may bring about settlements that would not have occurred had the clients been unrepresented. *See infra* Part IV.B.3.

mediation process, most of this literature focuses on either the mediator, the mediation process in general, or the unrepresented client.¹⁸ Even those relatively few books and articles that seem, from their titles, to hone in on the lawyer's role in mediation often fail to discuss in detail how a lawyer should go about representing a client in mediation or how this representation should vary, depending on the circumstances.¹⁹

This gap in the literature is no doubt attributable both to the view, held by some, that lawyers ought not to advocate on behalf of their clients in

¹⁸ For example, Christopher Moore's otherwise excellent book spends only a page on the subject of representation issues and otherwise seems to assume that parties are representing themselves in mediation. *See* CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 146 (2d ed. 1996) (observing that lawyers who negotiate on their clients' behalf may create special problems for mediators in that many are familiar only with hard line positional bargaining). Similarly, Jennifer Brown and Ian Ayres' interesting analysis of economic rationales for mediation fails to focus on the fact that parties in mediation are often represented by attorneys. *See* Brown & Ayres, *supra* note 8. By contrast, an abundance of books and articles discuss whether a mediator should "evaluate" the disputants' claims or merely "facilitate" their agreement without providing any evaluation as to the validity of their claims. For a small sampling, see generally Symposium, 24 FLA. ST. U. L. REV. 839, 839-1010 (1997) (containing articles by James J. Alfini, Lela P. Love, Jeffrey W. Stempel, and Joseph B. Stulberg addressing the relative virtues of facilitative and evaluative mediation). Many books and articles also debate whether the mediator should seek to "empower" the parties or rather simply assist them in reaching an agreement. *Compare* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 81-112 (1994) (arguing that the primary value of mediation is to "empower" participants and to encourage them to "recognize" other persons' points of view, even if no settlement is achieved), *with* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 235-239 (1995) (book review) (critically reviewing the Bush and Folger thesis).

¹⁹ *See, e.g.*, DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (1996) (describing the mediation process, strategies, and issues in detail but organizing his discussion primarily around the mediator's perspective). Casebook authors John S. Murray, Alan Scott Rau, and Edward F. Sherman, in *Processes of Dispute Resolution*, do at least include several discussions that focus on possible alternative roles that may be played by the lawyer, *see* MURRAY ET AL., *supra* note 6, at 370-371, as well as on potential differences between the goals of lawyers and their clients. *See id.* at 71-72, 187-190. However, even these discussions fail to offer suggestions to the attorney on how to decide the extent to which the lawyer should be active in the mediation process, whether the lawyer should allow the client to vent, and whether or how the attorney should guide mediation discussion.

mediation,²⁰ as well as to the empirical perception that lawyers do not typically participate in mediation.²¹ However, now that more and more jurisdictions are requiring parties in major civil suits to attempt mediation before being allowed to proceed to trial,²² lawyers and their clients must address the question of what role the lawyer should play. In Florida, for example, three-quarters of the circuits responding to a survey reported that attorneys accompanied their clients to "circuit civil" mediation one hundred percent of the time, and the other one-quarter of responding circuits reported that attorneys accompanied their clients between fifty and eighty percent of the time.²³ While very little empirical work seems to have been done to verify this experience on a nationwide basis,²⁴ anecdotal

²⁰ See *infra* Part II.A.

²¹ See McEwen et al., *supra* note 2, at 1351 (observing in a section entitled "The Disappearing Lawyer" that "[c]ritics and proponents of mediation alike see the absence of lawyers as a defining aspect of divorce mediation") (citing STEPHEN K. ERICKSON & MARILYN S.M. ERICKSON, *FAMILY MEDIATION CASEBOOK: THEORY AND PROCESS* 173 (1988); RICHARD A. GARDNER, *FAMILY EVALUATION IN CHILD CUSTODY MEDIATION, ARBITRATION, AND LITIGATION* 504-505 (1989); HOWARD H. IRVING, *DIVORCE MEDIATION: A RATIONAL ALTERNATIVE TO THE ADVERSARY SYSTEM* 83 (1980); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 515-519 (1992); H. Jay Folberg, *Divorce Mediation—A Workable Alternative*, in *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* 11, 13 (Howard Davidson et al. eds., 1982); Robert Geffner & Mildred D. Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 BEHAV. SCI. & L. 151, 156 (1990); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1581 (1991); Joshua Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 500 (1991)).

²² See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* app.B (2d ed. 1994 & Supp. 1997) (listing significant mediation legislation on a state-by-state basis).

²³ SHARON PRESS & KIMBERLY KOSCH, 1998 FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM 122 (11th ed. 1998). "Circuit civil" mediations are those that arise out of the circuit courts—i.e., those not involving either family disputes or disputes for \$15,000 or less, which go to county court. *See id.* at 104.

²⁴ In 1991, the National Center for State Courts provided data which was analyzed in McEwen et al., *supra* note 2. The organization had surveyed approximately 1100 court-connected or court-referred dispute resolution programs. The data revealed 14% of the programs reported lawyer participation in most mediation sessions. *See id.* at 1322 n.18, 1331 n.72. However, the authors also found that in Maine, even in family law cases, lawyers both appear and participate actively. *See id.* at 1358-1360 (concluding that 78% of attorneys interviewed reported that they "almost always" attended mediation sessions and that another 17% reported that they usually did so). The authors recognized that parties are often unrepresented in divorce cases in general

information and the recent boom in books and continuing legal education courses geared to attorney advocacy in mediation confirm that lawyers are, in fact, accompanying their clients to many mediations.²⁵ The extent to which attorneys accompany their clients to mediations varies according to the custom of the area and also according to the type of case.²⁶ Lawyers are probably more likely to participate actively in large civil cases than they are in family or small claims disputes, where they may feel they have less to add and the client can less easily afford their fees.²⁷

The few works that do offer comprehensive suggestions on how attorneys can best represent their clients in mediation can be divided into the following two major categories: (1) those arguing that the attorney

and thus sought to measure the extent to which parties who were represented brought their attorneys to the mediation. *See id.* at 1359.

²⁵ *See, e.g.*, JOHN W. COOLEY, *MEDIATION ADVOCACY* (1996); ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* (1994); John B. Bates, Jr., *Using Mediation to Win for Your Client*, *PRAC. LAW.*, Mar. 1992, at 23, 24; *see also* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 429 (1997) (noting the existence of courses and books geared to teach litigators how to participate effectively in ADR proceedings).

²⁶ *See* Lande, *supra* note 3, at 883 (stating that while attorneys routinely attend mediation sessions in some jurisdictions, they rarely attend in others).

²⁷ Florida, by statute, encourages such a differentiation. The statute providing for court-ordered mediation treats the issue of attorney participation differently, depending on the type of dispute. As to circuit court mediation (disputes of more than \$15,000) the statute provides, "[i]f a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court." FLA. STAT. ANN. § 44.1011(2)(b) (West 1998); *see also* FLA. R. CIV. P. 1.720(b). As to county court mediation the statute provides: "Negotiations in county court mediation are primarily conducted by the parties. Counsel for each party may participate. However, presence of counsel is not required." FLA. STAT. ANN. § 44.1011(2)(c) (West 1998); *see also* FLA. R. CIV. P. 1.750(e). As to family and dependency mediations the statute sets out an intermediate standard:

Negotiations in family mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required, and, in the discretion of the mediator, and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.

FLA. STAT. ANN. § 44.1011(2)(d) (West 1998); *see also* FLA. FAM. R. P. 12.740(d) ("In the discretion of the mediator and with the agreement of the parties, family mediation may proceed in the absence of counsel unless otherwise ordered by the court.").

should play no role or virtually no role in the mediation and (2) those arguing that the attorney should participate very actively in the mediation in order to adequately advocate for the client and also protect her from potential harm.

A. The Argument that Advocacy Does Not Belong in Mediation

Mediation is a nonadversarial process in two senses. First, it is designed to encourage parties to work out mutually acceptable solutions to their disputes, rather than to allow one party to obtain a victory over the other. Second, the dispute is not presented to a neutral third party for resolution but rather is resolved by the parties themselves.²⁸

Given these key differences between mediation and litigation, some have argued that attorneys' participation in mediation as advocates for their clients is inconsistent with the goals of mediation. At the extreme, persons holding this view believe that mediation works best when attorneys are altogether excluded from the process.²⁹ Some states have implemented such a rule, at least in certain settings.³⁰

²⁸ For some varying descriptions of the nature and purpose of mediation, see generally BUSH & FOLGER, *supra* note 18 (arguing that the primary purpose of mediation is not to resolve disputes but rather to empower the parties and allow them to recognize or come to terms with each others' positions and points of view); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984) (offering a framework for effective mediation); GOLANN, *supra* note 19 (focusing, primarily, on the mediator's perspective in mediation); MOORE, *supra* note 18 (providing practical suggestions for mediators and others on how best to use the mediation process to resolve disputes).

²⁹ Mediators, in particular, are often uncomfortable with attorneys' adversarial, argumentative style and may feel the lawyer is a hindrance to a successful process. See McEwen et al., *supra* note 2, at 1331–1332, 1354–1355; see also THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* 174 (1989).

Having attorneys interact with the divorce mediation process in their usual adversarial capacity is perilous and, in fact, threatens to compromise the viability of the process. Unless they espouse the dispute resolution values embodied in the divorce mediation, lawyers are likely to become a disfunctional element in the process, not only jealous of its intrusion into their domain of competence, but also unable to adapt professionally to a situation of controlled and defused, rather than polarized and contentious, conflict.

Id.

To the extent attorneys participate in the process other than as parties or mediators, some argue they must do something different than merely represent or advocate for their own clients' interests. Commentator Mark Rutherford puts it plainly: "For mediation to succeed as a profession and to reach its highest objectives, advocacy has no place in any part of the process. For outside counsel to advocate a client's interests contradicts the very essence of mediation and can produce inequitable results."³¹ Instead, Rutherford urges, a party's private attorney should, like the mediator, play a neutral nonadversarial role. Such an attorney may provide advice to help ensure the mediated agreement is fair but should not attempt to help her client obtain an advantage over the opposing party.³² Professor Steven Hobbs, similarly, contends that the attorney representing a client in mediation should assume the role of "an instrument of peace trained to avoid litigation."³³ She should recommend a course of conduct that is "most beneficial to the individual client as well as other interested parties (*e.g.*, grandparents and children) and society"³⁴ and thereby "facilitate the fulfillment of the client's moral and legal family obligation."³⁵ Similarly,

³⁰ See McEwen et al., *supra* note 2, at 1331 (discussing several states' rules precluding attorney attendance).

³¹ Mark C. Rutherford, *Lawyers and Divorce Mediation: Designing the Role of "Outside Counsel,"* MEDIATION Q., June 1986, at 17, 27. Rutherford believes the attorney's active participation is likely to increase costs and may also be unfair where only one party can afford an attorney. See *id.* at 26-27. It is notable that all of the commentators who express the greatest discomfort with lawyers' role in the mediation process have focused on divorce mediation, rather than on other types of mediation. No doubt their views reflect a degree of discomfort with resolving marital disputes through a legal adversarial process, as well as a more general belief that mediation should be utilized by parties rather than their lawyers. As will be discussed, however, see *infra* notes 49-55 and accompanying text, some of those critics who have advocated that lawyers play a strong role in the mediation process have also focused on family law disputes.

³² See Rutherford, *supra* note 31, at 28-31. See generally LENARD MARLOW, DIVORCE MEDIATION: A PRACTICE IN SEARCH OF A THEORY (1997) (critiquing the use of adversarial techniques in divorce mediation).

³³ Steven H. Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325, 338 (1988).

³⁴ *Id.* at 339.

³⁵ *Id.* at 363. Hobbs contrasts the role of the attorney participant in a divorce mediation to that of the adversarial litigator. He states that the litigator, whose goal is to protect her client's rights and shield her from emotional or economic exploitation by the "other" side, may appropriately pursue her client's cause zealously, must share information with the other side only where permitted by her client, and must not

arguing that the adversarial approach is inconsistent with good mediation, Professor Kimberlee Kovach has urged that a "good faith" requirement be imposed upon lawyer representatives as well as upon their clients in mediation.³⁶ She states that "lawyers must not be able to use the process to gain adversarial advantage which intentionally disadvantages other parties."³⁷ Professor Jacqueline Nolan-Haley suggests that attorney representation in mediation should be grounded on deliberation and problem-solving approaches and distinguished from adversarial-style lawyering in order to protect the dignitary and participatory values of mediation.³⁸

Professor Carrie Menkel-Meadow has taken a more nuanced approach, repeatedly expressing great discomfort with the use of adversarial or advocacy tactics in mediation,³⁹ but still stopping short of urging attorneys

advocate a generous settlement if it would not serve her client's best interest. *See id.* at 334-336.

³⁶ *See* Kovach, *supra* note 2, at 578; Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISP. RESOL. MAG., Winter 1997, at 9, 9.

³⁷ Kovach, *supra* note 2, at 581. Professor Kovach does not set out a hard and fast proposal of how "good faith" ought to be defined, but she does make some preliminary efforts in this regard that would, *inter alia*, require attorneys to "participate[] in meaningful discussions with the mediator and all other participants during the mediation," to "remain[] at the mediation until the mediator determines that the process is at an end or excuses the parties," and to refrain from making "misleading statements." *Id.* at 622-623. While she stops short of imposing an obligation to disclose "everything about your case," *id.* at 611, Kovach does approvingly cite an article stating that it is a violation of good faith to withhold valuable information. *See id.* at 612 (citing Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1414-1425 (1958)). Critical of such adversarial conduct as using mediation for the purposes of delay, to obtain discovery from the opponent, or to wear down an opponent, Kovach also opposes lying and misrepresentation in mediation. *See id.* at 593-594. Attorneys who violated the good faith requirements would be subject to sanction by the court. *See id.* at 618, 623.

³⁸ *See generally* Jacqueline M. Nolan-Haley, *Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998) (drawing extensively from the work of MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994)).

³⁹ As Menkel-Meadow puts it, she has been "plagued . . . throughout [her] career . . . [by] the powerful heuristic of the adversary model and its concrete expressions in legal dispute resolution as a paradigm which does not aid, indeed, makes more difficult, the resolution of 'ethical' dilemmas when one seeks to use other processes." Menkel-Meadow, *supra* note 25, at 409.

to represent interests other than those of their clients in the mediation process. Calling the phrase "mediation advocacy" "oxymoronic,"⁴⁰ Menkel-Meadow has complained that "there is some evidence that at least some lawyers persist in appearing at various ADR sessions wearing their adversarial suits,"⁴¹ and that "the appearance of litigators at mandatory settlement proceedings may taint the quality of the process that ensues."⁴² She sees courses designed to teach attorneys how to "win" at ADR as fundamentally inconsistent with the goals of mediation,⁴³ and she is uncomfortable when attorneys "prepare briefs or 'mediation submissions,' plan opening statements and case narratives, ask for third party neutral evaluations and direct their attention to the mediator, when they should be planning, with their clients, how to negotiate and problem-solve with 'the other side.'"⁴⁴ However, Menkel-Meadow also seems to recognize that while many overly zealous attorneys may "prove a failure in mediation,"⁴⁵ at least some attorneys may be able to learn how to participate more productively in a mediation.⁴⁶ She does not quite go so far as to suggest that all advocacy is, per se, inconsistent with mediation.⁴⁷

⁴⁰ Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3, 3.

⁴¹ Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 35 (1991).

⁴² *Id.* at 36.

⁴³ See Menkel-Meadow, *supra* note 25, at 408.

⁴⁴ Menkel-Meadow, *supra* note 40, at 3-4.

⁴⁵ Menkel-Meadow, *supra* note 25, at 427 (arguing that the "zealous advocate who jealously guards (and does not share) information, who does not reveal adverse facts (and in some cases, adverse law) to the other side, who seeks to maximize gain for his client," may lack the creativity, the ability to "focus on the opposing sides' interests," and the ability to broaden rather than narrow issues that can be critical in mediation); see also Menkel-Meadow, *supra* note 41, at 36 (explaining that lawyers and judges "who have been taught to argue, criticize, and persuade, rather than to listen, synthesize, and empathize" may need to learn new skills to be effective in mediation).

⁴⁶ See Menkel-Meadow, *supra* note 25, at 427, 429 (identifying courses and books geared to teach litigators how to participate effectively in ADR proceedings).

⁴⁷ She would, however, prefer to speak in terms of "representation" rather than "mediation advocacy." Menkel-Meadow, *supra* note 40, at 4.

B. *The Argument that Attorneys Should Serve as Zealous Advocates and Protectors in Mediation*

At the other extreme, some have urged lawyers to continue to serve as their clients' active vocal advocates in mediation, just as they would in litigation.⁴⁸ One rich body of work has focused particularly on the use of mediation with respect to family disputes. A number of commentators have asserted that because family disputes may often involve a power imbalance between the parties, particularly where domestic abuse has occurred, such disputes should not be resolved through mediation.⁴⁹ Frequently such commentators have opposed mediation in part because they have assumed that the weaker party would not have the benefit of an attorney at the mediation.⁵⁰ However, some writings in this area have attempted to

⁴⁸ A number of groups have also recently begun to offer continuing legal education programs to assist lawyers in representing their clients in mediations. See Menkel-Meadow, *supra* note 25, at 408 & n.1 (citing DEFENSE RESEARCH, INC., WINNING IN ADR AND NEGOTIATION—ADR FOR THE DEFENSE (1995)).

⁴⁹ See, e.g., Bryan, *supra* note 21, at 441 (using a powerful anecdote to caution against use of mediation where a serious power imbalance may exist); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & SOC. INQUIRY 35, 60 (1991) (contending that mediation is essentially "a highly political process" in which mediators and the process contribute to the oppression of one party's story); Grillo, *supra* note 21, at 1549–1550, 1597–1600 (arguing that mediation, particularly where it is mandatory, has the potential to harm many women and some men in that mediation may deprive persons of procedural protection and also prevent them from determining the roles of their own attorneys); see also MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 144–146 (1991) (asserting that the bias of divorce mediation toward shared custody harms women). But see Mary A. Duryee, *Mandatory Mediation: Myth and Reality*, 30 FAM. & CONCILIATION CTS. REV. 507, 509–510 (1992) (suggesting that Grillo's critique is inconsistent with empirical evidence); Folberg, *supra* note 21, at 26–30 (arguing that mediation may often be fairer than litigation); Rosenberg, *supra* note 21, at 467–468 (arguing that Grillo has exaggerated the potential dangers of mediation and that mandatory mediation is generally helpful both to women and men).

⁵⁰ See, e.g., David B. Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7 MEDIATION Q. 331 (1990); Stephan K. Erickson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, 7 MEDIATION Q. 377 (1990); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993); Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990); Lisa Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV.

prescribe an activist role for lawyers in mediation in order to protect their clients from being harmed in that process. Professor Penelope Bryan, in particular, has written an article entitled *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*,⁵¹ in which she argues that "divorce mediation . . . poses hazards that require lawyer intervention and advocacy."⁵² Bryan therefore provides attorneys with a checklist to help them identify the "high-risk client" who is likely to be victimized in a mediation.⁵³ She asserts that while the attorney's first goal should generally be to prevent such a client from having to mediate a dispute, the second-best, but more likely, course of action is for the attorney to not only accompany her client to all mediation sessions but also to play an active advocacy⁵⁴ role in such sessions in order to "vigilantly . . . protect her client's interests during mediation."⁵⁵

Outside the specific context of family disputes, some have also urged that lawyers must be vigilant in acting as their clients' advocates in mediation. John Cooley, a former U.S. Magistrate, Assistant U.S. Attorney, and private firm partner, recently authored a text entitled *Mediation Advocacy*, which is published by the National Institute for Trial

WOMEN'S L.J. 57 (1984); Andree G. Gagnon, Recent Development, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 272-273 (1992) (charging that such mediation places abuse victims at risk of further abuse).

⁵¹ Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994).

⁵² *Id.* at 192.

⁵³ *Id.* at 193-207 (suggesting that the attorney must consider both tangible resources such as income, education, and occupation, as well as intangible resources including personal characteristics, emotional states, and relationship patterns).

⁵⁴ Bryan observes, however, that "advocacy" need not mean "adverseness" or acting without dignity. *Id.* at 192 n.19.

⁵⁵ *Id.* at 210. Bryan warns attorneys not to succumb to rhetoric pushing compromise for its own sake, efficiency, preservation of relationships, or even the lawyer's own self-interest. *See id.* Specifically, she explains that an able advocate will secure and review basic financial information prior to the mediation, *see id.* at 211, and ensure that neither the mediator nor the opposing party inflict inappropriate pressures on her client during the course of the mediation by, for example, further diminishing the client's self-esteem, *see id.* at 217. She also suggests that an attorney encourage the client to give her position first in order to secure a negotiation advantage, *see id.*, and help the client devise at least a tentative bottom line prior to commencing the mediation, *see id.* at 218. Interestingly, Bryan does not suggest that the attorney should necessarily do all the talking for her client. *See id.*

Advocacy.⁵⁶ As the title indicates, this treatise is designed to teach attorneys how to use the mediation process effectively to advocate on behalf of their clients; it urges attorneys to play an active role at all stages of the process.⁵⁷ Focusing specifically on the respective roles client and attorney should play in the mediation, Cooley states that it is up to the attorney to decide whether to bring a client whose presence is not mandated⁵⁸ and to determine the extent to which, if at all, an attending client should be permitted to speak.⁵⁹ Assuming the attorney decides to “allow” the client to

⁵⁶ See COOLEY, *supra* note 25. Some mediators and academics are very uncomfortable even with the phrase, “mediation advocacy,” and argue that it is entirely against the spirit of mediation to attempt to win a victory for one’s client in that forum. See Menkel-Meadow, *supra* note 40, at 3.

⁵⁷ See COOLEY, *supra* note 25, at 41 (noting that effective advocacy in mediation “has four discrete aspects: (1) preparing the case for mediation, (2) preparing the client for mediation, (3) advocacy during the mediation session, and (4) mediation-related advocacy after the mediation session”). Cooley states that the lawyer should help the client determine her needs, plan a strategy and theme, determine what if any part the client should play in the mediation, make presentations on behalf of the client in the mediation, and ensure that any agreement that is reached is adequately memorialized. See *id.* §§ 3.4, 3.5, 4.3, 4.4, 5.2, 5.4, 6.2.

⁵⁸ See *id.* § 3.15, at 80–81. Cooley explains that while an attorney representing a plaintiff in a personal injury suit should normally bring that individual to the session in order to humanize the claims and demonstrate the appeal of plaintiff’s case from an emotional and credibility standpoint, lawyers might appropriately choose not to have clients who present themselves as “‘too slick,’ ‘too senile,’ or ‘too naïve’” attend the mediation. *Id.* § 3.15, at 81. From a defense standpoint, Cooley advises that the insurance adjuster is often the “real client” in that she will play a large role in deciding how much to pay on the claim and that it may not make sense to also bring the named defendant to the mediation. He suggests that such attendance would, however, make sense where the defendant is a knowledgeable and likeable witness who could help establish that the defendant has the better case in terms of liability. See *id.* § 3.15, at 81–82.

⁵⁹ As Cooley puts it,

[d]epending on the particular client, the nature of the case, and the personalities and style of the opposing parties or counsel, you may decide that your client will have an active verbal role, a limited verbal role, or no verbal role whatsoever. If your client is to have some verbal role, then you should advise him regarding the basic ground rules for a client’s verbal participation.

Id. § 4.4, at 89. Cooley recognizes that if the attorney decides the client should stay quiet during the mediation and that the attorney should do all the talking, the client may find this division of responsibilities difficult. He therefore advises attorneys to discuss such potential difficulty with their clients in advance and to provide their clients with an “inoffensive, reasoned basis for your decision to do all the talking.” *Id.* In essence

speak during the mediation, Cooley cautions the attorney to advise her client carefully regarding how and to whom she should speak. Cooley states clients should be told to address all their comments to the mediator rather than to the opposing attorney or party,⁶⁰ that they should be instructed to state only facts and not argue,⁶¹ and that they should neither ask nor respond to difficult questions.⁶² Nor does Cooley suggest that clients be permitted to play a more active role in private caucuses. In his section entitled "Deriving the Most Tactical Advantage from Caucuses," he speaks primarily of how the attorney should attempt to be proactive and "take charge"⁶³ and also observes that the primary advantage of the caucus "is that it eliminates one of the principal barriers to dispute settlement—direct confrontation between the parties."⁶⁴

Some, in a far less extreme way, have also argued that attorneys can play a positive role by acting as their clients' advocates in mediation. Professors Craig McEwen, Nancy Rogers, and Richard Maiman have for example urged that the lawyers can help ensure a fair result.⁶⁵ While the

Cooley suggests that whereas a client who is "credible, likable, and persuasive" may be given a large role, an emotional, easily confused, unsure, or less credible client should be given a smaller role or perhaps no role. *Id.* He goes on to say that "if the case involves emotional or sentimental matters that are difficult for your client to verbalize, then you should do most, if not all, of the talking." *Id.* He explains that allowing such a client to speak would damage her position in the negotiation. *See id.* By contrast, clients who are sufficiently presentable may be allowed to make part of the opening statement. *See id.* § 5.2, at 103–106.

