

Engagement of Lawyer-Mediators in Client Conflict

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I. INTRODUCTION

For some time, mediation as an alternative dispute resolution technique has captured the imagination of the legal profession. Mediation is a process in which disputants gather information, create options or solutions to resolve their dispute, negotiate or bargain over options and craft a mutually acceptable agreement.¹ Mediators do not make decisions for disputants. As neutral third-parties, mediators create a "safe" and confidential environment for the disputants, initiate and facilitate information gathering, moderate option development, supervise negotiation, and draft the disputants' agreement.

The literature on mediation has increased in volume as well as quality. In particular, the neutral third-party role of the mediator has come under scrutiny as to how it can be reconciled with the advocacy role of the lawyer.² However, the apparent contradiction is not irreconcilable:

One does not have to claim that an intervenor must have no values to be neutral in the sense required to promote consensual decision-making. . . . It is conceivable that an intervenor can promote consensual decision-making even if some of the intervenor's values conflict with those of the participants.³

Nevertheless, mediators can easily become part of the problem which they seek to solve. For instance, what mediator has not favored one client's "position" or puzzled over why clients do not opt for an "obvious" solution to their problem? Such a result is not unusual because clients have a way of fighting which is their solution to the problem. For them,

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1. See Kelly, *Mediation and Psychotherapy: Distinguishing the Difference*, 1 *MEDIATION Q.* 33 (1983).

2. Cf. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 *UCLA L. REV.* 811 (1987). Gifford discusses the problems associated with the symbiotic relationship between an attorney and her client. Lawyers dominate sessions with the client and, according to Gifford, there is little interest in this dominance among clinical teachers. See *id.* at 840. See also Marlow, *Styles of Conducting Mediation*, 18 *MEDIATION Q.* 85 (1987) (a comparison of the attorney/labor mediator style and the therapist/mediator style).

3. Stulberg, *ADR Paradigms and Intervenor Values*, 1985 *MO. J. DIS. RES.* 1, 20.

the conflict *is* the solution. How mediators become engaged in the client's conflict, with the effect of thwarting resolution, is the focus of this Article. One commentator elaborates on the pitfalls inherent in the role of the mediator: "I wonder about the mediators who unwittingly fall in with, and facilitate, the exploitation of one party. Lawyer-mediators . . . can be psychologically exploited too. And the problem still exists even if the mediator does perceive what is going on."⁴ To be more specific, lawyer-mediators risk becoming engaged in the conflict of the clients every time they meet with them.

The problem of lawyer-mediators becoming engaged in the clients' conflict will be analyzed using the following format. First, the importance of scientific objectivity will be discussed. Second, the relevance of science to the lawyer as negotiator and mediator will be examined. Third, engagement will be defined in light of scientific objectivity. Fourth, conflict as a system, fact-finding, and neutrality will be proposed as antecedents to engagement. Finally, the practical significance of the previous discussion for the lawyer-mediator will be explored.

II. OBJECTIVITY AND SCIENCE

Newtonian science gave rise to a belief in scientific objectivity.⁵

One of the features of Cartesian-Newtonian materialistic physical science is a universe in which there are objects—discrete entities—subject to such immutable laws as gravity, inertia of motion, inertia of rest, and attraction-repulsion. One further feature is that these objects can be observed and that each observer can observe the same phenomena, having not altered the immutable laws, cycles, and trajectories of these objects. The observer is independent of the cosmos of the objects. This principle—Newtonian mechanics—has dominated Western science since Descartes.⁶

This model raises a question as to the extent to which any observer can be independent of that which is observed. When the object being observed is a person, this question is particularly troublesome.

Many psychoanalytic theories have grappled with the impact of intimacy on observed objects (as well as the observer).⁷ Psychoanalytic observation is complex and includes "detached observation" as well as "empathic or vicarious introspection."⁸ A Cartesian-Newtonian model

4. Crouch, *The Dark Side of Mediation: Still Unexplored*, in A.B.A., ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 339, 343 (H. Davidson, L. Ray & R. Horowitz eds. 1982), reprinted in S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 330, 332 (1982).

5. See generally Grotstein, *The Higher Implications of Langs' Contributions*, in LISTENING AND INTERPRETING 3 (J. Raney ed. 1984).

6. *Id.* at 7.

7. See generally R. LANGS, THE LISTENING PROCESS (1978); H. SULLIVAN, THE INTERPERSONAL THEORY OF PSYCHIATRY (1953); Kohut, *Observations on the Psychological Functions of Music*, 5 J. AM. PSYCHOANALYTIC A. 389 (1957).

8. Grotstein, *supra* note 5, at 10.

of science only recognizes detached observation and considers vicarious introspection inappropriate. However, limiting, managing, or ordering vicarious introspection is possible and can be achieved if pursued actively and consciously.

Successful negotiation relies upon detached observation. Mediators need distance from the object studied so as to obtain valid and reliable observations upon which successful negotiating depends. Vicarious introspection, which is always part of observation, must therefore be reckoned with and cannot be dismissed out of hand.

