

**MEDIATING  
FAMILY LAW DISPUTES  
AND  
AVOIDING ADVERSARIAL VIOLENCE**



By  
THOMAS DIGRAZIA

**Bio**

Tom DiGrazia was born in NYC. He received a JD from the University of Notre Dame Law School and MA in Political Science from Rutgers University. He has practiced law in South Dakota, Indiana, Alaska and Hawaii. Early in his career he was a RKF Fellow working with the Lakota in South Dakota; and he practiced Public Interest Law with Native Americans all over the US. He is a Peacemaker, Lawyer and Director of the Mediation Center—Windward Oahu. He is an Adjunct Professor at Hawaii Pacific University, teaching graduate classes in Mediation and Conflict. His concurrent profession is as a senior teacher, co-founder and co-director of the Yoga School of Kailua and Hawaii Yoga Prison Project. He is author of *Peacemaker: A Sicilian American Memoir* (2013) and *Light On Peacemaking: Mediating Family Law Disputes and Avoiding Adversarial Violence* (publication date: 2014-15). He has been married to Louisa for 35 years and enjoys four grandchildren.

**CHAPTER 4: CONFLICT AND BRAIN SCIENCE**

---

*“It is the motivation behind an act that determines whether it is violent or non-violent. Non-violent behavior is a physical act or speech motivated by the wish to be useful or helpful.”*      The 14<sup>th</sup> Dalai Lama

---

**Conflict**

---

Over two decades ago, Barbara Ehrenreich wrote a provocative essay entitled: ***The Warrior Culture***, in the October 15, 1990 edition of **Time Magazine**. In her essay, Ehrenreich states:

*“Our collective fantasies center on mayhem, cruelty and violent death. Loving images of the human body -- especially of bodies seeking pleasure or expressing love --*

*inspire us with the urge to censor. Our preference is for warrior themes: the lone fighting man, bandoliers across his naked chest, mowing down lesser men in gusts of automatic-weapon fire. Only a real war seems to revive our interest in real events...*

*“And as in any primitive warrior culture, our warrior elite takes pride of place. Social crises multiply numbingly -- homelessness, illiteracy, epidemic disease -- and our leaders tell us solemnly that nothing can be done. There is no money. We are poor, not rich, a debtor nation. Meanwhile, nearly a third of the federal budget flows, even in moments of peace, to the warriors and their weapon makers. When those priorities are questioned, some new ‘crisis’ dutifully arises to serve as another occasion for armed and often unilateral intervention.”*

In America, we live in a warrior culture—a society that thrives on conflict. If you have any doubts about this, a casual look around contemporary America should dispel these doubts.

We live in a nation where elites will spend \$2600 or more for a ticket to see a professional football game, where young men, acting as warrior substitutes for their fans, literally have their brains smashed and irreparably damaged into a post-retirement fog of dementia. Until very recently, our country did little or nothing to stop or even discuss sexual violence against women—with at least one in ten women on college campuses, military bases and civilian life now reporting unwanted assaults by men. We are also a society that has elevated date rape against women to a national sport.

We are constantly at war—one serial war after another. We engage in wars because we are the only superpower left standing who can distribute retribution and revenge with impunity, creating pretexts such as WMD’s and terrorism (rather than what we are really dealing with, plain old criminality) to justify our military interventions around the world.

We are a nation obsessed through fear, anxiety and insecurity with our right to possess and use (*think*: stand your ground laws) firearms designed for only one purpose: killing people. President Obama scurries from one dramatic funeral to another, helping to assuage the grief of family and nation and bury the dead victims of nineteen mass shootings in the last five years (2008-13). And yet, the carnage continues without abatement, without any meaningful gun laws limiting the right of deranged people to purchase, carry and use

weapons of personal mass destruction.

In the name of fighting terrorism, old men in political power send our youth to die, along with tens of thousands of innocent civilians deemed *collateral damage* in the nations we invade, as a means of diverting our attention from their political impotence in the face of real issues facing our country: economic and gender inequality, racism, poverty, immigration, a disease-care system mired in symptoms and profit motivation, overpopulation and spiritual decay to name a few. We seem to define political leadership as a willingness to kill other people, whose accident of birth, skin color, religion, political beliefs, or geography makes them promising targets for our warrior nature.