⁶⁰ *See id.* § 4.4.3, at 91–92. He explains that posing comments directly to an opposing party may "arouse anger," cause an interruption, and perhaps then cause one's own client "to react emotionally and perhaps say something in front of the mediator that is embarrassing or even harmful to your case." *Id.* § 4.4.3, at 91. It is interesting that Cooley seemingly identifies the case as belonging to the attorney rather than the client.

⁶¹ *See id.* § 4.4.5, at 92–93. He explains that anger-based arguments do "nothing but distract listeners from the task at hand." *Id.* § 4.4.6, at 93.

⁶² *See id.* § 4.4.9, at 94–95.

⁶³ *Id.* § 5.4.2, at 116. *See generally id.* § 5.4, at 114–123.

⁶⁴ *Id.* § 5.4.2, at 116.

⁶⁵ *See* McEwen et al., *supra* note 2, at 1375–1378. The authors favorably compare mandated mediation, in which clients may be represented by attorneys, to what they see as the less desirable "regulatory" or "voluntary participation" approaches. The regulatory approach would attempt to use detailed rules and judicial review to ensure fairness. *See id.* at 1376. The voluntary participation approach would suggest that lawyers can predict whether unfairness is likely to occur at a mediation and thus stop a client from attending a session that might prove unfair. *See id.* at 1378.

authors do not spell out in detail how a lawyer and client ought to divide responsibilities in mediation to ensure that a fair result is achieved, they do provide a number of examples from their empirical study in Maine as to how lawyers believe they protect their clients. Such lawyers may, for example, make sure the client understands what she is doing, slow sometimes inappropriate momentum, protect against mediator pressures or unfair bargaining advantages, or do the talking for shy clients.⁶⁶

C. *Some Advocate a Middle Road*

A few commentators have attempted to take a middle road between exhorting attorneys not to ruin mediation and urging them to treat mediation much the same as they would treat litigation. However, even those commentators who have suggested a middle road typically fail to provide attorneys with clear guidance on how to distinguish among cases and how to decide what particular division of responsibilities between lawyer and client might be required in a particular situation. Several of these commentators do, nonetheless, lay a preliminary foundation for the "barriers" analysis that will be spelled out in detail in this Article.

Eric Galton, who has written a book addressing the question of how attorneys should go about representing their clients in mediations,⁶⁷ urges that both lawyers and parties should participate actively in the mediation.⁶⁸ While Galton does not explicitly posit that the roles of lawyer and client should vary from case to case, he does point out that "[m]ediation advocacy is inherently situational in nature."⁶⁹ Galton also provides his readers with guidelines on how to handle specific scenarios that are consistent with the analysis offered in this Article in that they suggest that the client's role

⁶⁶ See *id.* at 1358–1363.

⁶⁷ See ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION (1994). Galton worked as a trial lawyer for fourteen years before becoming an active mediator. See *id.* at vii.

⁶⁸ See *id.* at 14–15. Upon close reading, however, it seems that Galton assumes that the lawyer will dominate certain aspects of the mediation. For example, he clearly expects that the lawyer will give the major opening statement and states that the client only *may* be asked to briefly express her views. See *id.* at 70–72, 87–88. Galton also assumes that the lawyer will be the one to decide what roles should be played by lawyer and client in the mediation, rather than urging that lawyer and client jointly make such a determination.

⁶⁹ *Id.* at 97.

should vary depending on the psychological and economic factors that are preventing resolution of the dispute.⁷⁰

Edward A. Dauer's *Manual of Dispute Resolution*⁷¹ also begins to use a barriers analysis in discussing the attorney's role in mediation, emphasizing that "mediation is an effective alternative for parties who are blocked in their abilities to negotiate directly."⁷² Dauer additionally recounts some of the emotional and informational barriers that may prevent a case from settling and asserts that the mediator may be able to help surmount some of these barriers.⁷³ However, while stating that "[i]n mediation the role of the attorney is ordinarily diminished"⁷⁴ and that the attorney should "be prepared with the client to explore options and leave the conversation open, as much as to advocate a position and protect the client from harm,"⁷⁵ Dauer does not go on to provide lawyers with a model for deciding precisely how to divide their responsibilities with their clients in mediation or for deciding how much of an advocacy role the attorney should play.⁷⁶

⁷⁰ For example, Galton observes that certain disputes can be resolved only after an apology has been made and advises attorneys to prepare their clients to offer their regret, if they are comfortable doing so. *See id.* at 91-92. Similarly, he advises that in some disputes, resolution can be reached only after the parties have had an opportunity to address each other directly and urges attorneys to be watchful for such disputes and then attempt to facilitate direct discussions. *See id.* at 94-95. Galton also emphasizes that nonmonetary interests may be important to the resolution of many disputes. *See id.* at 98-101.

⁷¹ EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE* (1996). Dauer is a law professor and practicing attorney.

⁷² 1 *id.* § 11.10, at 11-28.

⁷³ *See* 1 *id.* § 11.10, at 11-28 to 11-29. While emphasizing the important role the mediator may play in surmounting the barriers to negotiation, Dauer does not explicitly recognize that the role the parties play in the process may be equally or more important in surmounting such barriers.

⁷⁴ 1 *id.* § 11.11, at 11-32.

⁷⁵ 1 *id.* § 11.12, at 11-41. Dauer further states that the attorney should "[r]eview the procedures, and be prepared to bite [her] tongue." *Id.*

⁷⁶ Attorney Lawrence M. Watson, Jr. has also drafted an article that recognizes the importance of the client's role in mediation. *See generally* Lawrence M. Watson, Jr., *Effective Legal Representation in Mediation*, in 2 *ALTERNATIVE DISPUTE RESOLUTION IN FLORIDA* 2-1 (2d ed. 1995). The gist of Watson's advice is that the attorney should use "solid adversarial skills to effectively plead the client's cause," *id.* at 2-5, but also adjust her behavior to take advantage of the special nature of mediation. *See id.* at 2-5 to 2-27. Speaking, for example, of the premediation stage, Watson advises that the attorney encourage the client to "avoid bottom line thinking" and explore nonmonetary objectives. *Id.* at 2-7 to 2-8. With respect to the mediation itself

Others, while failing to spell out how responsibilities should be divided, would permit lawyers to participate in mediation and perhaps even to advocate on their clients' behalf, but urge lawyers to play a minimalist role so as not to disrupt the mediation process. Professors Murray, Rau, and Sherman note that some suggest the attorney should act as "silent advisor," by sitting through the mediation but not taking an active role.⁷⁷ Professor Lande, relatedly, has expressed some concerns as to ways in which the participation of lawyers may transform mediation.⁷⁸ Lande worries, for example, that mediators may tend to see lawyers rather than clients as the principals in that it is the lawyer and not the client who is the "repeat player."⁷⁹ He also fears that lawyers, due to their own training, interests, and incentives, may play too dominant of a role by doing most of the talking, may seek to limit parties' dialogue in the mediation, and may therefore undermine their clients' exercise of responsibility and reduce the likelihood that the principals will truly consent to any agreement that is reached.⁸⁰ While not seeking to exclude lawyers from the process, Lande

Watson, assumes that the attorney will make the opening statement, *see id.* at 2-14 to 2-15, and urges the attorney to use creative and visual tools to convince the adversary that her chance of prevailing at litigation would be poor, *see id.* at 2-16 to 2-20, but advises that it may be appropriate to provide the client with an opportunity to "vent" by making a short direct statement summarizing her position, *see id.* at 2-20 to 2-21. Watson repeatedly warns advocates not to "forget the client" and encourages attorneys to allow their clients to play an active role in private caucuses, at a minimum. He explains that it is crucial for the client not only to have the opportunity to express her point of view, *see id.* at 2-21, but also "to hear and fairly consider the vulnerabilities and weaknesses in the case," *id.* at 2-21. Watson also advises attorneys that "being overly contentious or argumentative during the private caucus, or automatically dismissing the potential vulnerabilities and weaknesses raised, will block the mediator's communication to the client and diminish one of the real benefits of mediation." *Id.* at 2-22.

⁷⁷ MURRAY ET AL., *supra* note 6, at 371.

⁷⁸ *See* Lande, *supra* note 3, at 879-895. As the title, *How Will Lawyering and Mediation Practices Transform Each Other?*, indicates, Lande also discusses ways in which mediation may transform litigation, calling the new dispute resolution environment in which both practices will routinely coexist a "liti-mediation" culture. *Id.* at 841.

⁷⁹ *Id.* at 881-882 (citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97-104 (1974) (defining the "repeat player" concept and arguing that lawyers are quintessential repeat players)); *see also* Galanter, *supra*, at 114-119.

⁸⁰ *See* Lande, *supra* note 3, at 879-892.

urges lawyers to be sensitive to the range of possible roles they and clients may play in mediation.⁸¹

D. *The Road Not Yet Built*

The literature summarized above has raised the following two primary questions: (1) *whether* an attorney may appropriately serve as an advocate for her client in mediation; and (2) if advocacy is permitted, *how* the attorney may best represent her client in mediation. Part III argues that advocacy per se should not be proscribed, but that attorneys have a great deal to learn in terms of how best to advocate for their clients. The remainder of this Article then addresses the question of how attorneys should advocate in mediation.

In examining the question of how attorneys should behave in mediation, this Article will draw extensively from much of the literature summarized above. Many of the works offer excellent insights into both psychological phenomena and strategic issues that arise in the lawyer-client relationship.⁸²

⁸¹ See *id.* at 896-897.

⁸² Eric Galton discusses in some detail various potential barriers to a negotiated agreement and also makes suggestions as to how the attorney can use the mediation process to help overcome these barriers. Many of these barriers are psychological, such as a party's need for an apology, need to express anger, search for justice, or need to obtain an explanation. See GALTON, *supra* note 67, at 91-97; see also McEwen et al., *supra* note 2, at 1372 (observing that roughly one-quarter of the interviewed Maine attorneys spontaneously commented upon the fact that clients' expressions of emotions that could not normally be expressed in the settlement process may ultimately assist in resolving the dispute). Other barriers mentioned by Galton involve problems in the attorney-client relationship, such as attorney greed, ego, or the attorney's fear of being honest with his own client. See GALTON, *supra* note 67, at 89-91; see also 1 DAUER, *supra* note 71, § 11.10, at 11-28 (stating that "mediation is an effective alternative for parties who are blocked in their abilities to negotiate directly" and observing that such blockages may result from emotional factors, constituency factors, divergent valuations of likelihood of success, or an absence of good creative ideas); Lande, *supra* note 3, at 885 (observing that "lawyers sometimes look to the mediators to provide precisely that kind of pressure on the lawyers' own clients that the lawyers feel unable or unwilling to effectively exert themselves"); McEwen et al., *supra* note 2, at 1370. McEwen notes as the response of one divorce attorney to interview questions:

I can't force my client to do something the client is uncomfortable with. I'm not there to argue the other person's case. Whereas at mediation, it's an opportunity for my client to kind of expose his or her case to reality and the mediator many times is going to say "Wait, is that what you really mean? Do you really think a judge is going to listen to this? Listen, I've just heard it for the first time and let

Nonetheless, while their analyses certainly provide a good starting point, none of these works fully explicates either the unique ways in which mediation can help surpass psychological and strategic barriers to negotiation or the implications of this analysis to the proper division of responsibilities between attorney and client in a particular case. This Article will attempt a comprehensive analysis of the appropriate role of the attorney in mediation by methodically examining the ways in which the principal-agent relationship between attorney and client can often hinder successful negotiations, as well as the ways in which mediation can counter certain of these problems.

III. ADVOCACY CAN BE APPROPRIATE IN MEDIATION BUT THE NATURE OF SUCH ADVOCACY MUST BE RE-EXAMINED

Attorney advocacy, properly defined, is entirely consistent with and supportive of mediation. While many commentators have attacked attorneys' use of advocacy in the mediation process, this Part argues that the problem is not advocacy per se, but rather certain kinds of advocacy or adversarial behavior employed under particular circumstances. However, some attorney behavior should be proscribed in mediation (as it is in litigation), and some attorneys have a lot to learn regarding how best to advocate for their clients in a mediation.

If advocacy is defined broadly as supporting or pleading the cause of another,⁸³ there is no inconsistency between advocacy and mediation. Permitting an attorney to act as an advocate for her client simply allows that attorney to speak and make arguments on her client's behalf and to help her client achieve her goals. The purpose of mediation is to reach an agreement which is acceptable to and desired by all parties. To reach such an agreement, both parties may wish to share their views as to their likely success in court as well as to engage in problem-solving. While some parties may be comfortable participating pro se, others may prefer to be aided by an attorney. If a party can advocate for her own interests, this

me tell you what my reaction is." And you're kind of exposing . . . and many times when [a client] says it to their attorney, it will be received, obviously, differently from just a completely disinterested person.

McEwen et al., *supra* note 2, at 1370 (alteration in original) (quoting divorce lawyer interview data compiled by the authors between July 1990 and February 1991).

⁸³ A typical dictionary defines advocacy as the "process of pleading in favor; support." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 59 (1989).

Author sees no reason why her representative should not also be permitted to "advocate" on her behalf.⁸⁴

Nor is it clear why "adversarial" behavior, at least broadly defined, is necessarily inconsistent with mediation.⁸⁵ To the extent that acting adversarially means advocating only on behalf of one's own client and not on behalf of any other party or on behalf of the process or system, the conduct is easy to reconcile with mediation.⁸⁶ The problem-solving that works well in mediation does not require sacrifice of one's self-interest, but rather allows parties to search for solutions that are mutually beneficial.

Therefore, it is not at all clear to this Author why an attorney, hired by a party, should work toward achieving mediation results that, while helpful to others or supportive of a peaceful solution, do not serve the wishes of the client.⁸⁷ Of course, if a client chooses to direct her attorney to work toward an agreement that benefits all parties equally, rather than one that benefits the client most, she should be able to do so, but it is not clear why a client

⁸⁴ Some might take the position that because mediation is a process designed for the parties to exchange their views and interests, no third party should be allowed to play a role in this process. However, such an argument either is circular or proves far too much in that it would also undercut attorneys' roles in negotiation and perhaps even in litigation. After all, even litigation is an opportunity for opposing parties to exchange views and positions. Moreover, from a policy standpoint it is not at all clear why it would be desirable to require a weaker party to mediate unassisted with a stronger party, rather than allow that weaker party to bring a representative for support.

⁸⁵ If "adversarial" were to be defined as acting with intent to harm the opponent, then it would be inconsistent with the problem-solving, win-win approach many associate with mediation. However, even in the litigation context, few attorneys would describe their goal as harming the opponent rather than helping their own clients. Moreover, even many mediation supporters would agree that not all disputes can be resolved on a win-win basis.

⁸⁶ The question of whether lawyers owe a duty to the system, as well as to their clients, has long been debated in the field of professional responsibility. *See, e.g.,* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995). In establishing ethical prohibitions against particular behavior, regulatory bodies have made it clear that lawyers are forbidden from taking certain actions, even if the actions would benefit their clients. However, few if any would suggest that a litigating or transactional attorney owes a general duty to the public or to her client's adversary that equates with the duty owed to the lawyer's own client.

⁸⁷ Thus, this Author rejects Mark Rutherford's view that the attorney should work as a neutral actor to help all parties, *see supra* note 31 and accompanying text, and Steven Hobbs's view that the attorney should seek to benefit all parties, *see supra* note 33 and accompanying text. To the extent that Kimberlee Kovach would prohibit an attorney from working solely to advantage her own client, this Author also opposes her position. *See supra* notes 36-37 and accompanying text.

should be obliged to have her attorney represent interests other than her own.⁸⁸ Certainly a client should not be required to have the attorney she has retained act contrary to her interests. Were we to entirely forbid attorneys from advocating on behalf of their clients, to require them to be neutral between their own clients and others or to require them to disclose all that they know about their clients' interests and positions, many people would no doubt decide not to retain attorneys to help them in mediation.⁸⁹

Still, it is appropriate to place certain restraints on attorney and client advocacy and adversarial behavior in mediation, just as we have placed limits on such conduct in litigation. In litigation we require that attorneys and clients have an adequate basis for positions taken in pleadings,⁹⁰ we require attorneys to disclose the existence of relevant binding precedent to a

⁸⁸ Nor does this Author believe that an attorney is typically justified in advocating for her client's "best interest" in cases where that interest may diverge from the client's expressed wishes. As one commentator has observed, "[p]aternalism in lawyer-client relationships is seldom preached but often practiced." DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 411 (1994); cf. David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 468, 471-474, 487-493 (arguing that attorneys may appropriately act paternalistically to protect clients' values when these values are inconsistent with the clients' expressed wants). Absent incapacity or illegality, a client should be allowed to have her attorney do as she wishes, assuming she can find an attorney willing to take the position she advocates. For a discussion of the difficulty of defining incapacity, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 644 (1982).

⁸⁹ See David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745, 748-749, 752 (1997) (arguing that imposing a good faith duty of disclosure on attorney participants in mediation would be undesirable in that it would lead to new "satellite litigation" regarding whether the duty had been violated, cause lawyers to use mediation as a discovery tool, and discourage parties from using mediation). Moreover, as a practical matter, it would seem to be unworkable to impose stricter disclosure or nonprevarication requirements on those attorneys who participate in mediation than on those who participate in litigation or negotiation. Mediation and litigation are not mutually exclusive dispute resolution mechanisms. A dispute may be filed in court, mediation may then be attempted, and where mediation fails to achieve a settlement, the dispute will land right back in court. Thus, imposing a good faith or other requirement in mediation will ultimately affect litigation as well. Attorneys might actually use the mediation process to obtain information that would not have been available in litigation.

⁹⁰ See FED. R. CIV. P. 11.

tribunal,⁹¹ and we limit attorneys' ability to lie on behalf of their clients.⁹² These and other constraints may be appropriate in the mediation context as well.⁹³

Nor does this endorsement of advocacy mean that attorneys are relegated to being mere "hired guns."⁹⁴ A vast professional responsibility literature contains many works urging that attorneys do and should have their own sense of morality, and it is entirely appropriate for attorneys to attempt to convince their clients that a particular course of action is unwise

⁹¹ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(b) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1998); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 375 (1993).

⁹² Model Rule 4.1 provides that:

A lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1998). The comment to Rule 4.1 further qualifies this duty, stating that "[a] lawyer is required to be truthful . . . but generally has no affirmative duty to inform an opposing party of relevant facts." *Id.* at Rule 4.1 cmt. As to negotiations, the comment provides:

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category.

Id.

⁹³ The Center for Public Resources (CPR) recently formed a committee of practitioners and academics to examine the question of whether separate ethical restraints ought to be placed on those attorneys who represent clients in mediation or other types of ADR processes. This Author believes that because disputes are simultaneously taken to litigation and to ADR, no sharp distinctions in ethical responsibilities are practical.

⁹⁴ For a glimpse of the vast literature in this area, see Atkinson, *supra* note 86, at 303-315 (providing a taxonomy of three "arguably legitimate" modes of lawyering, including but not limited to the hired gun approach); see also Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 116-117 (1995) (discussing an amoral version of attorney representation but advocating a reformulated model such that a lawyer may select clients based on her own moral disposition).

or immoral.⁹⁵ Acceptance of such a view does not require abandonment of the principle that attorneys should serve as advocates for their clients.⁹⁶

Yet, while attorneys may appropriately advocate for their clients in mediation, it is certainly true that those attorneys who attempt to employ traditional "zealous" litigation tools when representing their clients in mediation may frequently (but not always) fail either to fulfill their clients' wishes or to serve their clients' interests.⁹⁷ Those who would hoard

⁹⁵ See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* at xxii (1988) (characterizing a lawyer as a moral activist who "shares and aims to share with her client responsibility for the ends she is promoting in her representation; she also cares more about the means used than the bare fact that they are legal"); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 604 (1985).

Although lawyers retain 'professional discretion in determining the means by which a matter should be pursued,' they should defer to the client regarding 'the purpose to be served by legal representation.' If during the course of representation, the 'client insists upon pursuing an objective that the lawyer considers repugnant or imprudent,' the lawyer has discretion but no duty to withdraw.

Id. (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt.; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt.; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3), respectively).

⁹⁶ This Author believes that if an attorney is unable to convince the client that the approach she advises in mediation is better, the attorney ought to resign rather than take steps that are against the client's wishes. See also Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 NEGOTIATION J. 105, 105-108 (1985) (suggesting that attorney and client should conduct a preliminary negotiation with one another to clarify the basis by which the attorney will conduct negotiations). But see LUBAN, *supra* note 95, at 157 (arguing that lawyers should be permitted to forgo certain tactics or ends they view as immoral without necessarily withdrawing from the case).

⁹⁷ Some see the skills required for litigation as sufficiently distinct from those required in negotiation or mediation such that a client may be well advised to hire separate counsel. See, e.g., Roger Fisher, *What About Negotiation as a Specialty*, 69 A.B.A. J. 1221 (1983) (suggesting the need for professional negotiators); Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOTIATION L. REV. 139 (1996) (arguing that given divergences between the incentives and psychology of a lawyer and a client, it may often be preferable to retain separate negotiation counsel); Marguerite S. Millhauser, *Gladiators and Conciliators: ADR: A Law Firm Staple*, 14 B. LEADER 20, 21 (1988) (urging that ADR specialists can help clients and attorneys to consider nonlitigation options, can convince other parties to participate in a particular process, and can negotiate ground rules). However, the hiring of separate counsel often will not be economically feasible or even desirable. Having multiple counsel will frequently add to communication problems in that the two attorneys will need to be aware of things that have transpired in the other arena. For example, the negotiating attorney would

information, rely solely on legal rather than emotional arguments, or refuse to let their clients speak freely will often have little success in mediation.⁹⁸ This is not because attorneys ought not to advocate for their clients, but rather because attorneys ought not to advocate *poorly* on behalf of their clients.⁹⁹ Professor Kovach's suggestion that attorneys should be sanctioned for failing to prepare adequately for mediation, to discuss the goals of mediation with their clients, or to foster meaningful discussion between the mediation participants may not be workable.¹⁰⁰ Nonetheless, as a matter of good practice attorneys should often behave as Kovach suggests in order to best serve their clients' own interests.¹⁰¹

need to be fully apprised of developments on the litigation front to help the client work out her best alternative to a negotiated agreement (BATNA). As well, the negotiating attorney might become aware of arguments or positions or witness demeanor that would be very useful to the litigating attorney. *See* MURRAY ET AL., *supra* note 6, at 218–225 (arguing that negotiation and litigation are complementary processes, woven tightly together, and that actions taken in one arena may affect the other); Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984) (using the term “litigotiation” to describe use of court processes to obtain strategic advantage in negotiation); Lande, *supra* note 3, at 841 (using the term “liti-mediation” to describe routine integration of mediation into litigation practices). In any event, whether or not the same attorney represents the client in mediation as will represent the client in litigation, that attorney needs to know what her role ought to be in mediation.

⁹⁸ *See, e.g.*, Menkel-Meadow, *supra* note 25, at 427.

⁹⁹ The difference between arguing that attorneys should not advocate and that they should not advocate badly is not just semantic. Once one accepts that it can be appropriate for an attorney to advocate on behalf of her client in mediation, one is more free to examine what such advocacy should look like in a particular context.

¹⁰⁰ As Dean Sherman has discussed, and as the experience with Rule 11 has amply demonstrated, the process of attempting to identify sanctionable behavior, may create more problems than it solves. *See* Edward F. Sherman, ‘Good Faith’ Participation in Mediation: Aspirational, Not Mandatory, DISP. RESOL. MAG., Winter 1997, at 14, 14–17; *see also* Hricik, *supra* note 89, at 748–749.