III. LAWYER-MEDIATORS AND NEGOTIATION

Lawyers are trained to negotiate. A successful negotiation terminates with the opponent losing and the client winning. The measure of an attorney's mettle is his or her ability to win for the client. An attorney who wishes to use alternative dispute resolution techniques, particularly mediation, must shift gears. In mediation, unlike in negotiation, the primary negotiators are clients. Mediators have an obligation to see that clients are equipped to negotiate fairly and with parity. This change in role from being partisan to neutral is not easy for lawyers. "The responsiveness of the negotiator to both her client and to the other negotiator, and her position as an intermediary between these competing influences are examples of what social scientists refer to as boundary-role conflict."⁹ A consequence of this "boundary" position is the lawyer's exposure to client influence. The lawyer is a partisan of the client but must remain neutral.

Mediation presents the lawyer with a role to which he or she is not accustomed. It requires skills which do not necessarily complement those of a successful negotiator. Even if the intricacies of maintaining neutrality while counseling clients have been learned, advocacy remains the primary focus of the legal profession. Neutrality, although important in law, is often affected by advocacy. All too often, it is easier to favor advocacy because of personality factors and legal training.¹⁰

Different factors influence attorneys in the practice of law. Negotiation strategies and personal style often combine to color the outcome of a lawyer's professional work.¹¹ Client personality also affects the relationship between client and attorney. "It can cause misunderstanding between attorney and client, conflicts in definition of objectives, conflicts in

9. Gifford, *supra* note 2, at 836. Gifford, in note 40 of his article, describes the conflict as one between "neutrality" and "partisanship." *Id.* at 819.

10. *Id.*

11. See Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 47-48 (1985).

strategy, conflicts in interactions with the other side, and conflict in expectations about ultimate outcome."¹²

The lawyer-mediator seeks to overcome these influences and to assume a neutral posture. However, neutrality is not easily maintained, nor engagement easily avoided when the mediator pursues solutions:

Parties to a dispute tend to view the negotiations from skewed perspectives and they will, in turn, regard a mediator's actions from the same slanted perspective no matter how well-intentioned the mediator might be. As a result, the mediator who chooses to advocate a particular point of view may become part of the problem and not part of the solution.¹³

IV. ENGAGEMENT

Engagement is difficult to assess as well as remedy. Detailed discussions of engagement are not found in mediation literature. It is assumed that mediators are aware when they are being engaged in the clients' conflict and will be able to cope. Mediator training, likewise, treats engagement superficially.

The risk of engagement increases with the complexity of the dispute. Multiple issue ("polycentric") disputes pose a greater threat to the mediator than single issue disputes.¹⁴ When engaged, lawyer-mediators abandon a neutral, objective posture and do battle with the parties. By engaging the mediator, negotiators can distract the mediator, so that he or she may not hear what the other parties to the conflict are saying.¹⁵

Engagement occurs in stages. Whether lawyer-mediator, client, or

12. G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 62 (1983). According to Williams:

The tension and mistrust create a whole series of additional effects, each of which may impact negatively on the negotiations. One immediate effect is to distort the communications between the parties. Mellinger, as early as 1956, found that when people communicate under conditions of distrust, they tend to overstate the extent of agreement or to overstate the extent of disagreement. Both have negative consequences.

Id. at 50.

13. Ross, *Should the Mediator Raise Public Interest Considerations During Negotiations*, in SPIDR, ETHICAL ISSUES IN DISPUTE RESOLUTION, 51 (C. Gold ed. 1983). The dilemma which Ross discusses results from the impossibility of the mediator to be completely removed from the dispute.

14. For a discussion of polycentric conflict, see Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978). It is generally understood that conflicts involving a single issue, e.g. some small claims disputes, are absent contingent conflicts and often are limited in emotional complexity and by the number of disputants. It is easier to focus on the sole issue because it can be defined easily and the parties, usually with a minimum of effort, will agree on its definition.

15. Honeyman, *Patterns of Bias in Mediation*, 1985 MO. J. DIS. RES. 141. Honeyman's discussion is limited to a particular type of negotiator advantage, e.g., shielding principals from the mediator. *Id.* at 147.

situation-induced, it often starts with an innocuous aspect of the polycentric conflict (particularly if it does not concern the major issue in conflict) and arises from the type of conflict.¹⁶ Each participant follows rules dictated by the conflict and crafted by the client.¹⁷ As a result, engagement seems appropriate. Under these circumstances, disengagement is difficult even if the mediator is aware that engagement has occurred.

A. Reasons for Engagement

Reasons for engagement may be divided into those resident in the lawyer-mediator and those outside the lawyer-mediator. One source of engagement could be the mediator's particular psychological make-up. Some people think of conflict as a metaphor which triggers conscious and unconscious responses.¹⁸ For example, if the mediator sees conflict management as a "battle," and the client "flings down the gauntlet," then it may be difficult for the mediator to resist the challenge.

The client's experience with conflict may also induce engagement. After all, clients may not be able to resolve their problems but they know how to engage others in conflict. Disputants have a vested interest in discovering the mediator's style of conflict at the same time the mediator is learning more about the disputant's problem.

Furthermore, influences lie outside of the mediator and client. The strength and complexity of conflict may overwhelm the unprepared. In addition, it is proposed that the timing of mediation, scheduling problems, and physical setting may facilitate engagement of the mediator.

B. Understanding Client Conflict

Lawyer-mediators must understand the relationship of client conflict to their engagement. The key is understanding *conflict as a system* and the mediator as a *neutral third-party fact-finder*. Fact-finding, an antecedent to engagement, is similar to participant observation. Engagement will be explained using counter-transference.¹⁹

16. When clients or conflicts are responsible for engagement, this is called co-optation. Mediators also become engaged in conflict because of their idiosyncracies. This is called self-induced engagement. To avoid confusion, the term engagement will refer to participation of the mediator in the clients' conflict regardless of whether it is client-induced, conflict-induced, or self-induced or contains elements of each.