And, for our immediate discussion purposes, an adversarial divorce industry and legal system based on nineteenth-century precepts of *zealous* legal advocacy and a zero sum game has been and is the current norm. We are talking about an adversarial game, where winning is everything. Our zero sum game is often reflected in our popular movies through the years such as *Kramer vs. Kramer*, *The Santa Clause*, and *War of the Roses*, where Hollywood reflects back to us in black comedy the nature and effects of this war on families. The results of the game help create the relationship ruins of families and individuals. The ruins are strewn in a spiritual killing field, affecting the moral fiber of our culture, and, most importantly, children.

---

### ***BRAIN SCIENCE***

---

So, what is at the root of this warrior culture that so profoundly affects the field of divorce in America? At the root of our warrior culture is conflict. Here, once again, we are talking about conflict within and between individuals.

Yoga philosophy is most instructive on this subject. It holds that conflict is based on a concept called *avidya*. *Avidya* is translated as ignorance of self. Founder of the Yoga School of Kailua and forty plus year Yoga teacher, Lu DiGrazia, states about *avidya*: “*It is simply the lack or absence of awareness; a limited or inhibited awareness of sensitivity; (and) the absence of vision of one’s self.*” As Yoga philosopher-sage, **Patanjali, (Book II, 4)**, informed us centuries ago, *avidya* is ignorance of one’s true self or when the individual ego identifies as a separate independent self, unconnected to all sentient things, most importantly in relationship to other people. *Avidya* is in contradiction to what philosopher, **Krishnamurti, (Volume XV, 1964-6, P.52)**, has said and I paraphrase: *You are the world, and the*

*world is you.*

In the divorce realm, current brain science teaches that conflict (which also according to **Krishnamurti, *ibid*, p.54**, arises from ignorance of self) comes from different sources. However, the primary conflict source is the genetically triggered freeze, flight or fight response. When unprocessed emotions, which are a form of self-ignorance—fear, anxiety, insecurity, hit the pavement of an adversarial divorce system, legal warfare is the most likely result. The only real limitation on legal warfare is the emotional and financial exhaustion of the parties.

The emotional disturbance within divorcing disputants is prey to the endless legal arsenal of motions, discovery procedures, hearings, appeals and other stratagems. In the zero sums, take no prisoners legal game of divorce—there is little room for vision. The parties to conflicted divorce are usually stuck in the past. This is a past filled with perceived broken promises and unrealized dreams.

The adversarial divorce approach spends most of its time, sometimes inadvertently and sometimes not, roaming in the dead past of marital memory and not in a transformative vision of the future. Parties and their lawyers spend most of their time preparing to defend or offend each other through the arcane and myriad channels of divorce law.

Lawyers are a further source of conflict in that, as advocates for their clients, they are warriors in the adversarial divorce process. Their role in our culture of divorce, as first established early in their law school ethics training, is to be *zealous* in representing the perceived family and financial interests of their clients. As a *zealot* (defined as one who acts zealously, especially excessively so; a fanatically committed person), lawyers by disposition and training are not predisposed to a spiritual, non-violent approach to conflicted divorce. Their motivation is not non-violent, as defined by the **Dali Lama** at the outset of this chapter. That is, their behavior as a zealot is not normally “...*motivated by the wish to be useful or helpful.*” Rather, their primary motivation is quite narrow: to only successfully represent the perceived individual interests of their client (as well as their own financial interests) at the consequential expense of the other party, family and society.

At least in their legal work, most divorce lawyers are not inclined to cultivate a meditative mind—a mind that is in the present moment, observing and not judging another—either for themselves or encouraging such a mind for their clients. The failure to develop and

utilize a meditative mind or *mindfulness* on the part of most lawyers presents a major failure to find peace within oneself and to help clients and others end conflict.