¹⁰¹ However, it is not always bad practice, much less unethical, for an attorney representing a client in mediation to attempt to convince the opponent of the validity of the client's position, to hold back information, or to refuse to cooperate in a supposed problem-solving endeavor. Depending on the circumstances, including the nature of the client, the opponent, and the opponent's lawyer, such behavior may be appropriate. *See, e.g.*, Tom Arnold, *Twenty Common Errors in Mediation Advocacy—In No Particular Order*, in ALTERNATIVE DISPUTE RESOLUTION: HOW TO USE IT TO YOUR ADVANTAGE! 581, 581 (ALI-ABA Course of Study Materials No. CA13, 1996) (stating that trial lawyers often do a very poor job in mediation advocacy because they either “foul their own nest or miss important persuasions”); Lee Goodman, *Preparing Your*

The distinction between whether attorneys may advocate on behalf of their clients in mediation and how they may do so is not merely semantic. Once it is recognized that advocacy is permitted the question becomes when and how attorneys should best represent their clients in mediation. Attorneys need much more specific guidance on how to behave in mediations than the simple edict "thou shalt not advocate" or the equally simple "thou shalt advocate." The remainder of this Article therefore focuses on how attorneys can best serve their clients in mediation, arguing that the best answer to the difficult question can be found by using economics and psychology to examine the lawyer-client relationship in mediation.

IV. BARRIERS TO NEGOTIATION

A. Barriers in Direct Negotiations

Researchers in various social sciences have recently focused a great deal of attention on a deceptively simple question: Why don't more legal disputes settle more quickly? These researchers have been puzzled by the fact that parties often spend a great deal of money progressing toward or even completing a trial, when seemingly both parties would be better off resolving the dispute quickly and thereby saving time, attorney fees, and costs, as well as foregoing a tremendous drain on both individual emotions and company morale. This Part will quickly summarize some of the insights of economists and psychologists on this point.

While the researchers who focus on economic, strategic, and psychological barriers to negotiation sometimes seem to assume that any negotiated agreement is a good one, this Part will also examine a second set of barriers or factors—those that cause an agreement to be reached that is not in the parties' best interest. A settlement may be deemed unsuccessful or nonideal where the costs of reaching the settlement were too high in terms of time or money or other factors, where the agreed-to terms failed to achieve all possible gains for either party, or where a party settled on terms that were less desirable than taking the dispute to court.¹⁰²

Client for Mediation, CBA REC. (Chicago), Jan. 1994, at 18, 18–22 (explaining that attorneys should play an important role in mediation while encouraging clients to participate actively and keep an open mind).

¹⁰² See Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 8

1. *Economists' Insights*

Starting, as economists typically do, from the assumption that humans are rational, profit-maximizing entities,¹⁰³ it is simple to devise a formula setting out when a dispute should settle. A plaintiff ought to settle whenever the value of the settlement offered equals or exceeds the expected gain at trial less the cost of paying for that trial. Similarly, a defendant ought to be willing to settle on terms less than or equal to its expected payout at trial, plus its cost of paying for that trial.¹⁰⁴ If both sides had perfect information as to expected results at trial, virtually every case ought to settle. Given that both plaintiff and defendant are basing their expected payout on the same facts and the same court, and given that the costs of going to trial are typically greater than zero, the parties should simply predict the results and then reach a settlement that is adjusted to reflect nonpayment of court

(1996) (pointing out that negotiations may be considered failures where they are too expensive or where the terms agreed to are "sub-optimal").

¹⁰³ See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 16 (1988). For an argument that economists should move away from the standard neoclassical assumptions by recognizing that people exhibit bounded rationality, bounded self-interest, and bounded willpower, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998).

¹⁰⁴ See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *J. LEGAL STUD.* 399, 417-420 (1973). This Author has presented the simplest possible model, assuming for example that costs of settlement need not be considered, that both parties are only interested in money, and that the parties are risk neutral. Economists have presented such a model but have also added some complexities. See David A. Anderson, *An Introduction to Dispute Resolution*, in *DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP* 1, 4-9 (David A. Anderson ed., 1996) (setting out the economists' approach in a way intended to be accessible to lay persons). For more complex versions of such models, see generally Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 *RAND J. ECON.* 404 (1984); Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 *J. LEGAL STUD.* 435 (1994) (reviewing various economic models of settlement); John P. Gould, *The Economics of Legal Conflicts*, 2 *J. LEGAL STUD.* 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & ECON.* 61 (1971); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 *J. LEGAL STUD.* 55 (1982).

costs.¹⁰⁵ Yet, these settlements do not always occur, and certainly they do not occur quickly.

a. *Lack of Perfect Information*

Without abandoning the assumption of profit maximization, economists have sought to explain this phenomenon by pointing out that perfect information does not typically (if ever) exist.¹⁰⁶ Each side may think its chance of success is much better than it is and because of this miscalculation may refuse to settle the case on terms that are acceptable to the other side. This lack of information may itself be divided into the following sub-problems: lack of preparation, lack of access to facts, lack of access to law, poor communication between the negotiators, or deliberate hoarding of information by one or both parties.¹⁰⁷ If lack of information of

¹⁰⁵ Even assuming perfect information, a range of acceptable settlements will typically exist, reflecting the variation in the two parties' court costs and attorney fees. See, e.g., Amy Farmer & Paul Pecorino, *Issues of Informational Asymmetry in Legal Bargaining*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP, *supra* note 104, at 79, 79.

Given the large costs and high risks associated with pursuing cases to trial, it is difficult to explain a failure to settle if both parties to a dispute have identical information concerning the expected trial outcome. When trial costs are high, there is a large bargaining range over which both parties can be made better off than they expect to be in the event of a trial, and settlement should be expected to occur somewhere in that range.

Id.

¹⁰⁶ See, e.g., Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP, *supra* note 104, at 17, 17 (according to economic models, "costly trials occur either because of a failure of prediction or a failure of bargaining").

¹⁰⁷ Economists have attempted to use models to explain the effects of lack of information. The Priest-Klein model, for example, provided that parties make random prediction errors about the likely court outcome. The authors then asserted that plaintiffs could be expected to win approximately 50% of cases that reach trial, assuming that the erroneous predictions would fall symmetrically around the actual decision point. See Priest & Klein, *supra* note 104, at 5. Experimental studies may not, however, support the 50% prediction. See Linda R. Stanley & Don L. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle*, 19 J. LEGAL STUD. 145, 150-164 (1990). Other economic models have also focused on the importance of lack of information in impeding settlement. See Bebachuk, *supra* note 104, at 404-406, 414 (discussing the effect of information asymmetries on settlement). See generally Landes, *supra* note 104; Posner, *supra* note 104; Shavell, *supra* note

any of these sorts is the barrier, the missing ingredient needed to achieve settlement is more information. Such information might be obtained through more complete discovery, through better access to jury reports, or through better communication or advocacy by each side. If plaintiff can convince defendant that she really does have that million dollar case, then defendant will presumably increase her offer.¹⁰⁸

b. *Game Theory*

Economists specializing in "game theory"¹⁰⁹ have further suggested that perfect information, alone, would not solve the problem of nonsettlement, instead turning their attention to the strategic aspect of the settlement "dance."¹¹⁰ Such economists have explained that even though an omniscient observer might be able to point the parties to a mutually acceptable settlement, the parties are not necessarily capable of getting to

104. Practitioners have also recognized the important role of information. See 1 DAUER, *supra* note 71, § 11.10, at 11-28 (describing some of the reasons cases may not settle); David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best to Serve the Client's Interest*, 8 ME. B.J. 38, 41 (1993) (setting out various factors "which doom traditional negotiation" including "inadequate analysis and preparation," inadequate communication, and "differing perceptions" and analyses of risks of litigation).

¹⁰⁸ Equally, if defendant can convince plaintiff that the claim is weak, plaintiff will presumably decrease her demand dramatically.

¹⁰⁹ Game theory is a method of analysis that studies an array of situational conflicts. It examines both pure conflict (zero-sum games) and interactions involving mutual dependence, that is situations where one or more parties' actions will be affected by actions taken by another. These include not only negotiations over litigation but also wars, blackmail, and maneuvering in a bureaucracy or traffic jam. See Thomas C. Schelling, *The Strategy of Conflict: Prospectus for a Reorientation of Game Theory*, 2 J. CONFLICT RESOL. 203, 203 (1958). For one of the classic works in the field, see J. VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1953). See generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994); ERIC RASMUSEN, *GAMES AND INFORMATION* (2d ed. 1994); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067 (1989); Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Michael L. Katz, *Game Playing Agents: Unobservable Contracts as Precommitments*, 22 RAND J. ECON. 307 (1991).

¹¹⁰ See, e.g., Kobayashi, *supra* note 106, at 17-18 (explaining that trials may occur because of strategic behavior on the part of litigants).

such a point themselves.¹¹¹ Rather, even to the extent there is an overlap between the parties' settlement positions, each party will attempt to have the case settle at the end of the range that is most beneficial to that party.¹¹² In order to achieve such a result the parties will often negotiate in a competitive fashion—starting with extreme demands, not budging very easily, and bluffing as to the true bottom line.¹¹³ Given this insight, it is understandable that cases often do not settle until they are on the courthouse steps. Only at this point do the parties feel that all the bluffs have been called and that the opposing party is making a realistic offer or demand. Of course, by the time the case reaches the courthouse steps, both parties have also spent a lot of money they could have put toward a settlement.

In an attempt to surmount this strategic barrier many have urged parties to change their negotiation style. Fisher, Ury, and Patton's landmark book, *Getting to Yes*, thus urges parties to be more willing to share information and to be flexible in their negotiating stances.¹¹⁴ The authors are not attempting to convince parties to abandon their self-interest, but rather to

¹¹¹ Some of the works detailing this strategic phenomenon include Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); I.P.L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539 (1983).

¹¹² This tension between "value creation" and "value claiming" has been described as the "negotiator's dilemma." See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 29–41, 117–153 (1986); see also Mnookin, *supra* note 13, at 238–242 (discussing how strategic behavior may block settlement).

¹¹³ For less technical discussions of how competitive negotiation may tend to prevent settlements due to bluffing, refusal to share information, and failure to budge from opening positions, see MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* 351–353 (1973); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 24–25, 41–42 (1983).

¹¹⁴ ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991). Fisher, Ury, and Patton explain that "traditional positional bargaining fails to meet the basic criteria of producing a wise agreement, efficiently and amicably." *Id.* at 4. Calling their alternative approach "principled negotiation," the authors recommend the following four-part method: "Separate the people from the problem," "[f]ocus on interests not positions," "[i]nvent options for mutual gain," and "[i]nsist on using objective criteria." *Id.* at 10–13.

abandon the strategic negotiation posture that is ultimately detrimental to their own interests.¹¹⁵

2. Psychologists' Insights

Psychologists and others have sought to explain the phenomenon of nonsettlement by expanding or even abandoning the economists' assumption of rational utility maximization.¹¹⁶ First, they have shown many persons do not merely seek to maximize wealth, but also have nonmonetary goals. Second, and more fundamental, such commentators have shown that the assumption of "rationality" in negotiations is itself flawed.

a. Nonmonetary Goals

Many have noted that humans may rationally have goals besides the acquisition of money. While some of these nonmonetary goals may be provided in a settlement,¹¹⁷ others seemingly require a trial.¹¹⁸ A party's

¹¹⁵ See *id.* at 7–9 (distinguishing "being nice" from engaging in positional bargaining). Some economists have also focused on the problems of diverging interests between principal and agent that will be discussed below in Part IV.B.

¹¹⁶ See, e.g., Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 8, at 86, 86–106; Robyn M. Dawes & John M. Orbell, *The Benefit of Optional Play in an Anonymous One-Shot Prisoner's Dilemma Game*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 8, at 62, 62–85; Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 8, at 44, 44–60; Robert H. Mnookin & Lee Ross, *Introduction* to BARRIERS TO CONFLICT RESOLUTION, *supra* note 8, at 3, 10–19; Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 8, at 26, 26–42 (discussing various psychological barriers to settlement). See generally Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994) (presenting experimental evidence illustrating the effect of various psychological barriers to settlement); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996). Some economists have recognized that their models, described above, may be incomplete. See, e.g., Jolls et al., *supra* note 103 (arguing that the field of law and economics would benefit by recognizing flaws in behavioral assumptions of the standard economic model); Shavell, *supra* note 104, at 57 n.8 (1982) (discussing the assumption of a "mutually attractive settlement amount").

¹¹⁷ A settlement might, for example, call for an employer to reinstate an employee or to set up a program to combat sexual harassment.

desire for these nonmonetary goals may rationally deter a party from entering into a settlement which precludes a trial. To reject a monetary settlement that does not fulfill these goals is therefore not necessarily "irrational," but rather may reflect a rationality that is broader than the mere maximization of wealth.¹¹⁹ Some of these possible goals are discussed below.¹²⁰

i. *Publicity*

Although parties often enter into settlements to avoid publicity, sometimes one or both parties desire publicity. For example, a plaintiff in a products liability suit might rationally reject a large monetary offer if her real goal was to use the trial to expose the problems with the defective product and thereby prevent others from being harmed. Similarly, a defendant accused of medical malpractice might rationally refuse to pay even a settlement that was less than her anticipated court costs if her

¹¹⁸ As will be discussed *infra* in Part V, some of these nonmonetary goals can in fact be achieved through mediation. A creative settlement that did not focus exclusively on money might also meet certain of these nonmonetary goals.

¹¹⁹ Bruce Kobayashi has actually set out an economic model in which he demonstrates that "external effects," specifically, a party's desire for nonmonetary results such as the precedent or preclusive effects a trial may yield, may prevent cases from settling even where the parties can accurately predict the outcome. *See* Kobayashi, *supra* note 106, at 18 (concluding that the existence of trials should not necessarily be viewed as a failure in that trials play an important role in developing legal rules).

¹²⁰ Professor Herbert Kritzer found in his study of certain personal injury cases from 1979 to 1980 "no indication that a large fraction of the cases that compose ordinary civil litigation involve goals other than money." HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 23 (1991). While recognizing the possibility that nonmonetary goals had been transformed into monetary goals by litigants or clients, he also found little evidence of this phenomenon. *See id.* However, because, as Kritzer recognizes, the costliness of litigation means that very few cases could or would be brought unless they were presented in monetary terms, it is not surprising that lawyers questioned about the stakes would respond primarily in terms of money. Significantly, only 55% of the plaintiffs surveyed by Kritzer initially described the stakes in terms of specific monetary amounts. *See id.* at 21. This Article does not dispute that money is a significant stake, but rather suggests that other nonmonetary goals may also be important.

primary goal was to obtain a verdict that would clear her reputation.¹²¹ Such desires for publicity may block a case from settling.

ii. *Precedent*

At times plaintiffs file lawsuits because they seek to establish a legal precedent that will constrain the behavior of the defendant and other similarly situated parties in future disputes.¹²² Defendants, too, may seek precedential victories. For example, a defendant in a products liability suit might rationally refuse to settle, even for a small amount, if she sought a defense verdict that would serve as a favorable precedent and deter other plaintiffs from bringing suit.¹²³ Such desires for precedent may rationally block a settlement.¹²⁴

iii. *Emotional Exchanges*

The experiences that lead people to litigate are often highly emotional. Many persons who participate in litigation have a need to vent their

¹²¹ See, e.g., Peter Charles Hoffer, *Honor and the Roots of American Litigiousness*, 33 AM. J. LEGAL HIST. 295, 308–309 (1989) (concluding that a person's decision to sue rests not only on material interest but also on that person's attempt to reclaim lost honor); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984) (stating "the grievant wants vindication, protection of his or her rights (as he or she perceives them), an advocate to help in the battle, or a third party who will uncover the 'truth' and declare the other party wrong"); see also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 364 (1991) (observing that settlement rates in medical malpractice cases are lower than in most other civil cases).

¹²² See Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 L. & SOC'Y REV. 775, 807–810 (1980–1981) (discussing how disputes may be expanded beyond the initial parties to focus on rights and needs of third parties, including the importance of legal precedent).

¹²³ Cf. Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 290–291 (1996) (observing that where the client's goal is to set a precedent rather than to settle a dispute, the client should seek out an attorney who will help to achieve this goal).

¹²⁴ Theoretically, settlements can be used to achieve certain precedential results. For example, a party might agree to the entry of a judgment against him. However, a court will not write a decision based on the parties' settlement, and a judgment without reasoning has little precedential impact.

emotions that cannot be satisfied by a mere monetary agreement. Plaintiffs may crave an opportunity to tell the defendant, face-to-face, how unfairly they believe they were treated and how their life has been changed as a result of the defendant's actions.¹²⁵ Defendants, similarly, may wish to explain how they have been wronged or misunderstood. Many attorneys have observed that they find it difficult to settle certain cases until their clients have had an opportunity to release their emotions.¹²⁶

As well, one or both parties may crave an interaction with or even an apology from the opposing party.¹²⁷ A plaintiff may want to hear, in the defendant's own words, just why the plaintiff was fired after twenty years of service. Or, the defendant may wish to hear how the plaintiff could possibly have sued the defendant, after so many years of an amicable working relationship. Again, the absence of such emotional exchanges may block any otherwise rational settlement.

iv. *Justice*

"Equity theorists" have posited that individuals' behavior and preferences may be affected by how well they believe they are faring relative to others.¹²⁸ In an experiment, Russell Korobkin and Chris Guthrie found that people were less likely to settle if they thought that the terms of

¹²⁵ See, e.g., McEwen et al., *supra* note 2, at 1372 (discussing the need to allow clients to get "stuff off their chest"); Alan Scott Rau, *Resolving Disputes over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2072 (1993) (observing that ADR provides "abundant opportunity for the open expression of emotions, [and] the venting and dissipation of anger").

¹²⁶ See John M. Conley & William M. O'Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 LAW & CONTEMP. PROBS. 181, 187 (1988) (discussing the litigation process as a form of therapy and observing that all parties seek a chance to tell their stories).

¹²⁷ See generally Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997) (discussing the potential importance of apology but also attempting to distinguish between different types of apologies and discuss when apologies are and are not likely to help).

¹²⁸ See, e.g., Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 151 (1973) (describing "equity theory"); see also Korobkin & Guthrie, *supra* note 116, at 142-147 (discussing the application of equity research to the litigation context); George F. Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426 (1989) (generally discussing the interpersonal comparisons' effect on individual behavior).

the settlement were unjust, although the monetary value of the settlement relative to the projected litigation result was the same.¹²⁹ Thus, either party's belief that a potential settlement, while rational as a prediction of the likely result at trial, is unjust may block a settlement. As Robert Mnookin has put it:

A proposed change in the status quo, one calling for an exchange of concessions or an allocation of gains and losses, may be rejected even when it offers indisputable advantages over maintenance of that status quo, and even when the future offers no realistic hope of more favorable terms, simply because the proposal violates one party's or both parties' sense of fairness or equity.¹³⁰

v. Vengeance

Vengeance or retribution may be seen as the evil twin of the justice concept discussed above. At times disputants may be willing to sacrifice monetary and other interests in order to punish their opponents or seek to ensure that they suffer. Litigants may often believe that a trial will afford them an opportunity to watch their attorneys wreak havoc on their opponents, perhaps through devastating cross-examination.¹³¹ Thus, where a party feels that a proffered settlement would not sufficiently harm her opponent, she may well prefer to take the dispute to trial, even where she knows her own expected recovery is less than the offered settlement.

b. Flaws in the Rationality Assumption

More radically than merely adding nonmonetary goals, psychologists (and some economists) have identified certain consistent flaws in the rationality assumption itself. That is, even people who are provided with

¹²⁹ Their experiment compared a situation in which a landlord, with no excuse, failed to make repairs and one in which the landlord had been required to leave the country unexpectedly due to a family emergency. In both cases the hypothetical plaintiffs were given the same information regarding their likely recovery in court. See Korobkin & Guthrie, *supra* note 116, at 144–147.

¹³⁰ Mnookin & Ross, *supra* note 116, at 11; see also Bazerman & Neale, *supra* note 116, at 87–96 (arguing that concerns for fairness can promote irrationality).

¹³¹ Attorneys often attempt to convince their clients that the scenario may not play out as hoped. The client who seeks to use the trial to achieve retribution may herself be further victimized in the process.

perfect information will tend to evaluate such information incorrectly due to errors of cognition, perception, and analysis. While the discussion below does not purport to be exhaustive, it highlights some of the most important psychological insights that are relevant to negotiation and mediation.¹³²

i. *Over-Optimism*

People tend to be over-optimistic about their chances in litigation. Numerous experiments have established that even when two groups of persons were given identical information about a case and then randomly assigned to play the role of either plaintiff or defendant, the persons assigned to play plaintiffs were far more optimistic about plaintiff's chances than were defendants.¹³³

¹³² See MARGARET A. NEALE & MAX H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION (1991) for further discussion of this subject. Some of the related phenomena which the authors discuss include the following: the "law of small numbers" (subjects' tendency to ignore sample size in processing new data), *id.* at 55-56; "confirmatory evidence bias" (subjects' tendency, once they hold certain beliefs, to discount information that might disprove or discount their beliefs), *id.* at 57-58; and "mythical fixed-pie negotiations" (subjects' assumption that their interests necessarily conflict with those of the other party), *id.* at 61-65; *see also* Chris Guthrie, *Better Settle than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 301, 320 (proposing to complement economists' utility maximization theory and psychologists' framing theory with one that would emphasize that litigants "possess not only the ability to crunch numbers but also the ability to experience emotion" and specifically that they seek to avoid regret).

¹³³ See HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 75 (1982) (discussing an experiment in which, though presented with identical evidence, the median plaintiff estimate of success was .75 and the median defendant estimate of plaintiff's success was .55). One psychological explanation that has been offered for this phenomenon of overconfidence is that people tend to overestimate the probabilities of outcomes that depend on a series of events. That is, if a plaintiff must prevail on points A, B, and C in order to win the case, and if the likelihood of A, B, and C is each .5, the likelihood of plaintiff succeeding in the case is only 12.5% (assuming no correlation between the events). Yet, most plaintiffs would feel far more optimistic than that about their chances. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11, 14 (Daniel Kahneman et al. eds., 1982). *See generally* Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980).

As well, people tend to see and remember things in a way that supports their own predispositions.¹³⁴ Thus, both parties to a dispute may truly believe that they are on the side of truth and justice. At the same time, people fail to recognize that they are subject to such cognitive biases.¹³⁵ These two sets of biases, both tending toward over-optimism, may often cause a potential zone of agreement in negotiation to disappear.¹³⁶

ii. Anchoring

When people estimate an unknown value they tend to be influenced by the starting point or anchor of the discussion.¹³⁷ Thus, a party who commences a negotiation by making a high demand or a low offer may be

¹³⁴ See Mnookin & Ross, *supra* note 116, at 13–15. See generally Robert P. Abelson, *Psychological Status of the Script Concept*, 36 AM. PSYCHOL. 715 (1981); Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, J. ECON. PERSP., Winter 1997, at 109, 110.

¹³⁵ See Mnookin & Ross, *supra* note 116, at 13–15; see also Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference, and Human Misunderstanding*, 24 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 319, 330–331 (1991).

¹³⁶ See Kahneman & Tversky, *supra* note 116, at 45–50 (discussing various cognitive phenomena that contribute to over-optimism and may serve as barriers to settlement, but also observing that such phenomena are not necessarily barriers to settlement).

¹³⁷ See, e.g., Tversky & Kahneman, *supra* note 133, at 14. The authors discuss an experiment in which parties' estimate of the percentage of African countries in the United Nations (U.N.) was influenced by the number offered in the question they were asked. Parties who were initially asked whether they thought African countries made up more or less than 10% of the U.N. estimated the actual percentage as 25, whereas parties who were asked whether they thought African countries made up more or less than 65% of the U.N. estimated the actual percentage as 45. See *id.*; see also MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 25 (1992) (examining the impact of anchoring on real estate agents given different list prices of houses and observing "an anchor will inhibit individuals from negotiating rationally"); Edward J. Joyce & Gary C. Biddle, *Anchoring and Adjustment in Probabilistic Inference in Auditing*, 19 J. ACCT. RES. 120, 122–126 (1981) (showing that professional auditors gave higher estimates of executive-level management fraud when they were first asked whether they thought fraud occurred in more than 200 of 1000 audited companies, than when they were asked whether such fraud occurred in more than 10 of the 1000 audited companies).

able to influence the final outcome of the negotiation.¹³⁸ However, anchoring may also impede a settlement that rationally ought to be reached. Where a party makes an initial offer that raises the hopes of the opposing party, that opposing party may then refuse to accept a subsequent offer, even if rationally the offer is a fair predictor of the trial outcome.¹³⁹

iii. *Risk Aversion, Risk Preference, and "Framing"*

The decision as to whether to settle a lawsuit rationally requires both parties to assess their risks if they proceed with the litigation. Plaintiff must calculate the likelihood that she will be awarded a judgment that, less costs, exceeds the settlement that has been offered. Defendant must calculate the probability that the sum of the expected judgment and costs will exceed a particular settlement.