17. See generally J. HOCKER & W. WILMOT, *INTERPERSONAL CONFLICT* (2d ed. 1985).

18. *Id.* at 9-12.

19. An eclectic approach which treats complex topics in a cursory and superficial manner is inherently dangerous. However, the absence of conceptual analyses of engagement in legal and mediation literature emphasizes the importance of beginning a dialogue. Hence, this Article will focus on conflict as a system and neutral fact-finding. Development of practical solutions for the lawyer-mediator in counteracting engagement is an additional topic.

V. CONFLICT AS A SYSTEM

A. *Grist for the Mediator's Mill*

Interaction in a conflicted social system is structured.²⁰

1. *Elements of Conflict.* Awareness of engagement begins with the dissection of a social system in conflict.²¹ First, circular causality is present.²² It is futile to identify cause or blame in specific past events. Typically, people in conflict will try to attribute blame. Blame keeps the system closed and resistant to change. Second, each person in the system has a role to play. However, neutrality is a mediator's shield against being assigned a role in the system. Third, unwitting collaboration among members of the system in conflict (often including the mediator) keeps it operating. Collaboration manifests itself in issue resolution stalemates. Fourth, there are "battle" rules. Generally, when engagement is present, the mediator will abide by the rules of the conflict. Fifth, interaction is stable when two parties are involved. The addition of a third party—the mediator—requires adjustments or the system will be unstable. By engaging the mediator, one party or both parties will restore the system's balance.

2. *Polycentric Conflict.* Clients bring a specific ("presenting") conflict to the mediator. However, presenting conflicts are often accompanied by contingent conflicts or problems.²³ Complex conflicted systems have been called polycentric as compared to monotonic conflicts which have a single and generally superficial issue.²⁴ Sources of conflict accompanying the presenting conflict are varied and include:

- (a) demographic characteristics of the parties, *e.g.*, social class, age, race, cultural characteristics;
- (b) characteristics of interpersonal communication, *e.g.*, how and whether people communicate in particular situations;
- (c) objectives of the dispute management process;

20. See J. HOCKER & W. WILMOT, *supra* note 17.

21. For a discussion of models of conflict analysis, see A. FILLEY, *INTERPERSONAL CONFLICT RESOLUTION* (1975); J. HOCKER & W. WILMOT, *supra* note 17.

22. The application of systems analysis to conflict leads the author to draw conclusions which demonstrate the relevance of systems analysis to understanding the mediator's role in conflict management.

23. See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). Menkel-Meadow states:

Some of the potential difficulties with problem solving inhere in the context of particular problems. Parties or their lawyers may seek particular political aims that go beyond the facts of the case or the relationship of the parties. Or, the parties involved may present barriers to problem solving that also go beyond the particular problem at issue by virtue of their own personal characteristics.

Id. at 834-35.

24. See *supra* note 14.

- (d) motivation of the parties, *e.g.*, do they really want a resolution of the conflict?;
- (e) sequence of events bringing the parties to the dispute manager;
- (f) type of dispute resolution being used;
- (g) what the measure of success will be and whether all parties find it agreeable; and,
- (h) satisfaction of the parties with the process once it has begun.²⁵

Conflict management requires the lawyer-mediator to control poly-centric conflict. Whether the problem is noisy music, custody of the children, or environmental pollution, the mediator's function is the same. Mediators help return the client's focus to the presenting problem when, for whatever reason, the clients change the focus. Through refocusing and referral to outside experts when necessary, mediators keep the tangential conflicts at bay or resolve them. Disputants are therefore better able to find solutions to presenting conflicts after contingent conflicts and problems are managed or become irrelevant.

B. *Fact-Finding*

Legal and mental health professionals are the most active professional mediators in the United States.²⁶ Both have standards for professional conduct which facilitate neutrality.²⁷ Understanding the psychodynamics of engagement, however, is not a primary objective of legal standards or education. In contrast, mental health professionals are generally well prepared in their training.

Lawyer-mediators can benefit from social scientists who have grappled with the issue of objectivity. Social and behavioral science students learn that objectivity is one of the goals of scientific thinking and research. They wrestle with determining what degree of distance from an individual or social group must be maintained to gather valid and reliable information. Interaction with clients under tense and conflicted circumstances underscores the need for neutral fact-finding.

Data-gathering techniques employed by social scientists can be adapted to the mediation process. Participant observation is a qualitative method

25. Oversimplifying the origins of conflict is not without its problems. There are many ways to characterize how conflict begins. Compare Frank, *Conflict in the Classroom*, in CONFLICT RESOLUTION THROUGH COMMUNICATION (F. Jandt ed. 1973) with J. HOCKER & W. WILMOT, *supra* note 17.

26. Personal observation is the basis for this conclusion. It is this author's opinion that up to now, there has been no attempt nor desire to classify mediators according to their professional backgrounds. For a discussion of the implications of the predominance of lawyers and mental health professions on mediation, see Girdner, *Family Mediation: Toward a Synthesis*, 13 MEDIATION Q. 21 (1986).