However, it should be noted that the legal profession's failure to cultivate a meditative mind or mindfulness might be changing. **Professor Charles Halpern** of UC Berkeley Law School teaches a course in law and meditation—whose goal is to promote empathy and mindfulness in the practice of law. He reports that:

*"Judges have been meditating before taking the bench, and opening their courtroom with a moment of meditative silence. Lawyers in tense divorce negotiations have been more effective by maintaining a perspective of mindful reflection throughout the process. Courses offered at a dozen law schools have given law students an introduction to meditation --an effort to help them sharpen their legal skills and make them more effective trial lawyers, negotiators, and mediators. All these steps are part of a bigger effort to help these budding and established professionals cope with the stresses of law practice—a field that, regrettably, tops all American professions in instances of depression, substance abuse, and suicide."* **(Halpern)**

Zen and meditation scholar, **Jon Kabat-Zinn**, defines a mindfulness approach to life as having two basic parts. One is the development of an observing attitude about one's emotions and life experience. The second is the growth of a nonjudgmental receptivity of what is being experienced without feeling a need to do anything about it. **(Kabat-Zinn, 1996)**

Adversarial lawyers by disposition, training and practice as zealous advocates are generally precluded from exercising mindfulness as defined above by **Kabat-Zinn** in their professional life. Perceiving themselves as warriors, their brain chemical of choice is *adrenalin*, leading too often to unneeded aggressiveness. This contrasts sharply with the more *mindful* state of the peacemaker—whose brain chemical of choice is *oxytocin*, which allows for a more observant, less judgmental and receptive attitude with mediation participants and cases. Oxytocin is also known as the *bonding hormone*, promoting trust and empathy in relationships—in short, a non-violent approach to conflict resolution. **(Cloke, 2009)**

As Lao Tzu, Chinese philosopher and author of the ancient book of Chinese wisdom, the *Tao Te Ching* stated: *"the greatest revelation is stillness (or the meditative mind)."* **(Daily celebrations website.)**

And stillness begets an environment where peaceful solutions to conflict can occur.

Instead of cultivating stillness, the adversarial system appeals to the primordial, instinct driven part of our brain known as the limbic brain. The limbic brain is where issues of daily survival are processed. In the early years of human existence, when we were more likely to be the hunted rather than the hunter, the limbic brain was called upon to make instantaneous life saving judgments. For instance, when confronted with a new danger—a large carnivore or other threatening human species, we had to decide whether we would freeze in place, flee or fight.

We *Homo sapiens* survived on the ability of the limbic brain to process potential death threats in the wild. Over the eons, the brain has evolved. Our thinking intelligence now predominates in the neo cortex or frontal lobe of the brain. This part of the brain uses past knowledge and sensory information to learn how to drive an auto, work a computer or learn a new language. It is a much more deliberative and intellectual part of the brain, and capable of abstract thought.

The raw, often unprocessed emotions generated in a conflicted divorce go directly to the limbic brain. Fears, anxieties and insecurities abound in highly charged divorces. Separating couples and families are particularly vulnerable to a divorce system predicated on warfare and violence. The conflict within and between husbands, wives and children of divorce is highly susceptible to manipulation by a spiritually bereft dissolution process. As **Baer** points out, the stress generated by divorce and similar experiences can cause a twenty percent drop in I.Q. and E.Q. levels, thus making conflicted disputants more susceptible to often-ruinous decision-making. He goes on to state bluntly the obvious ethical question for divorce lawyers, who either know or should know that their emotionally distraught clients' effective decision-making abilities are impaired during the divorce process:

*“Do we have an obligation to our clients to make sure that they really want what they are telling us they want? As family law attorneys, we are in a different position than our colleagues in other fields of law because the stress that our clients are under is greater than the stress that clients our colleagues deal with are under. Thus, the "effective decisions" our clients make may very well be "significantly impaired." This is true whether the "effective decision" is to*

*divorce or the manner in which our clients decide to proceed with the divorce (in terms of the process and the constructive or destructive nature of the proceeding). Therefore, do we as family law practitioners have a higher ethical duty than attorneys in any and all other fields of law? Should our ethical obligation be to ensure that our clients really want what they say that they want? Do we as family law attorneys respect the importance of relationships and family or are we just interested in our clients as a means of making our mortgage payments?"*

When conflict goes right to the limbic brain, it instinctively goes into freeze (do nothing), flight (ignore reality) or fight (hire the most aggressive and expensive lawyer you can—sometimes even agreeing to place a lien on your home to pay exorbitant legal fees to your chosen warrior) mode. When choosing some of the ADR models summarized above, such as mediation, collaborative law, Educated Divorce, and the multidisciplinary team approach, participants reside more in the neocortical, frontal lobe part of their brains. This type of brain residency allows for a much more nuanced observational, intuitive and skillful response to the transformative marital dissolution challenge posed for individuals and families. To put it most simply, the difference between a limbic and frontal lobe response is akin to the difference of holding your breath or breathing deeply and fully through the divorce experience.