"Rationally," the probabilistic calculation should be the same whether a person is calculating the possible gain of a dollar or the possible loss of a dollar.¹⁴⁰ Traditional economic theory assumes either that people are "risk neutral," meaning that they would be indifferent between having a ten percent chance of winning one hundred dollars and having ten dollars, or that they are "risk averse," meaning that they would prefer the "sure thing" of the ten dollars.¹⁴¹ Economists also typically assume that a person's risk

¹³⁸ See, e.g., BAZERMAN & NEALE, *supra* note 137, at 25; NEALE & BAZERMAN, *supra* note 132, at 49.

¹³⁹ Researchers Korobkin and Guthrie showed that hypothetical plaintiffs were less likely to accept a \$12,000 final offer to settle their case where the defendant had previously made a "reasonable" offer of \$10,000 than where the defendant had previously made a "low ball" offer of \$2000, even though rationally the prior offers should have made no difference. See Korobkin & Guthrie, *supra* note 116, at 139-142. See generally Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 296 (1992).

¹⁴⁰ See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263-264 (1979); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S251-S254 (1986).

¹⁴¹ Economists explain the phenomenon of risk aversion with the fact that individuals maximize utility rather than wealth and that a dollar is worth more to a person who has none than to a person who already has \$10,000. Given that, in economists' terms, the utility function is concave, the wealthy person is likely to be risk neutral whereas the poor person will be risk averse. See Rachlinski, *supra* note 116, at 117 n.13 (citing Harry Markowitz, *The Utility of Wealth*, 60 J. POL. ECON. 151 (1952)).

preference will remain constant whether she is contemplating a loss or a gain, although the preference may vary depending on the size of the gain or loss.¹⁴²

Yet, theorists have asserted and experiments have consistently demonstrated that people treat potential losses differently than they treat potential gains. Specifically, the prospect theory model developed by Kahneman and Tversky suggests that people are risk seeking as to potential losses and risk averse as to potential gains.¹⁴³ A typical person would prefer a sure twenty-five dollars to a twenty-five percent chance of winning one hundred dollars, but would prefer a twenty-five percent chance of losing one hundred dollars to the sure loss of twenty-five dollars. Jeffrey Rachlinski has emphasized that this phenomenon is significant in litigation because plaintiffs and defendants will tend to respond differently to risk.¹⁴⁴ Increasing the level of risk or uncertainty as to the outcome in court will tend to increase plaintiffs' but decrease defendants' interest in settling.¹⁴⁵

Psychological research has also revealed that the way a risk is characterized or "framed"—whether it is framed as a loss or rather as a gain—will significantly affect the parties' interest in accepting a settlement.¹⁴⁶ That is, two scenarios that are actually the same, from a rational perspective, will be viewed differently depending upon the

¹⁴² See *id.* at 121; Shavell, *supra* note 104, at 57–58.

¹⁴³ See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 342–344 (1984); Kahneman & Tversky, *supra* note 140, at 268–269; Tversky & Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453–455 (1981); Tversky & Kahneman, *supra* note 140, at S257–S260 (1986); see also Korobkin & Guthrie, *supra* note 116, at 129–130; Rachlinski, *supra* note 116, at 118–120.

¹⁴⁴ Rachlinski describes an experiment in which he described the same basic scenario to a group of law students, identified as either plaintiffs or defendants. Both groups were told that the opponent had offered a settlement of \$200,000 and that if they rejected the settlement plaintiffs had a 50% chance of winning \$400,000 at trial. Whereas 77% of the "plaintiffs" took the settlement, just 31% of the "defendants" chose to settle. See Rachlinski, *supra* note 116, at 128–129.

¹⁴⁵ See *id.* at 119–120; see also Gross & Syverud, *supra* note 121, at 354, 357, 367, 374–375 (analyzing actual case data and concluding that defendants made final offers that were lower than the expected judgment at trial in many categories of cases).

¹⁴⁶ See, e.g., Mnookin, *supra* note 13, at 243–246 (providing examples and explaining that loss aversion can act as a barrier to settlement in that "both sides may fight on in a dispute in the hope that they may avoid any losses, even though the continuation of the dispute involves a gamble in which the loss may end up being far greater").

characterization.¹⁴⁷ Where a particular proposal is framed as a loss compared to the status quo, most negotiators will be very reluctant to accept it, whereas they will more readily accept the same proposal if it can be characterized as a gain.¹⁴⁸ Thus, to the extent that negotiators see the settlement that has been offered as a "loss" they will often reject it, even though from a rational perspective they would be better off accepting the offer.¹⁴⁹

Savvy negotiators have learned that an apparent loss can sometimes creatively be recharacterized as a gain and thus rendered more acceptable to the opposing party. For example, something that looks like a loss when placed in one frame of reference looks like a gain when placed in another frame of reference. A defendant might view the payout of \$200,000 as a loss, if comparing it to the victory of paying out \$0, but could view the same \$200,000 as a victory if compared to paying out the \$1.2 million

¹⁴⁷ Kahneman and Tversky found, for example, that it made a difference in a public health scenario whether the question focused on the number of people who would die if a certain option was taken, rather than on the number of people who would live. Persons surveyed were more willing to gamble to avoid the loss (deaths) and preferred to take a sure thing when it came to saving lives. *See* Tversky & Kahneman, *supra* note 140, at 260.

¹⁴⁸ *See* Kahneman, *supra* note 139, at 298 ("The general principle is straightforward: when an option is compared to the reference point, the comparison is coded in terms of the advantages and disadvantages of that option."). For example, researchers Neale and Bazerman conducted an experiment involving a hypothetical labor-management negotiation. The basic facts were that the union sought a raise to \$12 per hour and that management did not want to pay more than \$10 per hour. The experiment revealed that settlements occurred more frequently when negotiators were instructed that their principals would view any settlement that was better than their bottom line as a "gain" than when they were instructed that any settlement worse than the bottom line would be perceived as a "loss." *See* NEALE & BAZERMAN, *supra* note 132, at 44-45.

¹⁴⁹ Korobkin and Guthrie have demonstrated this hypothesis experimentally as applied to three hypothetical litigation situations. For example, they studied a group of subjects presented with a choice between a \$21,000 settlement and a trial where they would receive either \$28,000 or \$10,000 (with unknown odds). They found the "litigants" were far more likely to accept the settlement where accepting the settlement would leave them better off than they had been prior to the hypothetical accident, than they were if the settlement would leave them worse off than they had been. *See* Korobkin & Guthrie, *supra* note 116, at 130-133; *see also* Rachlinski, *supra* note 116, at 130-132, 135-140, 149-167 (summarizing his own and others' experimental results verifying framing hypothesis).

awarded against another defendant in a similar case.¹⁵⁰ One important role lawyers may play in the negotiation context is to “reframe” options to their clients to encourage settlements.¹⁵¹ For example, Rachlinski observes that an attorney might convince a reluctant client to settle by pointing out sure losses (as opposed to mere possible losses) if the client continues to litigate.¹⁵² It is not clear how easy it will be for lawyers to reframe the issues as perceived by their clients.¹⁵³

iv. *Reactive Devaluation*

Groucho Marx is reputed to have said that he would not want to be a member of any club that would have him. “Reactive devaluation” is a sort of corollary to this proposition. Psychologists have found that people tend

¹⁵⁰ See Rachlinski, *supra* note 116, at 145 (observing that prior expectations may affect risk preferences).

¹⁵¹ See *id.* at 170–173 (“An attorney may have some power to reframe a settlement offer, sparing the client the most costly aspects of framing.”); see also Korobkin & Guthrie, *supra* note 116, at 138, 161–163; cf. Jonathan R. Macey, *Packaged Preferences and the Institutional Transformation of Interests*, 61 U. CHI. L. REV. 1443, 1443, 1477–1478 (1994) (observing that “individuals often find it in their interest to select a variety of mediating institutions (corporations, investment funds, unions, political parties, religious institutions, etc.) to act as their agents” and to make decisions for them, in part to guard against individual irrationality).

¹⁵² See Rachlinski, *supra* note 116, at 171. Rachlinski also observes that the attorney can use framing to discourage a client from settling and that an “avaricious defense attorney who works on an hourly rate may portray all settlements as losses so as to encourage the risk-seeking proclivities of the client.” *Id.* at 172.

¹⁵³ Researchers Korobkin and Guthrie sought to test lawyers’ ability to reframe by providing the hypothetical litigants with additional information and analysis attempting to show them that it would be irrational to hold out for a trial simply to recover sunk costs. They found that, using mere written amplification, it was very difficult to eradicate the psychological barrier. They speculated, however, that conceivably an attorney sitting down face-to-face with a client might have greater success in overcoming the psychological phenomenon. See Korobkin & Guthrie, *supra* note 116, at 161–163. In a subsequent study Korobkin and Guthrie found lawyers could influence their clients’ likelihood of accepting a settlement by educating clients or by directly advising the clients to take the deal. They did not specifically test lawyers’ ability to reframe. See Korobkin & Guthrie, *supra* note 14, at 113–120; see also Rachlinski, *supra* note 116, at 173 (discussing the fact that attorneys seem to have limited power to save clients from their own biases).

to devalue proposals based on their authorship by an adversary.¹⁵⁴ That is, a person who would have been willing to settle her claim for five thousand dollars may no longer be willing to settle for that amount once the other side makes the offer.¹⁵⁵

B. Effects on Barriers When Principals Are Represented by Agents

An attorney's representation of her client in litigation or mediation is a form of principal-agent relationship. This subpart will apply the growing literature on principal-agent relationships to explore the extent to which the insertion of the attorney agent into the negotiation process may add new barriers to settlement or perhaps augment those already discussed above. It will also discuss ways in which the addition of the attorney agent may lower negotiation barriers, sometimes causing the client to enter into settlements that are not actually in the client's best interests.¹⁵⁶

¹⁵⁴ See, e.g., Ross, *supra* note 116, at 34; Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 392 (1991); see also Mnookin, *supra* note 13, at 246–248 (describing reactive devaluation phenomenon and providing examples).

¹⁵⁵ Korobkin and Guthrie suggest that some experiments that have been interpreted to exemplify reactive devaluation may really demonstrate either a fear that the opponent is taking advantage of private information or spite—a desire to prevent the opponent from obtaining something she values—rather than pure reactive devaluation. When Korobkin and Guthrie themselves designed a test for pure reactive devaluation, they found no statistically significant evidence of the phenomenon, leading them to conclude that “to the extent reactive devaluation occurs in the litigation negotiation context, it may be driven largely by spite, rather than by fear of private information or pure reactive devaluation.” Korobkin & Guthrie, *supra* note 116, at 159. For the purposes of this Article the distinction is not important.

¹⁵⁶ Other principal-agent relationships may also complicate mediations, but exceed the scope of this Article and will be discussed only in passing. For example, where a company sends its director of human resources to represent the company's interest at the mediation, that director is serving as an agent of the company. Her own interests and incentives may often diverge from those of the company. This phenomenon is discussed at length in LAX & SEBENIUS, *supra* note 112, particularly in chapter 15. As well, where defendants are insured, the insurance adjuster acts as an imperfect agent for the insured. The interests of the insurance company may often diverge from those of the insured in the following ways: the insurance company is only concerned with short term losses up to the policy limit, the insurance company may be concerned with how a particular result will affect other cases, and the principal will have concerns not shared by the insurance company such as protecting her reputation. Some of the effects of these conflicts of interest are discussed in Samuel R. Gross & Kent D. Syverud,

When an attorney represents her client in a mediation or a negotiation she acts as an agent in several ways. She both speaks for the client and listens for her, then communicates information back to the client. Thus, the attorney acts as a filter between her client and the opposing party or attorney. This filtering, while often desirable, also gives rise to potential "agency costs."¹⁵⁷ The literature on principal-agent relationships has described three major types of costs or inefficiencies that may result from the insertion of an agent, given the lack of identical interests between principal and agent¹⁵⁸ and given the lack of perfect monitoring of the agent by the principal. First, the agent knows more than it can adequately communicate to the principal about the activities for which it is serving as agent.¹⁵⁹ Second, the principal knows more than it can adequately communicate to the agent about the principal's goals.¹⁶⁰ The principal and agent can try to minimize these losses by building in structural mechanisms to maximize communication and understanding. Third, and most important, agency losses will occur to the extent that the agent's own interests and incentives diverge from those of the principal. This loss will be greatest to the extent that it is costly for the principal to monitor the agent adequately and thereby ensure that the agent is properly serving the principal's interests.¹⁶¹

Many lay people, mediators, and even lawyers and commentators might assume that the addition of a lawyer-agent to a two-party dispute will tend to increase the parties' disagreements and thereby decrease the likelihood of

Don't Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. REV. 1, 18-26, 50-59 (1996) (discussing data showing that defendants are insured in virtually all cases that go to trial and the divergence of incentives between insurer and insured).

¹⁵⁷ An "agency cost" is a reduction in welfare that is attributable to the role played by an agent in a particular relationship. See John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 1, 3 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

¹⁵⁸ As Pratt and Zeckhauser have explained, no agency loss would occur if the agent were the perfect representative of the principal. See *id.* However, absent cloning, this seems unlikely. No two people are completely alike. Moreover, in the case of lawyer-client relationships, it is not even clear that a client would want to send her clone in as her attorney or agent. We hire lawyers because we believe that they have special knowledge and expertise, not because we believe they are simply extensions of ourselves.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 5.

settlement.¹⁶² Certainly this can occur. Lawyers face economic incentives that are different from those facing their clients, and these incentives may sometimes lead the lawyers to oppose settlement.¹⁶³ As well, lawyers' psychological makeups may sometimes cause a dispute to be litigated rather than resolved through negotiation or mediation, whether this is due to the lawyer's predisposition toward litigation or perhaps to other psychological characteristics that block a settlement that might otherwise be possible.¹⁶⁴

However, two recent important articles have argued that the participation of a lawyer may in fact facilitate the dispute resolution process and increase the likelihood of settlement. Approaching this question from the vantage of game theory, Ronald Gilson and Robert Mnookin have argued that there is good reason to believe that lawyers may facilitate the dispute resolution process by making it easier for the parties to engage in problem-solving rather than positional bargaining.¹⁶⁵ While recognizing that various factors may nonetheless subvert the cooperative approach, Gilson and Mnookin argue that the presence of attorneys will tend to foster rather than preclude settlement.¹⁶⁶ Approaching the lawyer-client

¹⁶² See Gilson & Mnookin, *supra* note 13, at 510–511 (noting that many assume that lawyers “magnify the inherent divisiveness of dispute resolution”).

¹⁶³ Herbert Kritzer has emphasized that it is crucial to think of the attorney's own incentives in the negotiation process, observing that attorneys may not even be conscious of the extent to which they allow their own needs to influence the negotiation. See KRITZER, *supra* note 120, at 100–110. See generally HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990) (arguing that lawyers should be seen not merely as professionals who serve as alter egos of their clients, but also as brokers who respond to client requests while also having their own interests and incentives).

¹⁶⁴ See *infra* Part IV.B.2.

¹⁶⁵ See Gilson & Mnookin, *supra* note 13, at 512. Gilson and Mnookin suggest that the choice between positional and problem-solving negotiation may be viewed in game theory terms as a prisoner's dilemma and that lawyers can help their clients avoid the choice of positional bargaining in that clients may, through their choice of a cooperative attorney, bind themselves to this approach. See *id.* at 514–527. In a subsequent article Croson and Mnookin present experimental findings they claim are consistent with the hypothesis of the Gilson and Mnookin article. See Croson & Mnookin, *supra* note 13, at 331.

¹⁶⁶ Gilson and Mnookin explain that several agency problems may subvert the cooperation that would otherwise be expected, specifically the possibility that attorneys may conspire together to avoid cooperation to boost their own fees and the possibility that a client may be able to convince a formerly cooperative attorney to turn positional. See Gilson & Mnookin, *supra* note 13, at 527–529. They argue that lawyers' participation in law firms may help avoid these problems, see *id.* at 530–531, but

relationship from a psychological standpoint, Russell Korobkin and Chris Guthrie reached a similar conclusion. Having conducted a series of psychological experiments they found that given psychological variances between lawyers and their clients, lawyers may cause their clients to enter into settlements that the clients would not find acceptable if they were representing themselves.¹⁶⁷ Korobkin and Guthrie argue that because lawyers are less affected than clients by some of the psychological barriers discussed above, they will often urge their clients to enter into settlements that appear undesirable to the client but rational and desirable to the attorney.¹⁶⁸

This subpart will explore how these potential divergences between attorneys and their clients may affect the settlement process. It will examine both divergences that prevent principals from finding agreements that would serve their mutual best interests and those that cause principals to enter agreements that do not in fact serve their interests.

1. *Given Professional Responsibility Requirements, How Can Lawyers Fail to Represent Properly the Interests of Their Clients?*

The concept that a lawyer might not properly represent the interests of her client in a negotiation may seem strange to many. After all, the ethical rules governing lawyers' professional conduct are geared to prevent lawyers from acting out of self-interest. For example, the comment to Rule

ultimately recognize that even law firm lawyers' presence cannot guarantee a cooperative approach, *see id.* at 531-534.

¹⁶⁷ *See* Korobkin & Guthrie, *supra* note 14, at 82. Korobkin and Guthrie seem to assume that the different approaches taken by lawyers and clients in their experiments reflect different inherent psychological makeups, rather than the fact that people may act more rationally when serving as an agent for another than when acting on one's own behalf. *See id.* at 81-82. For the purpose of this Article the distinction is not important, but this warrants future research.

¹⁶⁸ *See id.* at 95-121. Korobkin and Guthrie show that attorneys not only tend to be less influenced by various psychological phenomena, but also have an ability to influence their clients' decisions. *See id.* Yet, Korobkin and Guthrie recognize that such rational settlements do not always serve the clients' best interests. For example, where a client suffers from "loss aversion" and therefore has a strong desire to regain lost ground, the attorney will not help the client maximize her utility by convincing her to treat the loss as a sunk cost. Similarly, where the client seeks equity or vengeance as well as a monetary recovery, the attorney does not help the client maximize her utility by focusing only on the monetary factor. *See id.* at 132-136.

1.7(b) of the American Bar Association (ABA) Model Rules of Professional Conduct states that “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”¹⁶⁹ As to settlement, the Model Rules explicitly provide that “[a] lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.”¹⁷⁰

Nonetheless, there are several reasons to believe that lawyers’ own interests may at times affect their representation of their clients. First, even assuming all attorneys do their very best to act in their clients’ best interests rather than their own, lawyers may at times not see that there is a conflict between the two sets of interests. That is, even where lawyers attempt to set aside their own interests, they may unconsciously act according to those interests.¹⁷¹ Second, not all the phenomena described in this Article involve

¹⁶⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) cmt. (1992). The Rule itself provides that:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id. at Rule 1.7(b).

¹⁷⁰ *Id.* at Rule 1.2(a). Limited exceptions exist where the client is a minor or mentally disturbed. *See id.* at Rule 1.14(a) (stating that even where the client’s ability to make considered decisions is impaired, the lawyer shall, to the extent reasonably possible, maintain a normal lawyer-client relationship). The ABA Model Code makes the same point less explicitly, providing that while lawyers are entitled to make certain decisions “not affecting the merits of the cause or substantially prejudicing the rights of a client,” in other aspects “the authority to make decisions is exclusively that of the client.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

¹⁷¹ *See* Mendelsohn, *supra* note 97, at 139 (“Consciously or not, lawyers may prolong their clients’ conflict for financial or reputational reasons.”); *see also* KRITZER, *supra* note 120, at 110 (noting that although lawyers may not consciously favor their own interests over those of their clients, they, “like all of us, see the world through green-tinted glasses” such that “when confronted by a choice for which there is no definitive answer, they will tend to select the option that is in their own interest”); Melissa L. Nelken, *Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 426 (1996).

Since [the attorney] herself is the one negotiator she can’t walk away from, the more she can become aware of what motivates her own behavior in negotiations,

conflicts of interest as defined under the Model Rules. No rule of professional conduct mandates that an attorney view the world or express herself in the exact same way as would her client. Yet, at times such psychological variations may either prevent a case from settling or cause it to settle when it should not.¹⁷² Third, even the most naïve among us surely must recognize that not all attorneys act ethically all of the time. The rules of professional conduct are not one hundred percent successful one hundred percent of the time.¹⁷³

In short, it seems accurate to assume that attorneys' interests and psyche may at times vary from their clients'. The degree of disparity will likely vary. More sophisticated, experienced, and professional clients may see the world in a way that is closer to their lawyers' views than would less sophisticated, less experienced clients. In virtually all cases, however, it is likely that significant economic and perhaps also psychological differences will exist.

Given such disparities, what are the mechanisms by which attorneys may cause clients to take steps that are not in their best interests? Very simply, clients are largely dependent upon their agents or attorneys for information as to the strengths and weaknesses of each side's case and for an evaluation of the advantages and disadvantages of a proposed settlement. Even assuming that attorneys always, as they are required to do, convey all settlement demands and offers to their clients for consideration,¹⁷⁴ attorneys have a great deal of power to influence the clients' decisions on whether or not to accept the offer or meet the demand.¹⁷⁵ Having hired the attorney for

the more able she will be to step back in the heat of the moment to reflect on whether what is happening really serves the interests of her client.

Id.

¹⁷² See Nelken, *supra* note 171, at 423 ("Everyone has heard stories of lawyers so competitive that they poison deals that could have been made to the benefit of their clients; there are also lawyers whose need to accommodate those they negotiate with leads them to give away the store, to the detriment of their clients.").

¹⁷³ See, e.g., Lisa Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 663 (1990) ("Lawyers deceive their clients more than is generally acknowledged by the ethics codes or by the bar.").

¹⁷⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt. 1 (1995) ("A lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . should promptly inform the client of its contents unless prior discussions with the client have left it clear that the proffer will be unacceptable.").

¹⁷⁵ See Korobkin & Guthrie, *supra* note 14, at 81 (noting that lawyers have a great deal of influence over clients' decisions to settle). See generally KRITZER, *supra* note 163, at 60-66 (discussing lawyer-client relationships in general and concluding that

her expertise, the client cannot easily question the attorney's expert opinion.¹⁷⁶ Moreover, where the lawyer, and not the client, is the one who attempts to negotiate a settlement, the client is dependent on the lawyer not only for expert opinions but also, more simply, to be her eyes, ears, and mouth. The client must depend on the lawyer's assessment of the other side's witnesses' credibility and can only voice her own views and emotions through her attorney. Thus, deliberately or not, these restraints may well have a great impact on the client's decision of whether or not to accept a particular settlement offer.

Russell Korobkin and Chris Guthrie designed an experiment to test lawyers' ability to influence their clients' settlement decisions.¹⁷⁷ They hypothesized that lawyers might influence clients by any of the following four mechanisms: by educating clients as to the psychology that might lead them irrationally to reject a settlement, by helping clients to consider the opposing party's point of view, by making recommendations of settlement and providing explanations of the basis for the recommendations, or by making recommendations of settlement without explaining the bases of the recommendations. The authors found all four mechanisms to be statistically significant and concluded that those lawyers who made an explicit recommendation without an accompanying explanation had the greatest influence on their clients.¹⁷⁸

In short, attorneys have the opportunity to influence their clients' decisions in ways that might not serve the clients' own interests. The

lawyers generally exercise a great deal of autonomy, particularly when their clients are individuals).

¹⁷⁶ See, e.g., KRITZER, *supra* note 120, at 63 ("[T]he client is usually entirely dependent upon the lawyer's assessment of the appropriateness of the settlement that has been offered."); see also DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 133 (1990) (reporting that only a third of injury victims who sought legal counsel in making a compensation claim recalled their lawyers mentioning estimates of compensation they might recover).