27. The American Bar Association and the Academy of Family Mediators have developed standards of practice for mediators. See Milne, *Model Standards of Practice for Family and Divorce Mediation*, 8 MEDIATION Q. 73 (1985).

which, like other qualitative methods, is holistic and inductive.²⁸ It has its origins in the field study traditions of sociology and anthropology as well as symbolic interactionism, phenomenology, and ecological psychology.²⁹ Quantitative methodologies, on the other hand, emphasize deduction and prediction.³⁰ The goal of qualitative methods is to understand reality as it occurs in its naturalistic setting.³¹ A setting is naturalistic when the behavior, activity, or reaction of persons or things is not contrived, controlled, or fabricated.³²

Neutral fact-finding by lawyer-mediators consists of participant observation. Participant observation has been defined as: "a process in which the observer's presence in a social situation is maintained for the purpose of scientific investigation. . . . [T]he observer is a part of the context being observed, and he both modifies and is influenced by this context."³³ Facts equip lawyer-mediators to manage the conflict of clients. This process has been described as a lifting of veils:

The metaphor that I like is that of lifting the veils that obscure or hide what is going on. The task of scientific study is to lift the veils that cover the area of group life that one proposes to study. The veils are not lifted by substituting, in whatever degree, preformed images for firsthand knowledge. The veils are lifted by getting close to the area and by digging deep into it through careful study.³⁴

This reciprocity between the observer and the observed characterizes the relationship between the lawyer-mediator and client.

Participant observers play a social role. Their identity, however, must remain vague to permit differentiation from the reality being studied. "The observer remains marginal to the society or organization or segments of them which he studies. By his conscious action he stands between the major social divisions, not necessarily above them but surely apart from them."³⁵ Participant observers oscillate between an objective scientific stance and a stance as a participant in the individual's reality, so that the observer is intermittently detached and personally involved. This process has been called "discovery and verification."³⁶

28. See M. PATTON, *QUALITATIVE EVALUATION METHODS* 39-44 (1980).

29. The term *verstehen*, which loosely means "understanding," is often associated with qualitative methods. The objective of participant observation is to "understand" the reality one is studying. That is, valid and reliable data represent the subject's point of view and not the researcher's. *Id.* at 44-45.

30. *Id.*

31. *Id.*

32. *Id.*

33. Schwartz & Schwartz, *Problems in Participant Observation*, in *ISSUES IN PARTICIPANT OBSERVATION* 91 (1969).

34. H. BLUMER, *SYMBOLIC INTERACTIONISM* 39 (1969).

35. Vidich, *Participant Observation and the Collection and Interpretation of Data*, in G. MCCALL & J. SIMMONS, *ISSUES IN PARTICIPANT OBSERVATION* 81 (1969).

36. M. PATTON, *supra* note 28, at 47.

Participant observers' need for rapport with the client also complicates their role. To collect valid and reliable information, there must be a balance between objectivity and rapport.

The participant observer relationship requires rapport combined with objectivity. The researcher has to gauge how much rapport is necessary to get the cooperation required to continue the study. . . . To protect himself from developing impeding over-rapport, the researcher should ask himself: At what point does closeness to the subjects limit the research role?³⁷

Failure to balance rapport and objectivity results in overidentification. The clients' conflict becomes the conflict of the mediator.

Fact-finding with clients is similar to scientific data collection and should conform to the canons of science. Specifically, the secret to reciprocity and rapport with the client is marginality in the system and control of the mediator's identity. Avoidance of engagement requires that the identity of the mediator remain vague. Vagueness, in turn, depends upon professional rules or standards of appropriate professional behavior, e.g., the limits of personal disclosure to the client.³⁸

C. Neutrality

Mediation necessitates that the mediator remain neutral while facilitating solutions. Mediators can lose neutrality when they, like clients, pursue solutions. "In the attempt to meet needs, often without understanding them as wants, the client arrives at solutions that are both inadequate and irrelevant. When this happens, an all-too-common situation arises: the solution becomes the problem."³⁹ Solutions which become problems are often an outcome of the professional-client relationship.⁴⁰

1. *Counter-transference and The Frame.* Psychoanalytic literature is rich with concepts which can illuminate the dynamics of engagement and enhance neutrality.⁴¹ In particular, two bipersonal field perspective concepts are relevant to the analysis of lawyer-mediator neutrality and vulnerability to engagement. The first concept is counter-transference. It is an element of interaction between therapist and client that refers

37. Miller, *The Participant Observer and "Over-Rapport,"* in G. MCCALL & J. SIMMONS, ISSUES IN PARTICIPANT OBSERVATION 88-89 (1969).

38. See Dorpat, *Technical Errors in Supervised Analyses,* in LISTENING AND INTERPRETING 195 (J. Roney ed. 1984).

39. H. HACKNEY & L. CORMIER, COUNSELING STRATEGIES AND OBJECTIVES 107 (2d ed. 1979).

40. See generally Hodges, *The Langsian Approach to Acting Out,* in LISTENING AND INTERPRETING 75 (J. Roney ed. 1984).

41. For a review of literature and clinical data focusing on empathy in psychotherapeutic relationships, see Beatrice, *Empathy and Therapeutic Interaction,* in LISTENING AND INTERPRETING 165-78 (J. Roney ed. 1984).

to the therapist's distorted and destructive responses to the patient.⁴² More specifically, counter-transference can be defined as:

Any conscious or unconscious feelings, attitudes, or reactions of the therapist toward the client which hinder the therapist's understanding of the client's conflicts and troubles and/or generates anxiety in him. Since nearly any attitude, feeling, or reaction of the therapist—fear, jealousy, sexual attraction, competitiveness, overinvolvement, ethnic and class difference, excessive need for money, egotism, narcissism, possessiveness, diffidence—can become a hindrance in his understanding of the client's struggles all of those factors may show up as counter-transference.⁴³

The first step in understanding counter-transference is for the therapist to examine his or her own feelings.⁴⁴ Through self-analysis, supervision, and keeping and reading adequate session notes, examination of feelings becomes easier. Interaction between the most aware professional and his/her client may involve counter-transference. Counter-transference is, arguably, present in most professional-client relationships.⁴⁵

The second psychoanalytic concept relevant to engagement is what psychotherapists term a "frame." A "frame" is the total environment in which a therapist and client interact.⁴⁶ Ideal or standard frames include reserved appointments, maintaining time schedules, a set fee, or confidentiality.⁴⁷ The notion of a frame assumes the importance of the environment in which mediation occurs. The *total* environment influences interaction between professionals and clients.⁴⁸ Environment acts as a boundary within which the professional conflict manager works. For the lawyer-mediator, a frame includes all contact with the client and the rules of conduct which govern this contact. The clients' conflicted system is brought into the lawyer-mediator's frame and becomes part of it. The lawyer-mediator and the client share the same milieu, and great pressure militates against neutrality and in favor of engagement.

42. In general, in addition to counter-transference, Lang's analysis includes three other components. They are: the nontransference portion of the client's functioning; the non-counter-transference portion of the therapist's functioning which represents the therapist's nonconflicted responses to the patient; and the transference portion of the patient's functioning which represents the patient's conflicted responses to the therapist. See Lang, *supra* note 7.

43. S. SHARMA, *THE THERAPEUTIC DIALOGUE* 227 (1986).

44. *Id.* at 252.

45. If counter-transference is a natural human response to personal encounters, then professional activity, insofar as it is a personal encounter, will necessarily involve counter-transference.

46. For discussions of frames, see generally Dorpat, *supra* note 38 (study of frame errors); Cheifetz, *Framework Violations in Psychotherapy with Clinic Patients*, in LISTENING AND INTERPRETING 215 (J. Raney ed. 1984) (focus on mental health clinic frameworks); Keene, *Framework Rectification and Transient Negative Effects*, in LISTENING AND INTERPRETING 267 (J. Raney ed. 1984) (examination of framework rectification factors and resolutions).

47. See Dorpat, *supra* note 38.

48. R. LANGS, *supra* note 7.

Deviations in the frame lessen neutrality and invite engagement. Most psychotherapists agree on a core of important frame errors.⁴⁹ Errors develop when standards are not met. Standards include: abstinence (denial of the demands of the client); anonymity (nonintrusiveness of mediator's private life, values, or needs); providing of a "holding environment" (a safe and secure place for the client); and the exercise of care with educative interventions (client must play an active part in educative interventions).⁵⁰

These standards are premised upon a view of the client as an independent and responsible agent. "Contrary to the medical model, a therapist should have no power over the client since a power relationship curbs the development of the autonomy of the client, inhibits an open and free exchange between the two parties, and is antithetical to the ideology of egalitarianism."⁵¹ Similarly, it has been observed that the major cause of frame errors among candidates for degrees in therapy has been their unresolved counter-transference. They unconsciously introjected and acted out the role transferred onto them by the patient. An illustration of the problem can be seen in the following case study.⁵²

Another candidate in three control cases . . . was unaware of how frequently he became involved in power struggles with his patients. He typically engaged in destructive interpersonal conflicts with them in which the crucial issues concerned which of the two contestants would control the payment of the fee, the appointment times, and how and when the patient would talk.⁵³

2. *Responses to Frame Deviations: Engagement and Co-optation.* The effectiveness of the mediator depends upon proper frame management.⁵⁴ Professional rules and standards do structure the frame and can be used to manage it. Formal rules in alternative dispute resolution have reduced prejudice by encouraging appropriate behavior.⁵⁵ Changes in the rules may result in frame deviations. Mediators and disputants will react to frame deviations differently. By listening to both disputants and being aware of the mediation process, the mediator can recognize breaks in

49. For types of frame errors, see Dorpat, *supra* note 38, at 195; Cheifetz, *supra* note 46, at 215-16.

50. Dorpat, *supra* note 38, at 200-04.

51. S. Sharma, *supra* note 43, at 58-59.

52. Dorpat, *supra* note 38, at 212.

53. *Id.* at 208.

54. Psychotherapists argue that frame management ensures effective professional service. It is the author's position that frame management has a similar impact on mediation. Frame management for mediators consists of, for example, controlling the process of mediation with the use of rules. For a discussion of the role mediators can play in managing the "frames" of different stages of mediation, see Wildau, *Transitions: Moving Parties Between Stages*, 16 *MEDIATION Q.* 3 (1987). See also J. HOCKER & W. WILMOT, *supra* note 17, at 195.