According to Dr. Daniel J. Siegal, a neurological and child psychiatrist, in his book called, ***Mindsight: The New Science of Personal Transformation***, from a physiological perspective when the nervous system is ***receptive*** and an individual is centered in the prefrontal lobe, facial muscles and vocal chords relax, normal blood pressure and heart rate are enjoyed. We are more creative and open to what the other person is stating or proposing.

By contrast, when the nervous system is ***reactive***, we are in a limbic or survival mode, physically and emotionally. According to Siegal, in a reactive state, “...we distort what we hear to fit what we fear.” This causes us to ***hear*** (which is a physical act) ***without listening*** (which is a neocortical, cognitive event). Hearing without listening, both by parties and their lawyers, is at the heart of the spiritual morass known as the adversarial divorce process.

One of the principle roles of the peacemaker, who (to use the title of **Dr. Peter Adler’s** book) is at the *eye of the storm*, is to first recognize his/her own reaction/receptivity tendencies (which is much easier to

do with the help of other multidisciplinary team members) and then the reaction/receptivity patterns in the mediation participant's behavior and statements. This recognition can enable the peacemaker or peacemaking team to help move participants from a reactive to receptive state. In the zero sum game of contested divorce such movement is almost impossible and would be interpreted as weakness, undermining negotiation and trial strategies.

The spiritual corruption of the divorce process also extends between the once honored relationship between lawyer and client. This was a relationship based on mutual respect and trust. However, it is not uncommon today for high-end divorce lawyers to be sued by their own client for malpractice and/or reported to their local bar association's disciplinary counsel for ethics violations, often for allegedly and unethically charging a client excessive fees. This relatively new phenomenon is divorce practice's *dirty little secret*. It is also why lawyers suffer the highest suicide, substance abuse and depression rates of all professions in America. **Tyger Latham, Psy.D**, in an article in **Psychology Today**, shares the following information concerning lawyers:

- *According to an often-cited Johns Hopkins University study of more than 100 occupations, researchers found that lawyers lead the nation with the highest incidence of [depression](#). (1)*
- *An ABA Young Lawyers Division survey indicated that 41 percent of female attorneys were unhappy with their jobs. (2)*
- *In 1996, lawyers overtook dentists as the profession with the highest rate of [suicide](#). (3)*
- *The ABA estimates that 15-20 percent of all U.S. lawyers suffer from alcoholism or [substance abuse](#). (4)*
- *Seven in ten lawyers responding to a California Lawyers magazine poll said they would change careers if the opportunity arose. (5)*

Add to the above information the fact that by personality development lawyers are generally different from other professionals. And the demands of their profession are so competitive and exacting that the stressors they are subject to are far more stressful than almost any other type of work. It has been pointed out that getting a ninety on a university exam is a universally accepted good thing and to be applauded. For a practicing lawyer, getting a ninety grade on a case would subject the lawyer to a malpractice claim.

On this point, **Randall B. Christison, J.D.**, relates:



*“Studies suggest entering law students are not markedly different from other graduate students, at least as far as psychopathology. But other studies show these students are different from the general population in several ways, a difference law school intensifies. The well-known Myers-Briggs tests show lawyers and law students are appreciably different from the rest of the population. They are detached thinkers, not empathetic feelers, abstract intuitive thinkers rather than concrete (“sensing”) ones. Surprisingly, they are more introverted than extroverted. Some suggest this reflects self-selection and law-school winnowing; much of law training rewards those whose hours of studying resembles less a courtroom performer than a monk. Susan Daicoff<sup>2</sup> summarizes the “attributes associated with effectiveness as a lawyer,”*

- 1. Need achievement,*
- 2. Be extroverted and sociable,*
- 3. Be competitive, argumentative, aggressive, dominant, cold,*
- 4. Show low interest in people, emotional concerns and interpersonal matters,*
- 5. Have disproportionate preference for Myers-Briggs thinking v. feeling,<sup>3</sup>*
- 6. Focus on economic bottom-line and material concerns, and*
- 7. Have a markedly higher incidence of psychological distress and substance abuse.”(Christison)*

The above factors recounted by **Latham** and **Christison** generally preclude lawyer receptivity and observation and instead foster reactivity and defensiveness. Such factors generally make lawyers poor listeners, often impatient, angry, less empathetic, dominant, and, in general—absent divine intervention or dramatic and life-changing experiences—not the best candidates for peacemakers and non-violent dispute resolution.