¹⁷⁷ See Korobkin & Guthrie, *supra* note 14, at 113–121 (explaining that in the experiments, the authors did not actually have clients consult with real attorneys, but rather provided the students who were playing the roles of clients with written information summarizing a supposed attorney's input).

¹⁷⁸ See *id.* at 119 (noting that those clients who did not receive attorney advice averaged a mean score of 2.60 on a scale of 1 to 5 as to whether or not they would settle. In comparison, those who received a lawyer recommendation scored 3.66; those who received a psychology lesson scored 3.44; those who received a lawyer recommendation together with an expected value analysis scored 3.39; and those who received the "consider the opposite" explanation scored 3.14).

remainder of this Part will outline how divergences between economic incentives and psychologies can lead attorneys to block settlements that would serve the clients' best interests or to promote settlements that would not serve the clients' best interests.

2. *Reasons Lawyers May Block Cases from Settling*

a. *Diverging Monetary Incentives*

Economists and others, including clients, have long realized that attorneys who are paid by the hour have at least a short term interest in prolonging the dispute, and thereby maximizing their fee, rather than allowing a settlement to kill the goose that is laying golden eggs. To some extent the attorney's longer term interests in retaining the client or gaining referrals from a satisfied client may counter this short term greed, but it seems that the short term profit-taking urge may sometimes cause an attorney to be less than enthusiastic about a proposed settlement.¹⁷⁹

Attorneys' incentive to keep the clients satisfied and on board as clients may also lead them to derail potential settlements.¹⁸⁰ Clients typically hire attorneys with the idea that they will be their "gladiators," who will attempt to convince the world of the virtue of the clients' positions. This role creates a tension in the settlement context. In analyzing a potential settlement, the lawyer must discuss potential weaknesses of the case with the client. Although this sounds easy enough, as many practicing attorneys have found, it is a very difficult process, particularly where the client is an individual.¹⁸¹ The client may well feel abandoned and threatened when she

¹⁷⁹ One reason the short term interest may prevail is that attorneys' own short-term interests may diverge from the longer-term interests of their firm. Whereas a firm has a strong interest in retaining a particular client and thus keeping the client happy, a particular attorney at the firm may be more focused on billing 2200 hours in order to make partner. *See* Gilson & Mnookin, *supra* note 13, at 531-533.

¹⁸⁰ This incentive is not necessarily shared by clients in that clients have no particular need to retain any particular attorney.

¹⁸¹ *See* James C. Freund, *Bridging Troubled Waters: Negotiating Disputes*, LITIG., Winter 1986, at 43, 43-44 ("For a litigator—poised to defend his client's honor through the last appeal—the conciliatory approach is a hard road to travel without running the risk of being seen as a softy who is reluctant to fight and ready to give away the store."); Jerry Spolter, *Checklist for Successful Mediation*, DISP. RESOL. J., Mar. 1994, at 26, 26 (noting that clients may view settlement as lack of faith on the part of their attorneys).

hears her gladiator seemingly taking the other side's position.¹⁸² Clients sometimes fear that the attorney has "sold out" or is acting out of ulterior motives when the attorney tries to present a balanced view of the case.¹⁸³ At times, these feelings even lead clients to fire their attorneys.¹⁸⁴ To avoid such unpleasant encounters, and also to avoid being fired, an attorney may consciously or unconsciously upwardly exaggerate her own client's likelihood of success.¹⁸⁵ This exaggeration, in turn, may well lead a client to reject a settlement offer that ought to have been accepted.

The fact that an attorney is being compensated through a contingent fee may sometimes also discourage a settlement. While, as will be discussed below, one might expect contingent fee representation to cause the attorney to push for a settlement that is not in the client's best interest, it can sometimes have the reverse effect. Clients are smart. If a client suspects that her attorney is pushing her to settle simply so that the attorney can maximize her hourly fee, the client may well reject the settlement and insist that the attorney take the case to trial. At times, of course, the client will make a mistake. In some instances the contingent fee attorney will recommend a settlement that is truly in the client's best interest, and the client will reject the fair settlement simply because she fears she is being duped.

b. *Diverging Nonmonetary Incentives*

Clients' nonmonetary incentives or goals are not always shared by their attorneys. Because the attorney does not share her client's nonmonetary

¹⁸² See Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. REV. 863, 894 (1987) ("By considering the legitimate interests of others, seeking fairness for all, and looking for durability, the lawyer appears to be abandoning her fiduciary obligation to maximize the gain for the client."); Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 45 GEO. J. LEGAL ETHICS 45, 101 (1994) (noting that lawyers fear that they may lose business if they do not take a "hired gun" approach).

¹⁸³ Cf. William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1455-1456 (1992) (stating that lawyers and clients are filled with suspicion and doubt toward one another and observing that clients are suspicious about lawyers' depth of commitment).

¹⁸⁴ See GALTON, *supra* note 67, at 90.

¹⁸⁵ See KRITZER, *supra* note 120, at 110-111 (observing that lawyers' financial incentives will affect which settlements they encourage their clients to accept); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 111 (1974).

interests, she may regard these interests as having little or no value. She therefore may not present them or certainly not emphasize them as part of the settlement package.¹⁸⁶ Yet, if these nonmonetary interests are important to the client, their absence may well prevent a settlement from being reached. Some examples should help to clarify the point. A client in an employment discrimination case might seek not only monetary compensation but also nonmonetary relief including an apology, establishment of a training program intended to discourage future discrimination, or reinstatement. More generally, the client may seek dignity and respect. Yet, these nonmonetary goals likely have little appeal for the attorney who, after all, cannot take a one-third contingency of an apology. Other nonmonetary client goals might include desires for revenge, security, love, an opportunity to "vent," or the possibility of securing future business from the opposing party. Again, because the attorney likely does not share these goals, the attorney will not always take adequate steps to secure them in a settlement.

The opposite problem may sometimes exist as well. Attorneys may have certain interests, not shared by their clients, that may cause them to prefer to take a case to trial than to allow it to settle.¹⁸⁷ For example, the attorney may seek a trial in order to further her own reputation in the community as a lawyer who is willing to "go the distance,"¹⁸⁸ to hone her trial skills, or to obtain a legal precedent on an issue of interest to the attorney. Any or all of these nonmonetary interests might, perhaps unconsciously, cause an attorney to steer her client away from settlement.

c. Diverging Psychology

Differences between the psychological makeup of the client and her attorney may also create a barrier to a negotiated agreement. Obviously, both lawyers and clients vary tremendously among themselves in their

¹⁸⁶ See KRITZER, *supra* note 120, at 47, 101 (stating that very few lawyers in a study of personal injury cases made offers or demands based on acknowledgments of interpersonal obligations and also noting that contingent fee attorneys cannot afford nonmonetary solutions).

¹⁸⁷ See Mendelsohn, *supra* note 97, at 141–143 (discussing lawyers' nonfinancial incentives that may block settlements).

¹⁸⁸ See *Rizzo v. Haines*, 555 A.2d 58, 64, 66 (Pa. 1989) (finding an attorney was liable of malpractice for failing to convey a settlement offer to his client and observing that evidence existed showing that the lawyer wanted to take the case to trial rather than settle to get "a reputation as a negligence attorney").

psychological makeups. Nonetheless, it is possible to make some very gross generalizations as to differences between the typical attorney and the typical client. These disparities may cause the attorney both to see things differently than the client would have seen them and also to express herself differently than the client would have expressed herself. Often these differences are desirable and are the very reason that a client may choose to be represented by an attorney. At times, however, these differences may cause an attorney to stand in the way of a settlement that the client might have approved.

As a group, attorneys tend to be rational and analytical,¹⁸⁹ somewhat cynical,¹⁹⁰ verbal,¹⁹¹ and not particularly creative.¹⁹² Attorneys also tend to

¹⁸⁹ See Korobkin & Guthrie, *supra* note 14, at 81 (“[L]awyers as a class share an analytical orientation to decisionmaking that can facilitate a higher rate of settlement than behavioral scientists would expect litigants to negotiate on their own.”). As Korobkin and Guthrie observe, law schools select persons who have particularly strong analytical orientations and then also train their students to emphasize analysis and logic and de-emphasize emotion. *See id.* at 87; *see also* Susan J. Bell & Lawrence R. Richard, *Anatomy of a Lawyer: Personality and Long-Term Career Satisfaction*, in *FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER?* 149, 152 (2d ed. 1992) (contrasting “thinkers,” who while orderly and logical are often critical and hurt others’ feelings without knowing it, with “feelers,” who seek harmony and are sensitive to the effect their decisions may have on others); Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 248 (1974) (observing that law students tend to make decisions based on analysis and logic rather than based on sympathy or concern for others) (citing EDUCATIONAL TESTING SERV., *A FOLLOW-UP STUDY OF PERSONALITY FACTORS AS PREDICTORS OF LAW STUDENT PERFORMANCE* (1967)); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1405 (1997) (summarizing numerous studies showing that law students and lawyers tend to place a much greater emphasis on thinking, rights, and rationality than do typical persons, who place relatively greater emphasis on feeling, interpersonal harmony, and humanistic concerns); Nelken, *supra* note 171, at 422 (noting that law students are taught that only logic and not feelings are relevant). *See generally* Paul Van R. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460 (1967).

¹⁹⁰ *See* Norman Solkoff & Joan Markowitz, *Personality Characteristics of First-Year Medical and Law Students*, 42 J. MED. EDUC. 195, 197–199 (1967) (finding law students more cynical, i.e., distrusting of others’ motives, than medical students); *see also* James M. Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students*, 1979 AM. B. FOUND. RES. J. 791, 804 n.24 (noting research studies that found that law students were less interested in public interest work as they spent more time in school).

see themselves as gladiators, fighting for a particular cause or to protect their clients. Clients, by contrast, tend to be more emotional,¹⁹³ more open to new ideas, and more creative. These differences play out in the ways that lawyers and clients perceive the world¹⁹⁴ and also in the ways that they express themselves.

Lawyers' cognitive characteristics do not necessarily suit them well to engage in problem-solving or cooperative negotiations. Lawyers will often focus exclusively on monetary gain or loss,¹⁹⁵ be suspicious of their opponents' offers,¹⁹⁶ and dismiss as hyperbole their opponents' claims as to the strengths of their own positions. Lawyers will also tend to dismiss, as fluff, offers or requests for apology. Their quest for justice or to protect

¹⁹¹ See Daicoff, *supra* note 189, at 1349–1350 (stating that lawyers are focused on academics and have good social skills) (citing Martin J. Bohn, Jr., *Psychological Needs of Engineering, Pre-Law, Pre-Med, and Undecided College Freshmen*, 12 J.C. STUDENT PERSONNEL 359, 359 (1971); Edwin N. Shneidman, *Personality and "Success" Among a Selected Group of Lawyers*, 48 J. PERSONALITY ASSESSMENT 609, 613 (1984)); Korobkin & Guthrie, *supra* note 14, at 87 ("Lawyers are known for their analytical skills.").

¹⁹² See Daicoff, *supra* note 189, at 1362 (commenting that lawyers tend to be unimaginative) (citing Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 555 (1973)).

¹⁹³ See Felstiner & Sarat, *supra* note 183, at 1456 (observing that lawyers often feel clients are too emotional); Nelken, *supra* note 171, at 423 ("Client dissatisfaction with legal representation often results from the lawyer's inability to see the client's emotional self as anything but an impediment to sensible, rational management of the legal problem the client brings.").

¹⁹⁴ As will be discussed *infra*, Korobkin and Guthrie concluded that some of the cognitive differences between lawyers and their clients may foster rather than impede settlements in that lawyers tend to be less subject to certain psychological biases including framing, anchoring, and equitable factors. See Korobkin & Guthrie, *supra* note 14, at 95–112, 137; *infra* Part IV.B.3.

¹⁹⁵ In a hypothetical involving a landlord-tenant dispute over a broken heater, Korobkin and Guthrie found parties were more likely to settle where the landlord failed to fix the heater because he was out of the country on a family emergency than because he simply failed to return phone calls, even though the likelihood of prevailing in court was said to be the same. The attorneys, on the other hand, were far less affected by the "equity" story. See Korobkin & Guthrie, *supra* note 14, at 111–112.

¹⁹⁶ See *id.* at 106–107 (concluding that opening settlement offers had little effect on lawyer subjects); see also *id.* at 112–113 (noting that lawyers were not affected to the same degree as litigants by the psychological effects of framing, anchoring, and equity-seeking).

their clients against an unfair result may lead them to insist on going to trial.

Clients, on the other hand, are sometimes better able to see beyond short term financial interests and to be more creative in structuring a mutually beneficial settlement. They may also be more receptive to both the giving and receiving of an apology as a component of a settlement. As well, at times clients, particularly representatives of business entities, are less invested than the attorney in proving the strength of the party's own case. Clients may thus be better able to see that the opposing party's case also has some strengths. For all of these reasons, the parties may sometimes be able to reach a mutually acceptable settlement although their attorneys are deadlocked.

With respect to expression, lawyers are typically more calm, cool, rational, and collected than their clients.¹⁹⁷ At times this is helpful and may allow a negotiation to succeed where the two clients, negotiating alone, would have gotten angry and stalked off. Sometimes, however, lawyers' insistence on calm, rational expression is a hindrance to settlement. Clients often need to vent or blow off steam. Until they do, no settlement may be possible. As well, clients are sometimes willing to take the dispute to a personal level that would make the lawyer uncomfortable. That is, the client might want to make an appeal to past friendship or to apologize. Lawyers tend to be uncomfortable with the personal caring approach and to

¹⁹⁷ As Professor Daicoff discusses at length, lawyers have been shown to be much more oriented to "thinking," as measured by the Myers-Briggs Type Indicator personality assessment measure, than to "feeling," as compared to the population at large. See Daicoff, *supra* note 189, at 1392-1394 (citing Frank L. Natter, *The Human Factor: Psychological Type in Legal Education*, 3 J. PSYCHOL. TYPE 55, 55-56 (1981), reprinted in RES. IN PSYCHOL. TYPE 24, 24-25 (Thomas G. Carskadon ed., 1993); Larry Richard, *How Your Personality Affects Your Practice—The Lawyer Types*, A.B.A. J., July 1993, at 74, 76-77 (noting that lawyers tend to be "thinkers" and "judgers" on the Myers-Briggs test); Paul Van R. Miller, *A Follow-Up Study of Personality Factors as Predictors of Law School Performance* (1965) (unpublished report to the LSAT Council); Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States* 229-230 (1994) (unpublished Ph.D. dissertation, Temple University) (on file with Temple University)). That is, "[l]awyers tend to be more logical, unemotional, rational, and objective in making decisions and perhaps less interpersonally oriented than the general population, which might explain why lawyers and their clients at times have trouble interacting with and relating to each other." Daicoff, *supra* note 189, at 1394 (citing Larry Richard, *How Your Personality Affects Your Practice—The Lawyer Types*, A.B.A. J., July 1993, at 74, 78).

prefer to use a more abstract rights-oriented analysis.¹⁹⁸ When a lawyer blocks these more emotional exchanges, the lawyer may prevent resolution of a case that could have settled on mutually acceptable terms.

Lawyers and clients may also differ in their attitudes toward risk. Lawyers, as "repeat players" in the litigation process, will likely be willing to take more risks than those clients who have just one shot at the process. For example, a person who suffered severe injuries in a car accident and whose expected value of recovery at trial is \$500,000 might well be willing to accept a settlement of \$300,000, rather than run even a low risk of conceivably recovering nothing at trial. The down-side risk might be unacceptable. The plaintiff's attorney, by contrast, may well have quite a few cases pending and therefore be willing to take the rational risk of going to trial.

d. *Amplifying Psychology*

At times, the use of an agent in the negotiation process may block an otherwise satisfactory settlement not because the interests of the agent and principal diverge, but rather because they overlap.¹⁹⁹ Such an overlap may

¹⁹⁸ See James L. Hafner & M. Ebrahim Fakouri, *Early Recollections of Individuals Preparing for Careers in Clinical Psychology, Dentistry, and Law*, 24 J. VOCATIONAL BEHAV. 236, 236-241 (1984) (finding that law students were less interested in people, emotions, or interpersonal concerns than students of dentistry and psychology); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 228-229, 234 (1991) (concluding that lawyers are trained to ignore personal feelings in order to become effective advocates and further concluding that while women began law school with a moral orientation more oriented to "caring" than did men, they quickly shifted to rights perspectives after one year of law school); see also Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Co.*, 69 WASH. U. L.Q. 1059, 1062 (1991) (comparing mediation in which clients participated to one in which they did not and observing that the former was much more emotional and that the author-lawyer-mediator was much more comfortable when clients were not present); cf. Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1238 (1988) (concluding that significantly more females than males stated that they had attended law school to serve society).

¹⁹⁹ Although the work of Korobkin and Guthrie showed, in one set of experiments, that lawyers were less subject to the psychological phenomena of framing, equity seeking, and anchoring than were their clients, and even that these phenomena had no statistically significant impact on the attorneys, see Korobkin & Guthrie, *supra* note 14, at 95-112, more work would need to be done to establish that lawyers are

amplify some of the psychological barriers to negotiation that were discussed earlier in this Article. For example, not only the client but also the lawyer may tend to view the client's likelihood of success over-optimistically.²⁰⁰ Similarly, not only the client but also the attorney may have a strong belief in the justice of their side's position and therefore a strong need to ensure that the opponent's unjust behavior is sanctioned. Where such overlaps occur, the psychological effects may be exaggerated as the lawyer and client reinforce each other's views. Psychologists have observed a "groupthink" phenomenon that may come into play.²⁰¹

3. *Reasons Lawyers May Cause Cases to Settle that Should Not Settle*

a. *Diverging Monetary Incentives*

When an attorney represents a client under a contingent fee agreement, the attorney frequently has an incentive to settle the case more quickly, and therefore for a lower amount, than does the client.²⁰² In essence, the attorney seeks to maximize her return per hour of time expended. Attorneys have long recognized that they can often obtain a fairly decent settlement offer without investing a great deal of time in the case. Attempting to obtain maximum return on the case, either by trying the dispute or by spending more time on discovery prior to settlement, often makes no sense from the attorney's financial perspective. The attorney is best off settling the case

immune to these phenomena. Moreover, Korobkin and Guthrie did not demonstrate that lawyers are immune to other phenomena such as over-optimism.

²⁰⁰ See Mendelsohn, *supra* note 97, at 144 & n.18 (summarizing a study showing that subjects who were handed identical files tended to view the position of their assigned "client" more optimistically) (citing RAIFFA, *supra* note 132).

²⁰¹ See Mendelsohn, *supra* note 97, at 146–148 (discussing the reinforcement of psychological biases); Mnookin & Ross, *supra* note 116, at 17–18.

²⁰² See, e.g., KRITZER, *supra* note 120, at 63; RÖSENTHAL, *supra* note 185, at 96–99, 105 ("[F]or all but the largest claims, an attorney makes less money by thoroughly preparing a case and not settling it early."); Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536 (1978); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259, 260 (1997); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 200–202 (1987). For a recent empirical study on the returns from contingent fee practice, see Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998). See generally Symposium, *Contingency Fee Financing of Litigation in America*, 47 DEPAUL L. REV. 227 (1998).

quickly and moving on to the next case.²⁰³ By contrast, the client who is being represented through a contingent fee agreement has absolutely no incentive to think about the number of hours being expended by the attorney. If the client thought the attorney could increase the value of the case by five dollars by spending one hundred more hours on research, the rational client ought to insist on such an expenditure of time.²⁰⁴ In sum, the contingent fee arrangement may cause the attorney to push too hard for an early settlement.

b. *Diverging Nonmonetary Incentives*

For a variety of reasons, an attorney may prefer to settle a case rather than take it to trial. For example, the attorney may be lacking in trial experience and afraid that she will lose. Or, the attorney may have an excellent win-loss record at trial and fear that this particular case may be a loser. Some attorneys may not enjoy the stress, emotion, and time commitment that a trial necessitates. Other attorneys may seek to maintain an amicable relationship with the opposing counsel or opposing party, perhaps in order to obtain future business. These are interests that the client would not share.

By contrast, the client may have nonmonetary goals that lead her to seek a trial. She may believe a trial will help her obtain favorable publicity or precedent, vent her emotions, wreak vengeance on the opposing party, or resolve the dispute in a fair and just fashion. The attorney may not share

²⁰³ Douglas Rosenthal has used some simple charts to demonstrate how this phenomenon would work in a hypothetical case, showing that, whereas the attorney would maximize her self-interest if the case settled within the first three months for a mere \$2000, the client would maximize her interest by allowing the case to go to trial in over three years if her expected gross recovery was \$8000. *See* ROSENTHAL, *supra* note 185, at 97–98. Rosenthal explains that lawyers can respond to this conflict not only by settling cases quickly but also by cutting corners in the cases they do not settle, increasing their charging of expenses to clients, and bringing the conflict to the clients' attention and then negotiating a compromise. *See id.* at 106. Rosenthal found evidence of all these phenomena in his empirical study of 59 New York personal injury cases. *See id.* at 29; *see also* KRITZER, *supra* note 163, at 108–120 (reporting that contingent fee arrangements have a substantial impact on the process by which lawyers allocate time to various tasks such as responding to briefs).

²⁰⁴ While the rational client might oppose the expenditure of time on the grounds that she would prefer to receive her settlement more quickly, she would not take into account the actual work done by the attorney.

these views in that the views do not necessarily directly benefit the attorney as would a monetary solution.

To the extent that the attorney's and client's nonmonetary goals diverge in these ways, they may cause the attorney to be encouraging of settlement, even when the client might, according to her own utility function, be better off taking her claim to trial.

c. *Diverging Psychology*

The experimental work of Russell Korobkin and Chris Guthrie supports the proposition that attorneys may be less affected by certain "irrational" psychological phenomena²⁰⁵ than are their clients. In a series of role playing experiments in which students played the part of clients and local attorneys played the roles of attorneys,²⁰⁶ the authors manipulated various fact patterns to approximate the phenomena of framing,²⁰⁷ anchoring,²⁰⁸

²⁰⁵ Cf. Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 994-995 (1994) (concluding that bankruptcy lawyers and judges were affected by self-serving bias in a study regarding bankruptcy judges' rulings on attorneys' fee disputes); NEALE & BAZERMAN, *supra* note 132, at 81-96 (reviewing studies regarding the possibility of eliminating cognitive biases and concluding that neither experience nor even training can easily eliminate such biases).

²⁰⁶ See Korobkin & Guthrie, *supra* note 14, at 88-99 (describing the methodology of the study and responding to possible critiques).

²⁰⁷ To measure the effect of framing, the authors used two versions of a car accident hypothetical. In both versions, participants "were required to choose either a certain recovery of \$21,000 or the chance to recover \$28,000 at trial, coupled with the risk of recovering only \$10,000 at trial." *Id.* at 98. Members of Group A, however, were told that they had been driving a \$14,000 Toyota Corolla at the time of the accident and that the settlement would therefore bring them back to or above the original starting point. *See id.* at 98-99. Members of Group B were told they had been driving a \$24,000 BMW and that even with the settlement they would not be back at their original pre-accident starting point. *See id.*

²⁰⁸ To test anchoring, the authors used a hypothetical they call the "lemon." The client purchased a new BMW 318 automobile for \$24,000 and then learned it had serious problems. *See id.* at 103. Both groups of participants were offered a choice between settling the case for \$21,000 or taking it to trial where they would have approximately a 50% chance of recovering the full \$28,000. *See id.* at 98. Group A members, however, were told that they had already declined an offer of \$2000, whereas Group B members were told they had already rejected an offer of \$10,000. *See id.* at 105. Litigants who had received the lower initial offer were more likely to accept the final offer. *See id.*

and equity seeking.²⁰⁹ They found that the attorneys and “clients” reacted quite differently. Whereas the “clients” tended to be less interested in settlements that were framed as a loss in comparison to the presuit status, in settlements that reflected little gain from an initial offer, or in settlements that would not achieve a just result, these phenomena had no significant effect on the attorneys.²¹⁰ The attorneys instead seemed to use rational expected value calculations to determine whether or not the settlement was preferable to the result they might expect to achieve in court.²¹¹

Thus, because lawyers are less affected by certain psychological phenomena than are their clients, they may well push their clients to accept settlements that make sense from a purely rational financial perspective. Whether or not they explicitly use an expected value analysis with their clients, lawyers may attempt to convince their clients to set aside an irrational focus on sunk costs, equity, or previous offers and to instead accept a settlement that makes financial sense when compared to the expected trial outcome.