55. Delgado & Dunn, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *WIS. L. REV.* 1359.

the frame and can handle them appropriately.⁵⁶ "The analyst's way of managing the analytic framework is as significant therapeutically as the analyst's interpretations."⁵⁷ Adroit frame management invites clients to adopt the perspective of the mediator.⁵⁸

Deviations from the ideal or standard frame produce responses by clients that prevent the mediator from managing conflict effectively. To be effective, lawyer-mediators must manage the boundaries of the frame so that the client's response to the mediator's actions is devoid of subterfuge or attempts to co-opt the mediator into the parties' conflict. Communication by clients should be consistent with the input of the mediator, should not involve rambling, should be active and objective rather than passive and emotional. "Procedural rules . . . tend to place disputants into roles they are obliged to play. Since the people involved must follow more or less explicit rules of procedure the entire proceeding is effectively depersonalized."⁵⁹ Mediation rules provide the frame in which counter-transference is held in check and neutrality prevails. Neutrality, in turn, facilitates recognition of frame deviations.

3. *Secure Frames and Engagement.* Conflicts with clients are generated both by frame errors and secure frames. Well-managed frames are often a threat to the client because they restrict a client's "freedom."

Every patient will test the ground rules: ask for a change of hour or for an extension in a session, or want to go away on a unilateral vacation. . . . The manner in which the therapist handles these tests of the frame quite significantly reflects his own inner capacity to manage.⁶⁰

Secure frames may also enhance transference resistance on the part of the client.⁶¹ Transference resistance is a process whereby patients displace conflicts with past objects onto present objects. This transference, however, is likely to generate counter-resistance in the help-provider and invite engagement.⁶²

56. Casement, *The Reflective Potential of the Patient as Mirror to the Therapist*, in LISTENING AND INTERPRETING 129 (J. Raney ed. 1984). The breaks represent the "primary adaptive contexts of the session." *Id.*

57. Dorpat, *supra* note 38, at 195.

58. Casement, *supra* note 56, at 160. Although Casement is referring to the therapist-client relationship, the same conclusion can be drawn with respect to the mediator-client relationship.

59. Gadacz, *Power and Justice: An Hypothesis in the Anthropology of Law*, 24 ALB. L. REV. 296, 301 (1986).

60. R. LANGS, *supra* note 7, at 85.

61. See generally Keene, *supra* note 46.

62. See S. SHARMA, *supra* note 43, at 176. According to Sharma, client resistance must be brought to the client's attention. However, the professional must first be able to recognize client resistance. *Id.*

VI. PRACTICAL APPLICATION: A FOUR-STEP APPROACH

The participant observer and Langsian psychoanalyst roles have much in common with the lawyer-mediator role.⁶³ All require detachment as well as personal involvement and seek to limit if not avoid engagement. In addition, frame deviations and secure frames explain how countertransference is enhanced. The following approach presents a method by which engagement can be avoided or disengagement can be achieved. This approach has four steps: (1) assessing the conflict using systems theory; (2) assessing one's susceptibility to engagement; (3) assessing the degree of engagement; and, (4) disengaging.

A. Conflict Assessment Using Systems Theory

Conflict is a basic ingredient in the work of the lawyer-mediator. Its prevalence often desensitizes the conflict manager. Therefore, conflicted interpersonal communication systems place a premium on preparation if engagement is to be averted. As a medical doctor conducts a diagnosis before treating a patient, lawyer-mediators similarly should diagnose a conflict before attempting its resolution. Forethought enhances the probability of success:

The most important reason for a relatively high success rate in dispute resolution efforts probably is that the mediators conducted dispute assessments at the beginning of each case, as a first step in helping the parties decide whether to proceed with a voluntary dispute resolution process and, if so, what the nature or the ground rules of the process should be.⁶⁴

The mediator should also determine the degree or magnitude of conflict. Both unexpressed and unrestrained conflict are related to less productive interaction.⁶⁵ When conflict is regulated, the potential for productive interaction between parties increases. Managed conflict provides time and space for creative activities that enhance option development for dispute management.

Finally, the lawyer-mediator can assess whether he or she values the conflict. The mediator should ask whether the conflict would be beneficial as well as whether disengagement would be difficult. In addition, the mediator should ask whether he or she is willing to accept responsibility for having supported the conflict.

63. It has been the author's objective in this Article to encourage the application of ideas from disciplines and areas of study outside the area of law to that of mediation. Heretofore, the usefulness of participant observation and Langsian psychoanalysis has not been suggested. Mediation develops and grows stronger from the collective wisdom of other areas of professional practice.

64. Bingham, *Resolving Environmental Disputes: A Decade of Experience*, in S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 412 (1985).

65. J. HOCKER & W. WILMOT, *supra* note 17, at 159.

B. *Assessment of the Mediator's Susceptibility to Engagement*

The second step is the assessment of the mediator's susceptibility to engagement. A battery of psychological tests is not necessary. It is essential, however, to be aware of the ways in which one is psychologically vulnerable. Various conditions or factors can promote conflict. The following observations highlight areas of concern to the mediator.

First, clients express views of mediation in their metaphors that can challenge the mediator.⁶⁶ Second, by empowering weaker parties, mediators often alienate the powerful. Third, psychodynamic "baggage" increases the mediator's susceptibility to engagement.⁶⁷ Attitudes about family life and childhood often influence and can hamper the effectiveness of a mediator. Such forces are strongest in the family mediation context:

Training (family mediation) is largely based on role plays derived from typical family issues that focus on adolescent behaviors. Regardless of the trainees' professional or occupational backgrounds, all seemed to respond and react to these role plays at an emotional level. Mediator neutrality, mediator objectivity—the basic characteristics of the good practitioner—were in constant jeopardy. As mediators . . . we found ourselves moved, bewildered, angered, or shocked by situations that we had thought we could handle rationally and comfortably. We got over-involved, or we were turned off; perspective went out the window.⁶⁸

Fourth, extra-mediation factors such as court orders, mandates of social service agencies, or the time constraints of hearing dates can throw the most experienced off guard. Fifth, the mediator's particular conflict management style may facilitate engagement.⁶⁹ If unaware, a mediator might be easily embroiled in conflict by a client who recognizes the style and "plays up" to the mediator in an effort to engage him or her.