Divorce lawyers, particularly those of the adversarial warrior class, must be prepared to defend themselves against their own clients at the end of a case. It is a cost of doing adversarial law. Experienced divorce lawyers, who are recognized as very high insurance risks by legal malpractice insurance companies, practice defensive law, always preparing for a disgruntled client to turn on them. Or, more high-end lawyers must retain their own debt collection lawyers to pressure or sue clients into paying their full legal fees, often garnishing wages or

foreclosing on homes. Regardless of the merits of client or lawyer complaints, the source of these complaints comes from a conflicted adversarial system in which clients and lawyers are victims.

This conflicted system encompasses the lawyer-warrior's bravado at the outset of a case, often and preliminarily encased in an overly aggressive *motion for pre-degree relief*. A motion for pre-degree relief is generally the opening salvo in a divorce case, often filed with the original divorce complaint. In non-legal parlance, this motion is the immediate list of grievances enumerated by either party seeking temporary relief while divorce proceedings are pending finalization—raising issues such as temporary child custody and support, spousal maintenance, freezing of financial assets, sole possession of the marital home (in divorce court parlance violently referred to as a *kick-out* order) and restraining orders.

The motion is supported by an affidavit usually painting the party from whom relief is sought as a close relative of Attila the Hun. The affidavit, which is a sworn statement signed by one of the parties to the divorce, presents factual allegations showing what a terrible person the other party is—a person not to be trusted with children or marital finances. The motivation behind the motion and affidavit, when stripped of legal niceties, is violent. It is a direct appeal to the most primitive of human defensive instincts. It is almost guaranteed to bring a violent—that is, non-helpful in promoting a civilized divorce—response from the other spouse via her/his lawyer.

This bravado with its one-sided and hyperbolic assertions can act as a *limbic slap* in the face to the opposing party and his/her lawyer, challenging them to a court dual. Often, when compared with the later poor results obtained by the same aggressive lawyer from a court as perceived by the client, it makes for a volatile relationship between client and lawyer. It also fuels a client's high expectations, as consciously or unconsciously encouraged by their lawyer, that she/he is absolutely right and the other party absolutely wrong and that the law will support them. And then, the awful reality sets in when these same often-unrealistic expectations are not met in family court. Or, even worse, their "*victory*" is pyric since the victorious client is now emotionally and financially bankrupt, and inwardly and outwardly, in relation to their former spouse (and often lawyer), still conflicted, perhaps for life.

In an article entitled, "**Bringing Oxytocin Into the Room: Notes On the Physiology of Conflict**," well-known peacemaker, **Kenneth Cloke**, sums up the important interplay between brain science and conflict, in stating that:

*“Perhaps the most extraordinary thing about the human brain is its capacity to understand and alter the world, starting with itself. We have begun a period of rapid, perhaps exponential increase in understanding how the brain operates, and a growing ability to translate that knowledge into practical techniques. But without an equally rapid, equally exponential increase in our ability to use that knowledge openly, ethically, and constructively, and turn it into successful conflict resolution experiences, our species may not be able to collaborate in solving its most urgent problems, or indeed, survive them.*

*“All of the most significant problems we face, from war and nuclear proliferation to terrorism, greed, and environmental devastation, can arguably be traced to our brain’s automatic responses to conflict. Out of the last few years of neurophysiological research has emerged a new hope that solutions may indeed be found to the chemical and biological sources of aggression. These solutions require not only a profound understanding of how the brain works, but a global shift in our attitude toward conflict, an expanding set of scientifically and artistically informed techniques, a humanistic and democratic prioritization of ethics and values, and a willingness to start with ourselves.” (Cloke)*

---