Yet, as Korobkin and Guthrie recognize, this push toward financially rational settlements is not necessarily desirable, even from the standpoint of utility maximization.²¹² While economists often use money as a surrogate for utility, most of us know that money does not necessarily buy happiness.²¹³ That is, where an attorney pushes a client to accept a settlement that, from a purely financial perspective, is rational, the attorney may not increase that client’s utility or satisfaction. If the client truly feels that she must regain her initial position in order to be happy, then it may make sense for her to take a gamble on trial to attempt to obtain enough money to replace her loss. Also, why should not the client’s sympathy for the defendant’s personal problems or anger against his unexcused neglect be a factor in whether or not the case settles? Again, the client may be better off gambling on trial than accepting a settlement she believes is

²⁰⁹ To test equity seeking, the authors used a hypothetical in which a landlord had a better or worse excuse for having failed to fix the broken heater. *See id.* at 108–112.

²¹⁰ *See id.* at 95–112.

²¹¹ *See id.* at 100 (finding that framing had virtually no effect on lawyer subjects); *see id.* at 105 (finding that anchoring did not have a statistically significant effect upon attorneys); *see id.* at 111–112 (finding that equity had a small but not statistically significant impact on attorneys and that lawyers’ explanations showed that they typically focused only on the monetary aspect of the case).

²¹² *See* Korobkin & Guthrie, *supra* note 14, at 124–136.

²¹³ *See generally* THE BEATLES, *Can’t Buy Me Love*, on A HARD DAY’S NIGHT (EMI Records 1964) (“I don’t care too much for money/money can’t buy me love!”).

unjust. In sum, because clients' psychological makeup often differs from that of their attorneys', their attorneys may sometimes push them to accept settlements that appear undesirable to the clients. The client may seek a trial in order to prevent a loss, to achieve justice, to wreak vengeance, to obtain publicity, or for a variety of other reasons that the lawyer sees as inappropriate.

Of course, the client may well be wrong in her belief that the trial will provide her with the desired psychological benefits. Clients who seek to use a trial to wreak vengeance may often find that they suffer as much or more than their adversary in the trial process.²¹⁴ Korobkin and Guthrie therefore suggest that attorneys attempt to counsel clients on whether various means are likely to achieve the clients' desired ends, while not necessarily seeking to convince the clients to seek different ends—i.e., monetary relief rather than justice.²¹⁵

²¹⁴ See generally CHARLES DICKENS, *BLEAK HOUSE* (1853) (discussing the never-ending dispute of *Jarndyce v. Jarndyce*); WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (recounting monetary and other travails of a lender who sought to use the legal system to collect on a bond); ISAAC BASHEVIS SINGER, *The Litigants*, in *THE IMAGE AND OTHER STORIES* 230–234 (1985) (describing a miserable and long-lasting dispute between two farmers).

²¹⁵ See Korobkin & Guthrie, *supra* note 14, at 129–136. They call this the “cognitive error approach to lawyering” in that it calls upon attorneys to distinguish between those differences from their clients that are based on a desire for alternative ends and those that are based on the clients' cognitively erroneous perceptions. *Id.* at 130. That is, if a client's goal is to maximize her monetary recovery, then the lawyer should attempt to convince her to set aside irrational perceptions that will interfere with the goal. By contrast, the attorney should not attempt to convince a client who is interested in equity to instead adopt the goal of maximizing her monetary recovery.

Legal ethicists have debated the extent to which lawyers ought to attempt to convince clients that their ends are inappropriate. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 186–187 (1991) (stating that a lawyer should typically refrain from telling a client what she thinks the client ought to do, but rather should help the client explore consequences of alternative action); ANTHONY T. KRONMAN, *THE LOST LAWYER* 14–17 (1993) (urging that lawyers should play the role of lawyer-statesman); Luban, *supra* note 88, at 491 (contending that attorneys should act paternalistically to the extent that the client is expressing wants that are inconsistent with her own values). However, most ethicists have focused on the question of whether it might be appropriate for an attorney to urge a client to consider morality or justice, rather than whether the attorney ought to urge the client to set such goals aside in favor of purely monetary considerations. In contrast, Guthrie and Korobkin do raise the question of whether lawyers may appropriately seek to push their clients to focus exclusively on financial considerations in order to conserve scarce public resources and use our trial facilities only for financial rather than justice

V. USING MEDIATION TO SURMOUNT BARRIERS TO NEGOTIATION

Many praise mediation as a valuable dispute resolution technique because it can aid parties in achieving mutually acceptable settlements that they would not have reached through nonfacilitated negotiation.²¹⁶ While many mediation proponents may not have used such a theoretical explanation, mediation is often successful because it assists parties in surmounting significant barriers to successful negotiation.²¹⁷ Two features are key. First, as compared to nonfacilitated negotiations, mediation possesses the additional feature of a mediator—a third-party neutral whose role is to help the participants discuss their dispute and potentially work out

disputes. See Korobkin & Guthrie, *supra* note 14, at 138–141. This Author's own view is that disputes involving justice and morality are precisely those that ought often to be resolved in a public forum. See also Fiss, *supra* note 10, at 1085–1087; Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1673 (1985).

²¹⁶ Not all commentators would agree that dispute resolution is the goal of mediation. See generally BUSH & FOLGER, *supra* note 18 (arguing that the purpose of mediation is empowerment and recognition, rather than dispute resolution).

²¹⁷ Commentator Robert Bush has similarly argued that mediation can foster successful agreements that would not have been reached in an unfacilitated negotiation. See Bush, *supra* note 102, at 24–26. He cites two bodies of work to support his analysis. First, he draws upon the barriers literature that is relied upon in this Article. See *id.* at 6–15. Second, he cites what he calls the party-attitude or procedural justice literature, a body of studies showing that parties like mediation because it allows for substantial client participation, control, and expression. See *id.* at 15–22 (citing such studies as NANCY THOENNES ET AL., EVALUATION OF THE USE OF MANDATORY DIVORCE MEDIATION (1991) (finding dissatisfaction with mediation among those clients who perceived pressure to settle and to narrow issues); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 254–260 (1981) (finding parties' high satisfaction with mediation linked to such procedural experiences as opportunities for expression and full involvement); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 9, 18–29 (Kenneth Kressel & Dean G. Pruitt eds., 1989) (emphasizing the importance of party participation to achieve satisfaction with mediation)). While this Author agrees with Professor Bush that parties often appreciate mediation because it offers opportunities for direct participation and expression, this Author finds it most helpful to focus primarily on the analytic construct of the barriers approach. See *id.* at 25 (observing that the two approaches are consistent, while the emphasis is different). This Author also observes, in passing, that studies done regarding parties' satisfaction with small claims and family mediation may not be entirely applicable to the study of the advantages mediation offers in larger civil disputes.

a solution. Second, and even more important to this Article, mediation potentially allows represented parties to play a direct role in the negotiation.

Represented clients normally play a very limited role in negotiations that do not involve mediation. Presumably they explain their interests and bottom line to their attorney, but they do not typically attend negotiation sessions nor are they necessarily consulted frequently as the negotiation progresses.²¹⁸ In fact, even the attorneys typically do not engage in face-to-face meetings, but rather often conduct their negotiations by phone or by letter.²¹⁹ By contrast, mediation is an opportunity for the parties to come face-to-face with one another, with the opposing side's attorney, and sometimes with expert or other witnesses for the opposing side.²²⁰

As discussed below, both of these distinguishing features of mediation potentially allow parties to surmount economic, psychological, and principal-agent barriers to successful negotiation. At times the mediation process may also convince clients that the settlement being encouraged by their attorneys is not actually desirable and that they would prefer to work toward a different settlement or perhaps even to proceed to trial. The discussion which follows provides some illustrations of ways in which mediation will help surmount these barriers but is not intended to be comprehensive.

A. Using Mediation to Surmount Economic Barriers to Settlement

Mediation can effectively help overcome both barriers to successful negotiation that were identified by the traditional economic model—lack of information and blustering positional bargaining techniques.

²¹⁸ See ROSENTHAL, *supra* note 185, at 14; Riskin, *supra* note 198, at 1076–1077 (discussing the traditional lawyer-client relationship).

²¹⁹ See Plimpton, *supra* note 107, at 38. Often the attorneys do not focus fully on a dispute or its settlement until the dispute has progressed far down the road to trial. This appears to be one reason why so many disputes settle “on the courthouse steps.” *Id.*

²²⁰ Theoretically, one could seek to involve represented parties directly in negotiations without also using a third-party facilitator. On occasion such negotiations may occur. However, both because it is difficult for attorneys (fearing they may look weak to their clients or opponents) to initiate such an unusual process and because most attorneys would find it difficult to manage such a negotiation without the assistance of a facilitator, they rarely occur. Moreover, some jurisdictions explicitly require named parties to attend mediation sessions. See, e.g., FLA. R. CIV. P. 1.720(b).

1. *Conveying Information*

The mediation process can be extremely effective in helping both sides exchange information and thereby learn more about each other's litigation strengths and weaknesses, each other's interests, and even their own interests. To the extent clients attend the mediation,²²¹ parties and their attorneys are brought face-to-face with their opponents in an environment where they can have a direct discussion. Attorneys can speak directly to opposing clients without having their comments filtered by an opposing attorney. As well, the exchange of information can proceed much more rapidly and efficiently than if the attorneys in a negotiation had to repeatedly defer and state that they would raise various points or obtain certain information from their own clients.

In addition, the trained mediator can ask questions that parties may not have thought to ask, can offer creative suggestions,²²² and can help parties to better understand their own and each other's interests.²²³ By creating an

²²¹ In some jurisdictions clients are not required to attend and do not always do so. Where clients do not attend, many of the potential advantages of mediation discussed herein are not achieved.

²²² See LAX & SEBENIUS, *supra* note 112, at 173.

²²³ See *id.*; Bush, *supra* note 102, at 13-14. Those who believe evaluative mediation is appropriate, see sources cited *supra* note 18, would say that mediators can also provide information about likelihood of success to the parties.

Jennifer Brown and Ian Ayres also argue that mediation is successful at promoting settlements for a set of very different reasons relating to the conveyance of information. See Brown & Ayres, *supra* note 8, at 325-328. Focusing on the caucusing aspect of mediation, which they view as the unique contribution of mediation as a dispute resolution technique, see *id.* at 325-326, the authors argue that mediators can use caucusing as an opportunity to "collect and distribute private information," *id.* at 326, thereby potentially mitigating problems created by adverse selection and moral hazard. They state:

[M]ediators can create value by controlling the flow of private information (variously eliminating, translating, or even creating it) to mitigate adverse selection and moral hazard. Adverse selection is caused by hidden information that distorts the terms of a contract; because of adverse selection, for example, unhealthy people are more likely than healthy people to opt for life insurance. Moral hazard is caused by hidden conduct; because of moral hazard, insured people are more likely than uninsured people to take risks. Thus, adverse selection problems involve hidden precontractual information; moral hazard problems involve hidden postcontractual conduct. Both adverse selection and moral hazard are caused by the disputants' ability to hide information about themselves or their conduct.

atmosphere of trust, or by at least earning the trust of the opposing parties, the mediator can encourage participants to disclose information they would not have revealed in an unfacilitated setting.

2. *Avoiding Problems of Positional Bargaining*

Mediation can help avoid the pitfalls of positional bargaining in several ways. First, because parties and their attorneys have an opportunity to speak with one another directly, and to question each others' motives and interests, it is easier to use interest-based techniques such as those advocated by Roger Fisher, Carrie Menkel-Meadow, and others.²²⁴ Lawyers often find it natural to fall into positional bargaining.²²⁵ Clients, by contrast, may more easily see that no one's interest will be served if the negotiations founder and the dispute has to be litigated. They may therefore be more receptive to creative problem-solving approaches.

Second, the mediator can help defuse competitive bargaining problems in a variety of ways. She can directly question not only the attorneys but also their clients as to their background interests and motivations. Also, she can facilitate the flow of information. Whereas positional pressures might make negotiators reluctant to share information for fear of losing face or

Id. at 327–328 (citations omitted). Brown and Ayres then suggest that mediators can use caucusing to reduce the following inefficiencies caused by these phenomena: “(1) by committing parties to break off negotiations when private representations to a mediator indicate that there are no gains from trade; (2) by committing parties to equally divide the gains from trade; and (3) by committing to send noisy translations of information disclosed during private caucuses.” *Id.* at 328. The two approaches are not inherently inconsistent. It may be that mediation is successful for both sets of reasons. However, without arguing that Brown and Ayres are wrong, this Article does suggest that the success of mediation is due much more to the surmounting of attorney-client problems and to the focus on nonmonetary issues, as discussed herein, than to the overcoming of problems relating to moral hazard and adverse selection. The Brown-Ayres thesis also raises some potentially troubling ethical issues for mediators in that it seemingly calls upon mediators both to reveal private information and at times to misrepresent this information. These matters necessarily exceed the scope of this Article.

²²⁴ See generally FISHER ET AL., *supra* note 114; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

²²⁵ See Heumann & Hyman, *supra* note 15, at 255 (reporting the results of a study showing that, while litigators used positional bargaining entirely or almost entirely in 71% of cases, a substantial majority would have preferred to use a problem-solving approach).

momentum, mediators can serve as conduits for such information.²²⁶ Finally, the mediator can help blunt the conflict escalation that may both result from and cause positional bargaining by evincing sympathy, building trust, and using such techniques as separating hostile parties.²²⁷

B. Using Mediation to Surmount Psychological Barriers to Settlement

Mediation can help to surmount psychological barriers to settlement by allowing parties to deal with one another directly. Also, the mediator can both improve the character and quality of the participants' communications with one another and help parties to better understand their own goals and positions.²²⁸ Some examples of the specific barriers that can be addressed by mediation are set out below.

1. Over-Optimism

Mediation employs several devices to defeat the over-optimism that may stand in the way of a reasonable and fair settlement. First, it allows not only the lawyers but also the parties to take a close look at their opponent and to hear the opposing side's arguments. Absent mediation, most parties would not have the opportunity to hear the other side's point of view until the trial itself. While a party's lawyer presumably does her best to describe the strengths of the opponent's position, even the lawyer may not have full knowledge of the opponent's case. Moreover, diverging incentives may sometimes cause lawyers to exaggerate the strength of their own clients' positions, even in private conversations with their clients.²²⁹ Therefore, where no mediation has occurred many clients are shocked and alarmed to hear at trial how strong the other side's case is. By then, however, it may be too late to reach a mutually beneficial settlement. Mediation allows parties to hear the opposing party's story, to view the

²²⁶ See LAX & SEBENIUS, *supra* note 112, at 172–174. This role “can also reduce negotiators' vulnerability in the sometimes tricky endgame of negotiations.” *Id.* at 173.

²²⁷ See *id.* at 174.

²²⁸ See Bush, *supra* note 102, at 28 (stating that mediation provides “an increased opportunity to present and receive a broad range of messages—verbal and nonverbal, rational and emotional—and, even more importantly, the reduction of all kinds of distortion and misunderstanding that otherwise tend to skew the interpretations that parties place on each other's statements and actions”).

²²⁹ See *supra* note 200.

credibility of the opposing side's witnesses, and to hear a summary of the opposing side's experts' opinions, if not the opinions themselves.²³⁰

Second, mediation can show a party that her own position is not as strong as she may have thought or as her lawyer may have led her to believe. The opposing attorney or party can point out weaknesses in the case using charts, diagrams, videos, or occasionally even cross-examination type techniques. Practitioner-oriented materials guide attorneys in effectively deflating the expectations of the opposing party in mediation.²³¹

Third, the mediator helps deflate expectations by serving as a "reality check." While mediators may perform this role in different ways, some merely by asking questions and others by offering evaluations,²³² it is well recognized that an important part of mediators' function is to bring the participants' views of the dispute closer to reality.²³³ In fact, some attorneys explicitly ask mediators, in private, to help bring their clients' views of the case back to reality.²³⁴

²³⁰ In disputes for large amounts of money, some experts may even attend the mediation.

²³¹ See Watson, *supra* note 76, at 11–13 (suggesting that an attorney should bring weaknesses in the opposing party's case to the attention of the mediator in a private caucus).

²³² A sharp disagreement exists within the mediation community as to the extent to which mediators should perform evaluative functions. Many argue that it is entirely improper for mediators to *evaluate* the strengths and weaknesses of parties' claims, to predict likely success in court, or to suggest appropriate resolutions and that they should instead only attempt to *facilitate* the parties' negotiations. See generally Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COSTS LITIG. 31 (1996); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996) (providing a typology comparing different mediator approaches); Symposium, *supra* note 18 (containing articles addressing the relative virtues of facilitative and evaluative mediation by James J. Alfini, Lela P. Love, Jeffrey W. Stempel, and Joseph B. Stulberg). While this Author's own view is that parties ought to be able to select the type of mediation that they believe would be most helpful, this Author does not believe that the analysis set out in this Article depends on resolution of the evaluation-facilitation debate.

²³³ Lax and Sebenius assert that mediators can help facilitate information flow by providing a more neutral source of facts and analyses. See LAX & SEBENIUS, *supra* note 112, at 173.

²³⁴ See GALTON, *supra* note 67, at 90; see also Lande, *supra* note 3, at 885; McEwen et al., *supra* note 2, at 1360.

Fourth, as noted above, attorneys may also be over-optimistic about their chances of success. The techniques noted above can be important to help attorneys as well as clients see the dispute more realistically.

2. *Anchoring*

Mediation can help defeat irrational anchoring tendencies by allowing participants and the mediator to question the basis of a party's position. Much as was described above, in connection with over-optimism, mediation allows parties to interact directly with each other, the opposing attorney, and the mediator. These interactions can be used to attempt to convince parties that their "anchored" view of the world is not rational and does not serve their best interest. For example, a mediator might help a party to recognize that the settlement offered is far preferable to the costs and risks of going to trial, even though the offer would not make the party completely whole.

3. *Risk Aversion, Risk Preference, and Framing*

As discussed earlier, persons' reactions to a particular settlement proposal may vary substantially depending on how that proposal is framed. Specifically, a party will be more receptive to a proposal that is framed as a gain relative to the status quo than as a loss.²³⁵ While a party's own attorney can attempt to do this reframing, often the mediator or even the opposing party or her attorney can be more successful at this task. Mediators are trained to reframe issues, and the parties may be less suspicious of the motives of the neutral mediator than they are of the motives of their own attorney, who has a financial stake in the case. Also, because the mediation process is intense and face-to-face, it may be more effective in changing a party's frame of reference than would be a more remote phone call between attorney and client. Some experimental evidence showed it was not particularly easy to change a party's frame of reference using mere written materials, but the experimenters speculated that one-on-one discussions might be more effective.²³⁶ When faced with an opposing party and attorney who are explaining their intended course of action, absent a settlement, a party may more quickly come to realize that the proposed settlement is better than the alternative course of action.

²³⁵ See *supra* Part IV.A.2.b.iii.

²³⁶ See Korobkin & Guthrie, *supra* note 116, at 161-163.

4. *Reactive Devaluation*

The mediation process can be very useful in eliminating or at least reducing reactive devaluation. Here, the role of the mediator is crucial. As Robert Mnookin and Lee Ross explain, "the settlement proposal in question can be made to come, or seem to come, from the third party or some collaborative effort rather than one of the principals acting unilaterally."²³⁷ That is, the mediator can take an idea obtained from one of the parties and offer it as her own.²³⁸ Also, the mediator can help explain why a particular offer is being made and why it is being made at a particular time, thereby reducing the seeming significance of the authorship of the offer.²³⁹

C. *Using Mediation to Surmount Principal-Agent Barriers to Appropriate Settlement*

One of the greatest and yet unsung benefits of mediation is that it helps parties overcome problems that are created when they are represented by attorneys or agents in settlement negotiations. These benefits stem primarily from the fact that parties, participating directly in the mediation process, can learn about various aspects of the dispute on their own rather than through their lawyer's filter. As well, the parties can express themselves directly instead of relying on their lawyers to be their voice. By participating directly in the process, parties can avoid some of the problems created by the divergence of incentives between lawyer and client that were discussed earlier in this Article. Specifically, the parties can better deal both with conflicting incentives that might prevent them from entering into desirable settlements and also with conflicting incentives that might cause them to enter into undesirable settlements.

1. *Dealing with Diverging Monetary Incentives*

Where parties participate directly in mediation, they limit the attorneys' ability to influence the parties' decisions on whether or not to settle the case and on what terms. In the extreme, where an attorney who is being paid by

²³⁷ Mnookin & Ross, *supra* note 116, at 23.

²³⁸ As Lax and Sebenius observe, this mediator role will also protect negotiators from potential "loss of face" due to authorship of a settlement proposal. *See* LAX & SEBENIUS, *supra* note 112, at 173.

²³⁹ *See id.* at 173-174.

the hour has deliberately attempted to convince the client that settlement would be a bad idea so that the attorney can run up her own fees, mediation may prove quite an eye-opener.²⁴⁰ The client may learn that the other side has some good explanations for her conduct, has lots of favorable legal precedent, and has some evidence that she will use to undercut the client's own position. Also, the client may learn that she and her opponent have more in common than she thought and that it may be possible to work out a mutually acceptable agreement, perhaps involving a future business relationship. Most blatantly, a mediator or opposing attorney or party may even use a question or statement to educate a party as to her own attorney's financial stake in the case.

Parties' participation in mediation may also encourage their attorneys to prepare more thoroughly than they might have done for a negotiation. Attorneys, like many people, focus on the most pressing crisis in the office. Their financial incentives may be such that a negotiation in a case not scheduled to go to trial for a year or so has relatively low priority. However, where an attorney knows she will be on display before her client, as well as appearing live before the opposing client and mediator, she will have added reason to review the case carefully and assemble her best arguments.²⁴¹ That is, the performance requirement may counter the attorney's tendency to prepare inadequately, and more adequate preparation may make a settlement possible.

Mediation also helps deal with the phenomenon of the attorney who is afraid to give her own client bad news about the case, wary that conveying such news will jeopardize the attorney-client relationship. Attorneys are actually conscious of this tendency and are not necessarily deliberately seeking to mislead their own clients. Rather, through unpleasant experience, they have learned that it often does not work well for them to be the bearer of bad tidings. Thus, attorneys will frequently welcome and sometimes even privately desire that the opposing attorney or the mediator

²⁴⁰ See Riskin, *supra* note 198, at 1099 (noting that a client's participation in a settlement conference reduces the likelihood that the "interests of the lawyer will prevail over those of the client").

²⁴¹ See ROSENTHAL, *supra* note 185, at 57 (concluding that where plaintiffs participated more actively in personal injury cases they were likely to recover more money); Riskin, *supra* note 198, at 1099 (noting that attorneys are more likely to prepare thoroughly for a settlement conference at which the client appears).

bring their own client back to earth.²⁴² Again, where the client participates directly in the mediation such communications are possible.²⁴³

Mediation can also help deal with a situation where a client, suspicious of her own attorney's recommendation to settle the case, is resisting for fear that the attorney is merely trying to serve her own interest. Here, again, where the client participates directly in the mediation she can hear with her own ears things that confirm the advice her attorney has been providing. Once the client sees the opposing party's compelling evidence or hears how persuasive the opposing attorney can be, she may recognize that her own attorney's advice to settle the case was in fact sound.

Mediation can also protect a client against a settlement that is unwise. As noted earlier, diverging monetary incentives may sometimes cause an attorney to favor a settlement that, while beneficial for the attorney, does not serve the client's best interest.²⁴⁴ A client who participates in a mediation will typically become more familiar with both the strengths and weaknesses of her own case and thus may be better able to discern that her attorney is giving her self-interested advice. As the mediator helps the client and the attorney to probe their interests and motivations, the client may decide she is not prepared to settle, at least for the terms currently being offered.²⁴⁵

²⁴² See GALTON, *supra* note 67, at 90.

²⁴³ See WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* 476 (1988) (stating that a client who participates in a settlement conference is "better equipped to assess the value of recommendations" from the settlement judge and gains increased "confidence in the impartiality of the settlement judge"); Riskin, *supra* note 198, at 1100 (noting that a client who participates in a settlement conference can learn a great deal "about the strengths and weaknesses of both sides" of the dispute).

²⁴⁴ See *supra* Part IV.B.3.a (discussing the incentives of attorneys who handle cases on a contingent fee).