C. *Assessment of Engagement*

The third step is recognizing symptoms of engagement.⁷⁰ The source of the symptoms may be within or outside the mediator or between client and mediator. Confusion on the part of the mediator is common.

66. For an excellent discussion of metaphors and the conflict process, see *id.* at 9-12, 133-36.

67. Zetzel, *In and Out of the Family Crucible: Reflections on Parent-Child Mediation*, 7 *MEDIATION Q.* 47 (1985).

68. *Id.* at 49.

69. Putnam & Wilson, *Communication Strategies in Organizational Conflict: Reliability and Validity of a Measurement Scale*, in 6 *COMM. Y.B.* 629 (1982). For example, a test such as the Putnam and Wilson Conflict Styles Test measures three conflict styles: solution orientation, control, and nonconfrontation. These styles characterize conflict-managing behavior. *Id.*

70. See S. SHARMA, *supra* note 43, at 227-28 for a similar discussion of the characteristics of counter-transference. This author's discussion is tailored to address problems of lawyer-mediators and not therapists.

Confusion occurs because issues and facts characterizing the conflict are diffuse and vague. Another indication of engagement is when the relationship with one or another client is characterized by extraordinary friendliness. A positive and civil relationship with clients is not always suspect. On the contrary, positive relationships are often a measure of the effectiveness of the lawyer-mediator. However, over-friendly relations with one party and not the other may signal engagement.

Stalemates in proceedings can indicate engagement. Disputants hire mediators because they are unable to move toward resolution of their problem(s). By entering the conflict, mediators risk becoming disputants. The ineffectiveness of successful strategies provides another symptom. Strategies lose their legitimacy with the clients when the mediator is one of the combatants.

The failure of the mediator to respond to rule infractions may indicate engagement. For example, when parties consistently refuse to provide information, it may be time for the mediator to realize that he or she is playing their game. Defensiveness upon the part of the lawyer-mediator when asked for an accounting by the clients is another sign. Disputants may complain that little progress is being made and the mediator feels compelled to defend the past. Furthermore, focusing attention on past business can indicate engagement. Clients feel more comfortable with blaming and focusing on the past and have difficulty addressing the future. Mediators will behave similarly if they are engaged.

The use of client metaphors for argumentation and conflict is another symptom. The mediator's rationale is that it is important to speak the same "language" as the client. However, conflict style as a strategy and conflict style as a symptom of engagement are distinguished by whether the mediator is able to manage the conflict effectively. If the mediator is not effective with the client's conflict strategy, the mediator may be engaged. In doing so, a great deal may be lost because the mediator has betrayed the client's trust as well as taken on an adversarial role.

Finally, recurring dilemmas involving rules may signify engagement in the clients' conflict. For example, even though clients are committed to the rules, they cannot effectively defend themselves if full disclosure is always the rule. Clients reason that if the mediator uses information strategically, then they should also. Therefore, either consciously or unconsciously, erosion of rules by clients occurs. This may seem innocuous and inconsequential to the mediator. However, the mediator is often blamed for dilemmas which are a consequence of rule erosion by clients.⁷¹

71. For example, if the lawyer-mediator allows clients to be abusive, either party, at some point, may use the abuse to illustrate how the mediator is taking sides. Or, if full disclosure is not accompanied by an effort on the part of the mediator to secure records and other documentation from clients, the mediator may be asked in an individual session

At the end of a session, the mediator should make a tally of transactions with the client which were conflicted and those which were management-oriented, problem solving, or information giving. If the former predominates, then the mediator probably has been engaged. Some conflict is expected, but the mediator should not spend most of the mediation session in conflict with the clients. Effectiveness is measured by ability to manage conflict, solve problems, and provide information.

D. Disengagement

If engagement can not be avoided through a systems analysis of the conflict and assessment of susceptibility, the fourth step, disengagement, may be necessary. Langsian psychotherapists refer to this step as restructuring the frame.⁷² Restructuring a relationship with clients may be futile if the relationship has deteriorated too much. However, there are strategies that help lawyer-mediators reestablish the professional basis of the relationship to continue with the conflict management task.⁷³

First, lawyer-mediators should make a list of the most common dangers, e.g., conflict style and personality characteristics, which increase susceptibility to engagement. This list should be reviewed before any subsequent session with the clients. Second, a goal should be set for each session and the lawyer-mediator should periodically assess whether the interaction in the mediation session aids the reaching of the goal. Most mediators benefit from reminders about what they hope to accomplish in a session. Third, mediation session notes should be reviewed before the next meeting with the clients. Notes should document not only the substance of the previous session, but more importantly, the nature of the interaction between the mediator and the client. Fourth, analyze the parties' communication and conflict styles.⁷⁴ Discover how the parties communicate with each other and with third parties.

Fifth, if the lawyer-mediator is being supervised, comments of the supervisor should be reviewed. Sixth, assess whether clients have been successful in creating stalemates or dilemmas. Seventh, a mediator should ask clients to talk about what has transpired in the mediation session. This probing gives the lawyer-mediator an opportunity to hear how the client interprets what has been happening. It also provides the mediator

by a client not to tell the other party about that "bank account in Switzerland." Commitment to confidentiality on the one hand and knowledge to which the other party should have access, on the other, is the mediator's dilemma.

72. See authorities cited *supra* note 46 for a discussion of restructuring the frame.

73. See J. HOCKER & W. WILMOT, *supra* note 17, at 166-73 for a general discussion of strategies. The discussion in the text of this Article elaborates on the significance of conflict management strategies for mediators.

74. For a discussion of conflict styles, see A. FILLEY, *supra* note 21, at 48-58; J. HOCKER & W. WILMOT, *supra* note 17, at 37-66.

with time to be more passive and think. Eighth, stages in the mediation process act as reminders. The mediation process can be divided into the orientation stage, the fact-finding stage, the negotiation stage, and the agreement-writing stage.⁷⁵ These stages serve as standards by which the lawyer-mediator can judge the appropriateness of client behavior. Likewise, mediator behavior can be measured against these standards.

Ninth, "divide and conquer." All parties must participate in the conflict for it to survive. Separating disputants and working with them individually may reveal the source of the conflict and defuse it.⁷⁶ Tenth, breaking down a polycentric conflict into segments is useful. It is easier for disputants to understand their role in sustaining conflict when its component parts are isolated and named. Once this understanding exists, the mediator is in a position to put individual conflicts to rest by demonstrating that they are counterproductive in managing the presenting conflict. Eleventh, taking the initiative induces reciprocal behavior by clients.⁷⁷ Initiation and repetition of positive behavior may convince the combatant to mimic the same behavior. A mode of behavior which extinguishes conflict and provides a reward for the combatant is best.⁷⁸ Twelfth, try negotiation.⁷⁹ If all else fails, craft new rules relating to the engagement issue. Mediators and clients can manage their differences with rules. This technique is helpful if it does not damage mediator credibility or power over mediation rules.

Finally, mediators do have power.⁸⁰ Information or education can be powerful. During orientation, fact-finding, and even the negotiation stage of mediation, the strategic use of information can achieve compliance. Rule breaking has its consequences. Legal requirements or mandates may also be available to the mediator. Perhaps an appeal to higher

75. See C. MOORE, *THE MEDIATION PROCESS* (1986) for a discussion of stages in the mediation process.

76. See Heister, *Sequential Mediation: A Necessary Therapeutic Intervention Technique*, 9 *MEDIATION Q.* 57 (1985). Heister discusses the use of individual sessions and caucusing as techniques for facilitating agreements. See also Bethel, *The Use of Separate Sessions in Family Mediation*, 2 *NEGOTIATION J.* 257 (1986).

77. This is a well-known technique used in therapy called modeling. For examples of the use of this technique, see Skynner, *An Open-Systems, Group Analytic Approach to Family Therapy*, in *HANDBOOK OF FAMILY THERAPY* 39 (A. Gurman & D. Kniskern eds. 1981).

78. J. HOCKER & W. WILMOT, *supra* note 17, at 176. The authors speak of "shaping," which refers to giving rewards when behavior of combatants becomes positive.

79. *Id.* at 187.

80. For an excellent analysis of the power of mediators, see Mayer, *The Dynamics of Power in Mediation and Negotiation*, 16 *MEDIATION Q.* 75 (1987). Mayer "normalizes" the concept of power in mediation by suggesting that it is a factor in all human relationships. Mediators have the following types of power, according to Mayer: (1) formal authority; (2) expert/information power; (3) associational power; (4) resource power; (5) procedural power; (6) sanction power; (7) nuisance power; (8) habitual power; (9) moral power; and (10) personal power. *Id.* at 78.

values or norms will give the mediator power. For example, in divorce mediation, parental love can be relied upon to achieve compliance in certain circumstances.

VII. SUMMARY AND CONCLUSIONS

Mediators and other alternative dispute resolution professionals work in territory which is mined by the clients. It is easy to become engaged and a part of client conflict. The lawyer-mediator needs valid and reliable information from clients. Conflict is the medium through which the information is filtered. Approaching conflict too closely distorts the information needed to manage the conflict. Failing to maintain appropriate boundaries defeats client problem-solving.

The sciences, law, and mental health professions regulate the degree of closeness or intimacy between the professional and client. Most professionals agree that a certain degree of distance is necessary to be effective.

Although difficult, engagement can be managed. The four-step approach discussed in this Article should give the mediator insight into the process of engagement. First, a systems analysis sensitizes the mediator to how conflict manifests itself. Second, mediators should learn their weaknesses to reduce susceptibility to engagement. Third, the mediator ought to recognize the signs of engagement. Finally, mediators should know how to remedy becoming engaged in the conflict of the parties. Mediators can plan to refocus on the presenting conflict and manage it, thereby resolving the disputants' problems.

Legal and mediation training should include a study of systems theory, the scientific aspects of fact-finding as it relates to neutrality, analysis of the legal practice implications of counter-transference, and frame analysis. Lawyer-mediators should be trained to: (1) verify what has been observed through the use of introspection; (2) be aware of their reactions in naturalistic settings; (3) use feedback as a technique to decrease subjectivity; and, (4) reflect upon their own experiences. Sensitivity to issues raised in this Article can increase the effectiveness of lawyer-mediators in managing conflict and facilitating resolutions.