²⁴⁵ Admittedly, mediations may not always play out in this idealistic way. A great deal will likely depend on the mediator. Some mediators see their goal as pressing for settlement and pride themselves on their high settlement statistics. See, e.g., Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 259-260 (1989) (describing the "efficiency" conception of mediation as one that emphasizes removing disputes from court dockets); W. Lee Dobbins, *The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, 7 U. FLA. J.L. & PUB. POL'Y 95, 108 (1994-1995) ("Settlement rate comparisons pressure mediators to settle every case, regardless of the quality of the settlement or methods used."). Such a mediator may well help to push a party toward a settlement that does not serve her best interest. However, those

2. *Dealing with Diverging Nonmonetary Incentives*

Mediation offers parties an opportunity to voice their requests for nonmonetary relief that their attorneys may not have emphasized.²⁴⁶ As discussed above, although clients are not exclusively interested in money, attorneys tend to emphasize the monetary aspects of settlement. In a mediation, the client, in an opening statement or in the course of subsequent discussion, can make it clear that she also cares about nonmonetary relief such as an apology, reinstatement, or establishing a new business relationship.²⁴⁷ Particularly where the opposing client is also present and hears the expression of these needs, it may turn out that the parties are able to reach a mutually acceptable settlement that might not have been envisioned by the attorneys. That is, a negotiation that might have foundered as a purely dollar-based positional bargaining attempt may succeed once the nonmonetary goals are introduced. Focusing on nonmonetary side issues may also speed up a monetary settlement. At times seemingly minor items such as an honorary plaque may be worth more to a client than an attorney might imagine. Once agreement is reached on the emotional points, the dollar aspects of the agreement may fall into place.

Mediation can also help deal with the fact that an attorney's nonmonetary needs may be leading the attorney to advise against settlement. In the course of the mediation discussions, the client may come to realize that her own interests would be well served by the proposed settlement and that it is her attorney's nonmonetary need, such as her drive to try her first case, that is the road block. If the client sees this problem she can, of course, insist on settling the case.

Also, mediation can meet clients' desires for expression and communication. As Professor Bush has emphasized in many of his works, it is a mistake to view mediation exclusively as a tool to obtain better

mediators who aspire to help empower the parties and to aid them in taking control of their own future may aid parties in recognizing that a settlement is not appropriate. *See* BUSH & FOLGER, *supra* note 18, at 87-88 (arguing that a nonsettlement can be just as appropriate a result as a settlement).

²⁴⁶ An attorney's failure to emphasize nonmonetary relief may result either because the attorney only chooses to press for those settlement components (money) that will also pay the attorney's fee, or because the attorney's mindset simply prevents her from seeing the potential importance of the nonmonetary relief. *See supra* Part IV.B.2.b.

²⁴⁷ *See* Riskin, *supra* note 198, at 1102 (stating that "the client who not only observes the settlement conference, but also talks, may enhance his or her opportunities for developing a problem-solving solution").

outcomes. Rather, the process of mediation itself is important to many clients.²⁴⁸ Mediation may meet clients' nonmonetary desires for control, expression, communication, justice, or perhaps even vengeance, by allowing them to express themselves and also to learn more about their opponents' perspectives.²⁴⁹

Mediation can also help a client come to terms with the fact that given her nonmonetary aspirations, the proposed settlement may not be desirable. Whereas the client's attorney, who is typically focused primarily on monetary relief, may be encouraging the client to accept the settlement, the client may realize at mediation that she would rather take her chances in court in order to secure such possible advantages as publicity, precedent, or vindication. As noted earlier, by participating directly in the mediation the client may become better apprised of her own goals and aspirations as well as of her alternatives and thus better able to make an informed choice rather than simply depend on the advice of her attorney.²⁵⁰

3. *Dealing with Diverging Psychologies*

Mediation allows participating clients to see with their own eyes, speak with their own voices, and use their own creative talents. By participating directly in the mediation, the client has the opportunity to view the opponent, the opponent's attorney, and any witnesses directly rather than through the filter of her attorney. A good mediator can facilitate these opportunities. For example, whereas the attorney may have responded cynically to the opponent's apology, it may be meaningful for the client. Where the attorney may have regarded the opponent's story as hogwash,

²⁴⁸ See, e.g., BUSH & FOLGER, *supra* note 18 (arguing that the purpose of mediation should be to empower participants and to assist them in recognizing other participants' points of view, rather than to achieve a negotiated agreement); Bush, *supra* note 102, at 24–26 & n.46 (arguing that mediation is valuable not merely because it removes barriers to settlement but rather because it satisfies needs for expression and communication).

²⁴⁹ Professor Bush describes these benefits in terms of self-determination. See Bush, *supra* note 245, at 267–268; Bush, *supra* note 102, at 27–28; see also JOHN W. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 26, 171–172 (1990) (noting that informal fora provide disputants with a voice, which is otherwise stifled in formal courts); Riskin, *supra* note 198, at 1100 (noting that affording the client an opportunity to participate in a settlement conference will satisfy the client's desire to tell his own story).

²⁵⁰ See *supra* Part IV.A.1.

the client may see it as compelling. That is, the client's view is not restricted by the lawyer's cold, rational, and perhaps even cynical lens.²⁵¹ In addition, the client may come to realize that her own attitude toward risk differs from that of her attorney and that she is not willing to take certain risks that might interest the attorney.²⁵² For these reasons, the client may come to favor a settlement that she previously opposed.

The client can also increase the likelihood of settlement by bringing more emotion to the proceeding than the attorney would likely use. Whereas the client may feel a need to get certain issues off her chest and feel that she has been fully heard, the lawyer's instinct may well be to avoid emotion and upset and keep the discussion on an even and rational keel. Yet, the client may not feel able to settle the matter and put the dispute behind her until she has discharged her emotional feelings. Mediation can provide the client with an opportunity to vent. If the client gives at least a portion of the opening statement, she can immediately explain her perspective to the opposing party. Later in the mediation, as well, the client can further spell out her views and feelings in response to specific questions. Moreover, she can gain some satisfaction by expressing her views directly to the other party in a face-to-face encounter.

Finally, as alluded to above, mediation can increase the likelihood of settlement by providing a venue for the clients to be creative and to approach the negotiation from a problem-solving orientation. By nature or by culture, attorneys seem to fall into the pattern of positional bargaining. Clients, however, may be able to break free of this constraint to search for a settlement that is mutually beneficial. Particularly with the assistance of a mediator, clients will be able to introduce new interests and objectives into the discussion, thereby increasing the likelihood of a settlement.

Mediation can also protect clients against settlements that are inappropriate given the divergence between their own psychology and that of their attorney. As Korobkin and Guthrie have argued, even those settlements that are rational in the sense of maximizing likely economic recovery are not necessarily desirable.²⁵³ If a client absolutely will not be satisfied unless she can fully recover her losses,²⁵⁴ she may not be better off with a settlement that, while maximizing her likelihood of economic

²⁵¹ See *supra* Part IV.B.2.c; *supra* notes 197–198 and accompanying text.

²⁵² As discussed earlier, the attorney is likely to be more risk-loving than the client. See *supra* Part IV.A.2.b.iii.

²⁵³ See Korobkin & Guthrie, *supra* note 14, at 112–113.

²⁵⁴ See *supra* Part IV.B.3.c.

recovery, assures that she will not fully recover her losses. Such a client may instead be better off gambling on trial or a better future settlement offer so that at least she will have a chance at full recovery. An attorney might well be able to convince a client to accept the rationally desirable settlement. However, if such a client participates in mediation, she can better make her own fully informed decision as to how to weigh the settlement against other alternatives.

D. Summary as to How Mediation May Help Foster Appropriate Settlements and Defeat Inappropriate Settlements

In sum, when the client participates actively in settlement discussions through a mediation, several benefits can be achieved. First, such participation can help foster settlements that might not otherwise be possible by providing for a greater flow of information, avoiding problems of positional bargaining, surmounting various psychological barriers to agreement, and also overcoming divergences of interest between client and attorney that may hinder a desirable agreement. Second, a client who participates actively in mediation may thereby become better informed and thus better able to resist a settlement that does not serve her interests. Thus, mediation, if conducted properly, can both help foster appropriate agreements and also help defeat inappropriate or coerced agreements.

VI. LAWYERS' ROLE AS PROTECTOR OF THEIR CLIENTS IN MEDIATION

Thus far this Article has emphasized that clients must be permitted to attend and also participate actively in the mediation if that process is to reach its full potential to surmount barriers to appropriate negotiated agreements. The attorney who discourages or forbids the client from attending a mediation, or who allows the client to attend but not to speak, may thus be doing the client a real disservice.

At the same time, many, including this Author, would agree that lawyers often have an important role to play in protecting their clients during the course of a mediation and ensuring that any agreement that is reached is fair to the client or otherwise appropriate. This Part will briefly explore this role. Part VII will then attempt to reconcile these two guiding principles.

Some clients undoubtedly prefer to have their attorneys take a dominant role during the mediation. For example, for a variety of reasons clients may wish to have their attorneys speak for them. Such clients may be shy; they

may believe that their attorneys could express their positions more articulately and cogently than they could; they may fear that a stronger or better educated opponent may take advantage of them if they represent themselves in the mediation; they may worry that they would make an inappropriate admission; they may fear that they would cry or get angry if they had to speak; or they may believe that their speech would anger or upset the opposing party and thereby bring about physical or emotional harm or derail the negotiations. From a strategic standpoint, a party that wishes to settle the dispute but does not want to admit fault may also find it desirable to be represented in the negotiation.²⁵⁵

As well, some clients prefer to have their lawyers serve as buffers, limiting the clients' direct confrontations with either the opposing parties, the opposing parties' attorneys, or even the mediators. For example, some clients have been emotionally or even physically abused or harassed by the opposing parties and would find future confrontations emotionally distressing and perhaps physically threatening.²⁵⁶ Certain clients may also recognize that they would be subject to coercion or be outmatched if they had to go head-to-head with the opposing party or attorney.²⁵⁷ Mediation

²⁵⁵ Professor Eisenberg has emphasized this benefit of representation:

Since dispute-negotiation usually turns in large part on whether the respondent has violated some norm, a settlement often cannot be achieved unless the respondent accounts for his past actions by explicitly or implicitly admitting that a norm-violation has occurred. The difficulties involved in admitting fault might therefore provide a substantial obstacle to settlement in many cases, if the account had to be rendered by the actor himself. One set of institutions whose purpose or effect is to overcome this obstacle are those involving the concept of *party*, in which the roles of *actor* and *accountant* are split between different persons, so that the negotiator can concede a norm-violation without admitting *his own* fault. The legal profession is an obvious example of such an institution

Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 660-661 (1976) (footnotes omitted).

²⁵⁶ As discussed earlier, a rich literature contends that mediation is often, if not always, detrimental to and dangerous for victims of domestic violence. See *supra* Part II.B.

²⁵⁷ Some have argued that because women typically have less power than men, in terms of access to money and also education, that they are often ill served by mediation. See, e.g., Bryan, *supra* note 21, at 445 (stating "absent mediator, lawyer, or judicial intervention, mediation empowers only the already more powerful husband"); Grillo, *supra* note 21; Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431, 435 (1985). Others have argued more broadly that mediation is inappropriate between parties of significantly unequal power. See Linda R. Singer, *Nonjudicial Resolution Mechanisms:*

may not be an appropriate dispute resolution device for many parties who have such concerns.²⁵⁸ Or, if the dispute is to be mediated, such clients may prefer to stay home (if this is allowed by the jurisdiction rules) and allow their attorneys to represent them in mediation. At times, a client who has these concerns may choose to attend the mediation but request that the attorney do all or most of the talking and also ensure that neither the opposing side nor the mediator engage in conduct that would be painful or detrimental to the client.

In other cases the client may desire to play an active role in the mediation, but the attorney may believe that such active participation would not serve the client's best interests. For example, the client may desire to speak out but the lawyer may fear that the client would not be a good advocate of her own position, that she would make damaging admissions, or that she would either get mad or make the other side mad, thereby disrupting the negotiation process.²⁵⁹ Similarly, the client may express a desire to participate actively in the mediation, and perhaps to have the attorney stay home, but the attorney may fear that the client would be bullied or tricked by the opposing party or simply settle the case for less than the attorney might have obtained.²⁶⁰ Or, the attorney may fear that the client is not up to the emotional stress that will occur if the attorney does not participate actively in the mediation.

All of these concerns of both client and attorney are potentially legitimate. While some, and particularly some mediators, may believe that all attorney participation in mediation intrudes inappropriately into what should be a client-oriented process,²⁶¹ situations do exist in which attorneys

The Effects on Justice for the Poor, 13 CLEARINGHOUSE REV. 569, 575 (1979). It has also been argued that informal processes such as mediation are injurious to minorities, the poor, and the disempowered as compared to more formal processes. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391.

²⁵⁸ See *supra* Part II.B.

²⁵⁹ See COOLEY, *supra* note 25, § 4.4.1, at 89 (cautioning attorneys not to let certain clients play too active a role in the mediation); Riskin, *supra* note 198, at 1100 (noting that a client who participates in a settlement conference may get angry or harden her position, thereby making settlement more difficult).

²⁶⁰ Professor Riskin has observed that when clients participate in settlement conferences they may too readily succumb to a "quick fix" or otherwise lose their resolve. Riskin, *supra* note 198, at 1099-1100; see also BRAZIL, *supra* note 243, at 212-213 (discussing the "crucible effect" that may occur when clients participate in a judicial settlement conference that creates a great momentum toward settlement).

²⁶¹ See *supra* Part II.A.

need to serve as their clients' protectors and spokespersons. It is crucial to consider these important interests in devising guidelines for attorneys' roles in mediation. However, as discussed below, lawyers often protect, dominate, or stifle clients in situations where this role is not appropriate.

VII. THE PROPER ROLE OF THE LAWYER IN MEDIATION

The preceding sections of this Article have examined two competing sets of concerns that are relevant to the determination of what role lawyers should play in mediation. Parts IV and V looked in detail at various barriers to a mutually acceptable settlement and argued that particularly when clients participate actively in the mediation process that dispute resolution process can prove very useful in overcoming such barriers. Part VI, however, recognized that lawyers should at times participate actively in the mediation process in order to protect their clients from possible coercion, trickery, abuse, or emotional distress. This final Part will attempt to reconcile these competing concerns in answering the question of how lawyers can allow mediation to "work its magic" while still adequately protecting their clients.²⁶² It will show that attorneys looking for practical guidance on how to behave in a mediation can find some answers by making reference to the concepts of economic and psychological barriers to successful negotiation as well as to principal or agency constructs. This Part will focus primarily, but not exclusively, on the lawyer's role in joint sessions, rather than in caucuses, because joint sessions are the primary vehicle through which mediation can potentially be used to overcome many of the barriers to a negotiated agreement that have been discussed.

A. *The Need for Case-by-Case Determinations*

The worst mistake one can make in determining the appropriate roles of lawyer and client in a mediation is to refuse to see the issue and simply operate out of habit.²⁶³ Too many lawyers and clients have never thought seriously about how the lawyer-client relationship should work in the context of a mediation. Many lawyers, particularly those with extensive deposition or trial experience, have simply transferred their assumptions

²⁶² This barriers analysis might also be used by mediators to help determine how they ought to deal with represented parties and their attorneys in a mediation.

²⁶³ See Riskin, *supra* note 198, at 1104 (noting that good lawyers do not approach the question of clients' appropriate role in settlement conferences "woodenly," but rather consider particular circumstances).

and behavior from those areas to the mediation forum without thinking through the differences between a trial or a deposition and a mediation. Such lawyers often instinctively try to do all the talking for the client, tell the client not to volunteer anything, try to stifle emotional outbursts, and focus primarily on establishing the superiority of their clients' legal positions rather than on a problem-solving approach.²⁶⁴ While this dominating approach may be appropriate in certain mediations, adopting it as a general rule will prevent the use of mediation to overcome the various barriers to negotiation.

Equally inappropriately, some lawyers, like some mediators, assume that mediation is exclusively the clients' process and either fail to attend altogether or do attend but act as the much discussed "potted plant." Such a lawyer may figure that because comments made in mediation are protected by confidentiality, and because no settlement can be reached without her client's agreement, the lawyer need not worry much, if at all, about protecting her client's interests. Again, while this approach may sometimes be appropriate, adopting it unthinkingly in every case is a mistake which may subject certain clients to coercion and abuse and ultimately cause them to accept a settlement which is unfair.²⁶⁵

Instead of exclusively taking one approach or the other, lawyers and their clients should divide their responsibilities on a case-by-case basis after taking into account such factors as the nature of the clients and their attorneys, the respective goals of these participants, and the nature of the dispute. The following two subparts will set out the analysis in detail.

B. Lawyer and Client Should Jointly Determine the Division of Responsibilities in Mediation

A vast professional responsibility literature discusses the appropriate division of responsibilities in a case between lawyer and client. This literature attempts to fill in the gaps left by the rather vague strictures of both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility. While both sets of rules essentially require the lawyer to defer to her client on major matters (ends) while allowing the

²⁶⁴ John Cooley's advice tends in this direction. *See supra* notes 56-64 and accompanying text.

²⁶⁵ It might be argued that an attorney who fails to adequately represent her client in a mediation has violated her ethical obligations to adequately represent her client.

lawyer leeway on tactical choices (means),²⁶⁶ this distinction leaves plenty of room for argument. One school of thought, which some have called "traditional," contends that expert attorneys should behave very directly toward their typically passive clients.²⁶⁷ The other model, which some have called "participatory," urges that because many strategic decisions involve important choices on ultimate objectives, attorneys need to work closely and consultatively with their clients.²⁶⁸ As Professor David Luban has observed:

²⁶⁶ Rule 1.2(a) of the Model Rules of Professional Conduct states: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995). The comment to Rule 1.2 observes that "[t]he client has ultimate authority to determine the purposes to be served by legal representation." *Id.* at Rule 1.2 cmt. Even where "a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason," the Model Rules state that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." *Id.* at 1.14. The ethical canons of the Model Code of Professional Responsibility go into a bit more detail. EC 7-7 states:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980). The ethical canons also state that "[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client. . . . Examples include the representation of an illiterate or an incompetent." *Id.* at EC 7-11.

²⁶⁷ See, e.g., F. LEE BAILEY & HENRY B. ROTHBLATT, *FUNDAMENTALS OF CRIMINAL ADVOCACY* 44 (1974) (stating that "[a]s to your position as his attorney, make it clear that you alone will determine the strategy of the defense"); Clement F. Haynsworth, Jr., *Comments from the Bench: Professionalism in Lawyering*, 27 S.C. L. REV. 627, 628 (1976) (noting that counsel must be in control of the trial because his duty owed as an officer of the court is higher than his duty of loyalty to his client). See generally ROSENTHAL, *supra* note 185, at 7-16; Riskin, *supra* note 198, at 1076-1077 (distinguishing "traditional" and "participatory" models of representation).

²⁶⁸ See, e.g., GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 998-1017 (1978) (advocating that lawyers enable clients to make decisions); BINDER ET AL., *supra* note 215, at 16-24, 258-286 (urging that lawyers facilitate clients' decisionmaking by presenting them with the advantages and disadvantages of various options but allowing clients to make the ultimate decision); JAMES C. FREUND, *ADVISE AND INVENT: THE LAWYER AS COUNSELOR-STRATEGIST AND OTHER ESSAYS* 12-73 (1990) (stating that a lawyer should

[The ends-means rule] assumes a sharp dichotomy between ends and means, according to which a certain result (acquittal, a favorable settlement, *etc.*) is all that the client desires, while the legal tactics and arguments are merely routes to that result. No doubt this is true in many cases, but it need not be: the client may want to win acquittal *by* asserting a certain right, because it vindicates him in a way that matters to him; or he may wish to obtain a settlement without using a certain tactic, because he disapproves of the tactic. In that case, what the lawyer takes to be mere means are really part of the client's ends.²⁶⁹

In short, current rules, codes, cases, and commentary provide some guidance but do not provide crystal clear guidance on how, in general, lawyers and clients ought to divide decisionmaking responsibilities.

Nor do existing ethical provisions or commentary provide clear guidance on the specific question of how lawyers and their clients ought to divide negotiation and mediation responsibilities. While it is well recognized that lawyers have an obligation to convey settlement offers to their clients and to allow their clients to make the decision as to whether or not to accept a particular offer,²⁷⁰ few decisions or commentators have

not only advise her client on legal issues but also help the client to think through problems and make sound decisions); Robert M. Bastress, *Client-Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97 (1985); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 317 (1987) (urging the application of an informed consent model to the lawyer-client relationship). See generally ROSENTHAL, *supra* note 185, at 7-16; Riskin, *supra* note 198, at 1076-1077 (describing the participatory model).

²⁶⁹ Luban, *supra* note 88, at 459 n.9; see also Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 827-828 (1990) (arguing that the ends-means line is difficult to draw both because the two are not dichotomous and because clients may have many ends); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 57 (1979) (discussing an attorney's withdrawal of issues without client consent).

²⁷⁰ See HON. EUGENE LYNCH ET AL., NEGOTIATION AND SETTLEMENT 8 (1992) (stating that any offer or demand should be communicated to the client together with a candid assessment thereof); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 169-172 (1986) (stating that an attorney must have client approval for any settlement offer); Martin C. Bryce, Jr., *Rizzo v. Haines: An Attorney's Duty to Exercise Ordinary Skill and Knowledge in the Conduct of Settlement Negotiations*, 35 VILL. L. REV. 435, 455 (1990) (stating that the attorney must convey a settlement offer to the client); Cochran, *supra* note 269, at 828 (asserting that the client must approve any settlement offer and that the decision of whether or not to accept a settlement is the client's). Courts have

addressed the further questions of how lawyer and client should divide responsibilities beyond that bare minimum. One exception is Professor Robert Cochran, who has argued eloquently that lawyers ought to be required to consult with their clients extensively both as to the nature of the negotiation and as to whether a dispute would best be handled through litigation or rather through some form of alternative dispute resolution.²⁷¹ Cochran argues that such consultation is desirable to preserve parties' individual autonomy, to ensure better results,²⁷² and to protect against attorney conflicts of interest.²⁷³

As to mediation, lawyers typically assume that it should be the lawyer who decides how she and her client ought to divide mediation

imposed malpractice liability on lawyers who have failed to allow their clients to make these critical decisions. *See, e.g.,* Whiteaker v. Iowa, 382 N.W.2d 112, 115 (Iowa 1986) ("Attorneys handling claims certainly do have an obligation to communicate settlement proposals to their clients."); Joos v. Drillock, 338 N.W.2d 736, 739-740 (Mich. Ct. App. 1983) (stating that "an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle") (quoting Joos v. Auto-Owners Ins. Co., 288 N.W.2d 443, 445 (Mich. Ct. App. 1979)); Joos, 288 N.W.2d at 445 (holding that "an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle"); Rubenstein & Rubenstein v. Papadakos, 295 N.Y.S.2d 876, 877 (N.Y. App. Div. 1968), *aff'd*, 250 N.E.2d 570 (N.Y. 1969) ("[F]ailure to disclose an offer of settlement and submit to the client's judgment for acceptance or rejection is improper practice."); Rizzo v. Haines, 555 A.2d 58 (Pa. 1989) (holding an attorney liable for malpractice for failing to adequately convey the opposing side's settlement offer).

²⁷¹ *See* Cochran, *supra* note 269, at 823-824 (arguing for more client autonomy). Professor Riskin has also examined the related question of the extent to which represented clients ought to participate in settlement conferences, focusing particularly on whether judges may or should require such participation in court-ordered settlement conferences. *See* Riskin, *supra* note 198, at 1106-1107. Riskin concludes that while such participation can have a down side, generally the benefits to the clients outweigh the costs, and participation may be required. *See id.* at 1107.

²⁷² Cochran urges that results will be superior in that clients are better judges of their own interests than are attorneys. *See* Cochran, *supra* note 269, at 833.

²⁷³ *See id.* at 835-836. Cochran also argues that such a relationship would be consistent with doctrines involving medical informed consent. *See id.* at 836-840. Cochran recognizes that some may object to client control on the grounds that clients may make poor choices, that some choices require speedy decisions, and that clients might occasionally opt for illegal or unethical choices; he addresses all these concerns. *See id.* at 890-894. Douglas Rosenthal's 1974 report of his empirical study showed that, in general, clients who participate actively in their case do better than those clients who take a passive role as suggested by the traditional model. *See* ROSENTHAL, *supra* note 185, at 3, 38-41.

responsibilities.²⁷⁴ Eric Galton, for example, provides attorneys with a checklist summarizing the potential division of responsibilities between attorney and client, but does not discuss whether the list is open to revision by the client.²⁷⁵ John Cooley, similarly, states that the attorney should advise the client as to the role of both advocate and client during the mediation.²⁷⁶ He does not discuss whether the client would make these decisions or even be consulted regarding the division of responsibilities.²⁷⁷

This Article advocates that attorneys should consult extensively with their clients not only as to what position should be taken in a negotiation and as to whether the case should be mediated, but also as to the respective roles to be taken by lawyer and client in the mediation.²⁷⁸ It argues that, at a minimum, such consultation is desirable as a matter of good practice for several reasons.²⁷⁹ First, the determination of roles may well implicate important substantive concerns. For example, a client may wish to give her own opening in the mediation because one of her substantive goals is to be able to explain how she feels directly to the opposing party, even if this strategy might possibly lower the likely dollar value of the case. Or, a client may wish to have her attorney handle all of the questions because the client feels it would be emotionally damaging to attempt to confront the opposing party or her attorney directly, again regardless of the effect on the bottom line. The attorney should not simply assume that the client's only goal is maximizing, or minimizing, a dollar result.

Second, the client likely has more information regarding the client's aptitudes and abilities than does the attorney. If the attorney does not discuss participation issues with her client, she may make false assumptions regarding the client's interest or ability in participating actively in the mediation. A client who appears articulate may for emotional reasons nonetheless be ineffective in certain mediation contexts. Alternatively, a

²⁷⁴ See Plimpton, *supra* note 107, at 45 (stating that a lawyer should make a judgment call as to the appropriate degree of client participation depending on the client's "degree of sophistication and particular circumstances").

²⁷⁵ See GALTON, *supra* note 67, at 69–72.

²⁷⁶ See COOLEY, *supra* note 56, §§ 4.3–4.4, at 88–97.

²⁷⁷ See *id.*

²⁷⁸ The model of consultation urged here is largely consistent with the deliberative approach described by Professor Nolan-Haley. See Nolan-Haley, *supra* note 38, at 1384.

²⁷⁹ It might also be argued that attorneys are ethically required to consult with clients on such matters or even that they can be sued for malpractice for failing so to consult; but full explication of these arguments would exceed the scope of this Article.

client who appears very shy or inarticulate may be capable of making a very moving and personal opening statement.

Third, as previously discussed in detail, a number of conflicts of both economic interest and also psychology may exist between attorney and client. Where the attorney makes choices about the respective roles of client and attorney in mediation, she is likely, at least unwittingly, to make a decision that is biased in favor of her own economic and psychological interests. In cases where such conflicts are possible, it is particularly important that an attorney should consult with her client.

Fourth, it would not be costly for attorneys to consult with their clients on these points. Presumably the attorney will, in any event, meet with her client to explain the nature of mediation and discuss the client's case and settlement position. It is merely suggested that attorneys add an agenda item to this preparatory meeting.

Of course, when the attorney consults with the client, the client will sometimes throw the question of roles back to the attorney and ask the attorney to make the decision. It would be preferable to have the attorney outline the pros and cons of various options to the client and let the client make the call. However, if having heard all the options the client still requests that the attorney decide who should make the opening or how it should be structured, the attorney should go ahead and make these decisions.

Taken to an absurd extreme, the position advocated here might be thought to require attorneys to consult with clients on every occasion prior to either an attorney or client opening her mouth. However, it is only suggested that attorney and client have a general discussion on roles and behavior prior to the mediation so that the mediation can proceed naturally and without the need for excessive interruption. While at a critical moment either lawyer or client may ask to caucus to decide who should speak on a particular point or whether to respond at all, such consultations should be infrequent in a typical mediation.

C. Proposed Guidelines for Determining the Respective Roles of Lawyer and Client

While a lawyer should consult with her client in determining how best to divide mediation responsibilities, the lawyer should still play a key role in helping the client to make this decision. As the lawyer does in other contexts, she should facilitate the client's choice by helping to lay out the advantages and disadvantages of various options. The lawyer should also be

prepared to recommend particular divisions of responsibility given the client's expressed needs and desires. In order to perform these responsibilities well, the lawyer will need to take into account a broad array of economic, strategic, and psychological considerations. To aid attorneys in this endeavor, this subpart offers a methodology with which to approach the question of how lawyer and client should divide mediation responsibilities. Specifically, it advocates that attorneys ask themselves the following two interrelated questions to help determine how to divide mediation responsibilities: (1) who is this particular client and (2) what barriers seem to be preventing the case from settling.

1. *Who Is this Client?*

Attorneys should not assume that all clients are the same, but rather should focus on the potential differences between clients. Nor should they assume that all clients involved in a particular kind of lawsuit—e.g., personal injury, commercial, or employment termination—have the same concerns. They should instead try to determine not only the clients' goals and interests but also the clients' capabilities and even to some degree the clients' psychological makeup. They should recognize that clients and their attorneys often have very different incentives and psychologies.

a. *Is This a Client Who Would Benefit from Playing an Active Role in the Mediation?*

An attorney preparing to represent a client in a mediation should consider not only how the client's participation is likely to affect the value of the case, but also what benefits the mediation might potentially provide to the client. In doing so, attorneys will find it useful to think in terms of the possible economic and psychological barriers to negotiation and also to consider the many potential conflicts of interest between attorneys and their clients.

Although attorneys often think about cases primarily in terms of likelihood of success on the merits and consequential dollar value, either in court or in a settlement, they should recognize that clients' interests are not necessarily so narrow. Sometimes the client's interests are such that she would benefit from playing an active role in the mediation, even assuming for the sake of argument that such participation might lower the dollar value of the case. For example, the client may have nonmonetary interests or psychological needs such that she seeks an opportunity to voice her

concerns or sense of injury to the opposing attorney. Or, the client may feel a strong need to apologize to the opposing party. Alternatively, the client may seek to preserve her relationship with the opposing party. In these and many other situations, it may be beneficial for the client to be provided with extensive opportunities to speak and listen in the mediation, even when such behavior might not be desirable from a purely financial perspective.

b. Is This a Client Who Requires Protection by the Attorney?

The attorney should also attempt to determine whether, in the particular context of the mediation, the client would best be served by having the lawyer play a dominant role. Attorneys can potentially protect clients in a mediation both by speaking on their behalf and also, in terms of perception, by effectively standing between the client and the opposing party or attorney.

The attorney should ask herself whether this particular client would benefit by having the attorney speak for her.²⁸⁰ Is the client inarticulate? Shy? Prone to anger quickly in a context when such anger would be detrimental to the client's interests or wishes? Alternatively, is the client incapable of providing the analysis that is required? Is she likely to say things she later regrets or that jeopardize her case? Some clients may have some of these characteristics. Certainly, they are not shared by all clients.

As well, the attorney should ask herself whether the client would benefit by having the attorney protect her from the opposing party.²⁸¹ Although, ideally, mediation should be an opportunity for clients to communicate directly with one another, sometimes such direct communication by clients or their attorneys may be undesirable. At one extreme, if the client has been subjected to domestic abuse by the opposing party, it may be not only emotionally distressing but also coercive and even unsafe for the victim to converse directly with her abuser.²⁸² A victim of

²⁸⁰ As has been argued, *see supra* Part VII.B, this Article suggests that clients and attorneys should make joint decisions as to their respective roles. Thus, an attorney who concludes that the client needs protection should not simply impose this vision on the client. Nonetheless, it is appropriate for the attorney to draw her own conclusions so that she can engage in a discussion of the issues with her client.

²⁸¹ *See supra* note 280.

²⁸² In some such situations, the attorney should attempt to ensure that mediation does not take place at all. At times, even the most dominant or active attorney cannot adequately protect a client from coercion or physical harm that might occur in the mediation.

sexual harassment may similarly be unable to bargain as an equal with her harasser. Even in personal injury or commercial disputes, certain clients may be subject to browbeating or coercion by the opposing party or attorney.²⁸³ Where a client's attorney fears that direct confrontations would have such an impact, she should at least recommend setting up the mediation so as to minimize such problems. For example, the attorney might request that the parties break into caucus immediately, or the attorney might attempt to interrupt the opposing party's presentation or to prevent certain presentations from being made.

In answering these questions, the attorney should be sure to approach them separately. A client who is not good at speaking up for herself might well be perfectly capable of hearing directly from the opposing party or vice versa.

2. What Are the Barriers to Negotiation?

Once having considered who the client is, an attorney can best analyze how to divide mediation responsibilities with her client by attempting to determine what, if any, barriers are preventing the case from settling in a way that would serve the client's interests. If a case goes to mediation, it is because the parties and their attorneys have not yet reached a mutually acceptable agreement. Why have they not? What has stopped them from predicting how a court would resolve the dispute and reaching the same solution on their own? Or, what has prevented them from reaching an even better solution than the one the court might impose? By focusing on the dispute in this fashion, clients and their attorneys will begin to see how they ought to divide their responsibilities so as to best overcome the barriers to a negotiated agreement.²⁸⁴ The following discussion organizes potential barriers to settlement in terms of which participant is the primary obstacle

²⁸³ In a personal injury case, a defense attorney might, for example, come prepared with lots of glossy charts, videos, and statistics designed to scare a plaintiff into settling. While such exhibits might at times present an honest picture, at times they might also be unduly gloomy and inaccurate. Some clients might require assistance from their attorney to stand up to such a barrage. While this phenomenon does not mean clients should be excluded from mediation, it does mean that attorneys should be prepared to take an active role to prevent their clients from being misled, under certain circumstances.

²⁸⁴ Of course, sometimes the barrier is that the client simply wants to resolve the dispute in court, rather than through a settlement. If this is the barrier, attorney and client may divide their responsibilities so as to achieve this end as well.

to settlement.²⁸⁵ To clarify the discussion, it uses the following nomenclature: the primary client is labeled "A," her lawyer "AL," her opponent "B," and her opponent's lawyer "BL." As to each participant, this subpart will provide examples of some of the barriers that might exist to a reasonable and fair settlement, but it will not attempt to catalogue such barriers comprehensively.

Because this discussion is focused on how A and AL should divide their responsibilities in the mediation, this subpart will only touch in passing on the mediator's important role in facilitating a mutually acceptable settlement. However, the analysis provided here could also be applied to provide mediators with insights regarding how to facilitate settlements in mediations where the parties are represented by attorneys.

a. The Opposing Party (B)

i. B Has Unrealistic Expectations Based on Lack of Information

If B is blocking a fair settlement because she has unrealistically high expectations regarding her likelihood of success at trial, AL and A should attempt to convince B that B's expectations are overblown. Each may have a role to play, depending on the nature of the misinformation. For example, sometimes a party may refuse to settle because she believes the opposing party will be a terrible witness who will therefore lose big at trial. In this situation, it may be desirable to allow that supposedly terrible witness, A, to play a very active role in the mediation to disprove B's false belief. Alternatively, if B thinks she has a sure winner in terms of the law, it may be important to have AL make a lengthy legal presentation to convince B that she is being over-optimistic. Usually AL will be better suited than A to convince B that her case is problematic in terms of the law.

²⁸⁵ No single participant is the sole barrier because a refusal to accept a settlement virtually always involves more than one party. One may refuse to settle a minor fender bender and be very obstinate, but if that person were offered \$1,000,000, she would settle. Thus, when this Author says that one participant is blocking the agreement, this Author means that this person is rejecting an agreement that would seem to outsiders to be reasonable.

ii. *B Is Engaging in Strategic Behavior*

If B is blocking a settlement by engaging in strategic behavior, such as hoarding information or bluffing, then A and AL must attempt to convince B to engage in a more problem-solving approach that will allow for the possibility of creative and mutual gains. Roger Fisher, William Ury, and Bruce Patton, in *Getting to Yes*, have offered a series of practical suggestions on how one may convince her opponent to move from competitive to problem-solving negotiation.²⁸⁶ The gist of their advice is to attempt to move the discussion to the merits and to look behind mere positions to the underlying ideas.²⁸⁷ Either A or AL may be the person who is better situated to attempt to earn B's trust and convince B to change her orientation. Thus, A and AL should jointly consider which of them, or perhaps both, are most likely to be successful in such a venture and divide their responsibilities accordingly.

If, however, it appears impossible to convince B to approach the negotiation with a positive, problem-solving attitude, it may be necessary for AL to encourage her own client not to share too much information or case strategy. Where one party insists on behaving competitively and the other is attempting to cooperate, the cooperating party may be disadvantaged.

iii. *B Has Unmet Nonmonetary Goals*

If B is blocking a fair settlement because she has nonmonetary goals that are not being met, A and AL should consider whether it is desirable and possible for them to attempt to meet these goals. For example, B may be greatly injured because A chose to sue her, and an apology or explanation might go a long way toward healing the rift. In this event, if A is willing to apologize, it is important that she and her attorney divide responsibilities so she can do so. Alternatively, it may be that B feels the need to really tell A off, face-to-face. If A and AL decide that this would not be too damaging to A, they should again divide responsibilities to provide B with this opportunity. Perhaps A and B were business partners, and perhaps B would like to renew or continue the relationship. If such a result has possible appeal to A, and assuming A would be more capable of

²⁸⁶ See FISHER ET AL., *supra* note 114, at 108–112 (discussing negotiation “jujitsu”).

²⁸⁷ See *id.* at 107–109.

working out such an arrangement than her attorney, it is critical that A be provided with the opportunity to play a very active role in the mediation.

iv. *B Is Behaving "Irrationally"*

If B is blocking a reasonable settlement because of such psychological phenomena as over-optimism, anchoring, framing, or reactive devaluation, A and AL must strive to convince B to behave more "rationally," or they must restructure the settlement offer to better comply with B's psychological needs. It is not clear that either A or AL will necessarily be better situated to perform these tasks. However, depending on each of their personalities and depending on their relationship with B, they may decide that one of them is better suited to the task. Typically B will likely react more emotionally to A than to AL, so AL may be better situated to attempt to convince B to see things more rationally.

b. *The Opposing Attorney (BL)*

Sometimes it will appear that it is BL, rather than B, who is preventing a case from settling.

i. *BL Has Unrealistic Expectations Based on Lack of Information*

Where BL has an exaggerated idea as to the strength of B's case, again it is important to determine the source of the misperception. Where it is legal—i.e., a misunderstanding of relevant precedents—AL should actively attempt to convince BL to rethink the law. Where BL mistakenly thinks her own client will be a terrific witness, AL may be able to show BL that she is wrong, for example by showing a video of the supposedly injured B playing tennis. If BL's unrealistic expectations are based on a discounting of A's own strength as a witness, then A should often participate actively in the mediation.

ii. *BL Is Engaging in Strategic Behavior*

It may well be that BL, rather than B, is the person who is engaging in competitive negotiation behavior. Again, A and AL must attempt to

convince BL to take a more problem-solving approach.²⁸⁸ Probably AL would be more able to talk directly to BL and to have some impact than would A. As noted above, however, where these efforts fail it may be appropriate for AL to discourage A from sharing too much information with the opposing party or her attorney.

iii. *BL Has Unmet Monetary or Nonmonetary Goals*

Perhaps BL is opposing a settlement because of her needs and incentives that are not necessarily consistent with those of her client. As discussed earlier, BL's financial interests might lead her to oppose settlement. Or, BL might oppose settlement for nonmonetary reasons such as her own quest for justice or to hone her trial skills. Certainly it will be awkward for either A or AL to deal with such conflicts overtly. Rather than directly confront BL on these issues, A and AL may seek to convince B that the settlement is wonderful, regardless of BL's lack of enthusiasm. A may be able to do this by speaking directly to B, perhaps even outside the presence of the attorneys. Alternatively, AL might attempt to have a conversation with BL in which she subtly sought to convince BL not to let her own needs stand in the way of her client.

iv. *BL Is Behaving "Irrationally"*

Although attorneys are less likely to be affected by such phenomena as anchoring and reactive devaluation than are clients, they are not totally immune. If BL appears to be under the influence of such a mode of perception, AL is probably better situated than A to try to convince BL to behave more rationally.

c. *The Client (A)*

At times AL may realize that it is her own client A who is blocking what would seem to be a rational and fair settlement.

²⁸⁸ See *supra* Part VII.C.2.a.ii.

i. *A Has Unrealistic Expectations Based on Lack of Information*

A may be unrealistically optimistic about her own chances of success because AL has failed to provide her client with complete information as to the negative aspects of her claim. As has been discussed, AL may fear that if she provides A with an accurate assessment of her chances A might become dissatisfied with AL's work as her attorney. Also, even where AL attempts to be completely honest with her client she may find that her client still sees the case in an over-optimistic light. AL can effectively deal with this phenomenon by letting A play an active part in the mediation. In this way, the mediator, the opposing attorney, and even the opposing client can all educate A as to the problems with her claim and the strengths of B's position. AL will not have to perform this educational function on her own.

ii. *A Is Engaging in Strategic Behavior*

AL may realize that her own client A is not approaching the dispute from a problem-solving standpoint but rather is hoarding information and otherwise engaging in competitive behavior that may make it difficult to settle the dispute. AL may attempt to counter this tendency by encouraging A to participate actively in the mediation. If A begins to speak directly to the opposing party and to the mediator, A may start to see the benefits of working together toward a positive solution. By contrast, if A sits silently as AL serves as her gladiator, A may well become further rooted in her win-lose mentality.

iii. *A Has Unmet Nonmonetary Goals*

A may feel unable or unwilling to settle until she has expressed her feelings toward B, has received an apology from B, has apologized to B, has had her honor restored, or has achieved justice. In these circumstances, it may well be desirable to let A play an important and direct role in the mediation. By presenting at least a significant portion of the opening statement, A may, for example, vent her anger or make or demand an apology. By participating actively in the joint session, A can also work toward a problem-solving solution that can help meet her nonmonetary needs.

AL, while well meaning, may fail to see the importance of these needs or be insufficiently creative to devise a settlement that will meet the

nonmonetary needs. In these circumstances, A may do better as her own advocate. That is, if AL can at least recognize that A has unmet nonmonetary needs, she should think seriously about allowing A to play an active role in the mediation in order to better explain and meet her needs.

iv. *A Is Behaving "Irrationally"*

AL may recognize that A is rejecting proposals that rationally would serve her self-interests because A is under the influence of such phenomena as over-optimism, anchoring, framing, or reactive devaluation. As discussed earlier, it is not always appropriate to convince a client to abandon these "irrational" feelings.²⁸⁹ However, to the extent that AL wants to at least help A realize the source of her reluctance to settle, AL would probably want to allow A to play an active role in the mediation. It may be that the mediator, B, or BL will be able to be more successful than AL in convincing A that the proposed settlement serves her best interests. Unless A participates actively in the mediation, she will not be able to have conversations with these other persons.

d. *The Attorney (AL)*

It will be a very rare attorney who, at the time, recognizes that she herself is standing in the way of a fair and reasonable settlement. However, at least in retrospect, some may come to realize that they themselves have done so. Given this possibility an attorney should at least take into account that her own views and incentives may be impeding the settlement.

i. *AL Has Unrealistic Expectations Based on Lack of Information*

Recognizing the possibility that her own expectations and assessment of the case may be unrealistic, AL should allow herself to be educated through the mediation process. All of the other participants may have information she does not possess, so she should attempt to structure the mediation to allow A, B, and BL to participate actively. In this way AL can potentially be educated as to the law by BL and can also learn more about the facts and goals from listening to B and her own client A. If AL seeks to dominate the

²⁸⁹ See *supra* notes 212–215 and accompanying text.

mediation, she will lose out on an opportunity to learn more about the dispute and its possible solutions.

ii. *AL Is Engaging in Strategic Behavior*

To the extent that AL recognizes the possibility that she may be engaging in overly competitive negotiation behavior, she would often be well advised to allow her client to take an active role in the mediation. Clients will typically be more prone to engage in problem-solving than will attorneys, as discussed above. Also, clients will often be better able than attorneys to recognize opportunities for win-win solutions.

iii. *AL Has Unmet Monetary or Nonmonetary Goals*

Even a well-meaning attorney who strives as hard as she can to put her client's interests ahead of her own may sometimes realize, at least in retrospect, that she has allowed her own interests in maximizing her fee, obtaining a certain precedent, or achieving justice, to stand in the way of a settlement that serves her client's best interest. This well-meaning attorney may also realize that she has, inadvertently, focused exclusively on the monetary aspects of the case while failing to pay sufficient attention to nonmonetary goals that are equally important to her client. To guard against this problem, a well-meaning attorney should allow her client to play an active role in the mediation to the maximum extent possible. In this way, A can, herself, better evaluate the strength of her own case by observing the presentations made by B, BL, and her own attorney AL. A can also speak directly to B, BL, and the mediator, and perhaps come to see a solution to the dispute that her own attorney may not have recognized. This recommendation does not necessarily call upon attorneys to act against their own self-interest. Allowing the client to participate actively in the mediation may actually serve the attorney's long-term best interests in that a satisfied client is more likely to come back to the attorney in the future and also to provide the attorney with more referrals of additional clients.²⁹⁰ In any event, however, the rules of professional conduct do require attorneys to set aside their own interests when they conflict with the interests of their clients.

²⁹⁰ A well-satisfied client is also far less likely to file a malpractice action or ethical complaint against the attorney.

iv. *AL Is Behaving "Irrationally"*

Finally, AL should recognize that she, too, may sometimes be influenced by the irrational psychological phenomena discussed throughout this Article. For example, perhaps AL is encouraging her client to reject a settlement because the offer was made by the opposing attorney and AL is affected by reactive devaluation. Knowledge of these psychological phenomena may help AL guard against their undue influence. Allowing or encouraging A to participate actively in the mediation may also be appropriate to deal with this problem. By participating actively, A will likely become less dependent on AL's advice. She will be able to draw some of her own conclusions based on the comments of B, BL, and the mediator. Thus, A will be able to make her own decisions as to whether a particular offer serves her needs and best interests without being unduly influenced by AL's possibly irrational opinions.

VIII. CONCLUSION

Anyone who says they have a simple answer to the question of how lawyers and clients should divide their responsibilities in a mediation must be wrong. Either their answer is not simple or their answer is not right. The answer is complicated because the division of responsibilities should vary substantially depending upon who the client is, who the lawyer is, and what factors appear to be blocking a reasonable and fair settlement of the dispute. Allowing clients to participate actively and directly in a mediation can be critically important in overcoming barriers to settlement that have been identified by economists, psychologists, and those writing about principal-agent costs. Yet, at the same time, attorneys must sometimes play a more dominant protective role to ensure that their clients are not duped, harmed, coerced, or otherwise taken advantage of in the course of mediation.

The theoretical insights of economics and psychology can greatly assist practicing attorneys who are attempting to figure out what to do in a mediation.²⁹¹ While rejecting the possibility of a "one size fits all" division

²⁹¹ See generally Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707-712 (1996) (arguing that the debate in law schools and legal practice as to "theory v. practice" is misguided in that the two are symbiotically related and further arguing that properly explicated theory can assist lawyers in their day-to-day tasks).

of responsibilities, this Article has at least provided a relatively simple recipe for success. In determining her role in a mediation, a lawyer should do the following: (1) serve as her client's advocate, (2) consult with her client regarding the division of responsibilities, (3) consider who her client is, and (4) take into account whether she or her client is best situated to help to overcome the extant economic, psychological, and principal-agent barriers to a fair negotiated agreement. To some, this approach may sound unduly complex, but consciously or not, it has already been employed by attorneys in the real world. As well, several of the practitioner-oriented works discussed in Part II explicitly advise attorneys to consider barriers to negotiation in dividing mediation responsibilities with their clients.²⁹²

In short, attorneys representing clients in mediation must at times be able to be both "gladiators" and "potted plants," as well as to play many other more complex and interesting roles. Where, as will often be the case, economic, psychological, or strategic barriers to an appropriate settlement can best be overcome by allowing the client to participate actively in the mediation, the attorney should recommend such a division of responsibilities. But, where the attorney herself is best positioned to overcome the barriers to a fair agreement, she should recommend a more active role and sometimes even a more adversarial role for herself. Attorneys can derive many insights from economics and psychology in contemplating which representational approach is appropriate in a particular mediation.

²⁹² See *supra* note 82.