

The Amplification of Bias in Family Law and Its Impact

by

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I. Introduction

There's an old saying that "in this world nothing can be said to be certain, except death and taxes." However, it is also a certainty that nobody and nothing is perfect. Related to that is another certainty, which is, "if you have a brain, you're biased."¹

Bias is defined as "an unfair personal opinion that influences your judgment."² And, such an "unfair personal opinion" can be in favor of or against someone or something. Biases are preferences and opinions, which are not the product of research and thoughtful analysis. Thus, the more subjectivity involved, the greater the potential for influence of bias.

Objective facts are unquestionable.³ There are no "alternative" objective facts. Subjective facts, on the other hand, are those which rely upon interpretation or human analysis.⁴ To the extent that something is questionable, there can be "alternative" facts, opinions, interpretations, preferences, perceptions and points of view.

Biases are "blind spots" in judgment and decision-making. Along those lines, yet another certainty is that there is always a reason, even if unconscious, why a person performs a certain action. People may not know, understand, or agree with it, but there is always a reason underlying an action. Meanwhile,

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¹ Kathleen Woodhouse, *Implicit Bias – Is It Really?*, FORBES BLOGS (Dec. 19, 2017, 7:00 AM), <https://www.forbes.com/sites/forbescoachescouncil/2017/12/19/implicit-bias-is-it-really/#3ce5405659ce>.

² *Bias*, CAMBRIDGE UNIVERSITY PRESS. CAMBRIDGE ONLINE DICTIONARY (2008).

³ Butte College, *Objective and Subjective Claims* (2016), <http://www.butte.edu/departments/cas/tipsheets/thinking/claims.html>.

⁴ *Id.*

“neuroscience explains that all our perceptions of the outside world and of the minds of others are simply our own subjective perspective on what is going on, created by our own brain.”⁵ In other words, when it comes to the intention or purpose underlying an action, bias may well have played a part.

This article addresses bias within the field of family law and its impact, specifically the biases harbored by all those involved in family law, such as the clients, attorneys, experts, mediators, and judges. Part II of this article traces public biases regarding dispute resolution. Part III focuses specifically on the biases of family law attorneys. In Part IV the article examines the biases of mediators, while Part V explores the biases of experts. Part VI unpacks biases that judges may have, while Part VII does the same for lawmakers. The article concludes that lawyers would generally serve their clients more effectively if they utilized a non-adversarial counseling and problem-solving approach before taking an adversarial approach, which includes litigation.

II. Public Biases Regarding Dispute Resolution

People typically contact and retain attorneys to help them solve problems that may have legal implications and may require use of the court system. In family law, those problems typically center around a family crisis such as separation and divorce, which include non-married parents of minors and adult children with special needs.

It is well recognized in psychological circles that the stress of divorce itself is monumental, often reaching 9 out of 10 magnitude on the Subjective Units of Distress Scale.⁶ This is typically the highest subjective level of disturbance or distress a person will experience in their lifetime, with the exception of that resulting from the death of a child or spouse to whom they were happily married. Marital separation falls just below divorce in the stress assessment.⁷ People going through separation and divorce often experience some degree of pain, fear, loss, sadness, depres-

⁵ REGINA PALLY, *THE REFLECTIVE PARENT: HOW TO DO LESS AND RELATE MORE WITH YOUR KIDS* 37 (2017).

⁶ *Life Stress Self Assessment*. Justice Institute of British Columbia, School of Community & Social Justice, Centre for Leadership.

⁷ *Id.*

sion, anxiety, grief, hurt, humiliation, betrayal and/or anger, which “can easily make [them] feel trapped and disempowered. However, it is not really the emotions that keep [them] stuck, but the ways [they] respond to them.”⁸ Their unprocessed emotions are such that they attribute most, if not all, of the cause of the problem(s) to their spouse or the other parent, and may be seeking vengeance (emotional justice). Communication between them is often poor to non-existent. Therefore, it is fair to say that they tend to be biased against their spouse or the other parent.

Commenting on how people respond to their own emotions, unfortunately, “media portrays family law as a battlefield in which soldiers litigate. The consumer of legal services (i.e., the public) is strongly influenced by this cultural portrayal of the Rambo lawyer.”⁹ Bill Eddy, co-founder of the High Conflict Institute, contends that the public has become biased in favor of adversarial dispute resolution because the media romanticizes and idealizes the “fight” and shows it for entertainment and to gain market share.¹⁰

For the above-referenced reasons and otherwise, the public has a bias in favor of adversarial dispute resolution and contentious and argumentative lawyers. The general public also fails to understand the difference between conflict resolution or management and dispute resolution.

Additionally, other members of the public, including well-meaning family members, new partners, friends, associates, bystanders, mental health professionals, and other types of professionals tend to think they are protecting the spouse or parent with whom they are aligned, while unintentionally escalating the conflict by encouraging suspicion and fear in their minds.¹¹

⁸ FRIEDEMANN SCHAUB, *THE FEAR AND ANXIETY SOLUTION: A BREAK-THROUGH PROCESS FOR HEALING AND EMPOWERMENT WITH YOUR SUBCONSCIOUS MIND* (2012).

⁹ Mary E. O’Connell & Herbie J. DiFonzo, *The Family Law Education Reform Project: Final Report*, 44 FAM. CT. REV. 524, 541 (2006).

¹⁰ Bill Eddy, *Civility & the Surge Protector*, HIGH CONFLICT INSTITUTE (2011), HighConflictInstitute.com.

¹¹ Mark Baer, *When Divorcing, Beware of Meddlers!*, HUFFINGTON POST (July 26, 2016), https://www.huffpost.com/entry/when-divorcing-beware-of_b_7876508; Mary Elizabeth Lund, *The Place for Custody Evaluations in Family Peacemaking*, 53 FAM. CT. REV. 407, 408 (2015).

The public is also not typically aware or adequately informed of the various dispute resolution processes available and their corresponding burdens and benefits.¹² Furthermore, people have a bias in favor of the default option. “The default option for dispute resolution is ‘sticky.’ . . . The courts [are] the default mechanism for disputes. Even if one side proposes an alternative dispute resolution (ADR) mechanism, the other side is likely to devalue the offer.”¹³ To avoid the default mechanism, all parties must agree to handle their matter outside of court through negotiation, mediation, collaborative divorce, or some other dispute resolution process. They must also agree on the particular process and the professionals involved, to the extent they are jointly retained. Moreover, they must both actually remain in some such process until their issues have been resolved. Otherwise, they revert to the default mechanism, which is litigation.

When people turn to lawyers, it is not only because they require assistance in making informed decisions and navigating their way through the legal process. It is also because they feel disempowered and vulnerable. Their circumstances and emotional state coupled with the biases they hold regarding family law are such that they often readily relinquish control of the situation to their attorney.

III. Biases of Family Law Attorneys

Lawyers, as advocates and advisors to their clients, have their own biases, which the public’s biases have fed into and thereby amplified, impacting their advice and counsel. As is discussed in more detail later in this section, a blind spot that many attorneys may not see is their preference towards adversarial processes and approaches to dispute resolution.¹⁴ Due to the personality type of those attracted to the field, the portrayal of the field by the media, the training lawyers receive, and the legal cul-

¹² O’Connell & DiFonzo, *supra* note 9, at 525.

¹³ Program on Negotiation, *Mediation vs Arbitration vs the Courts: Disputant Preferences for the Alternative Dispute Resolution Processes*, HARVARD LAW SCHOOL PROGRAM ON NEGOTIATION BLOG (May 13, 2019), <https://www.pon.harvard.edu/daily/mediation/why-arent-mediation-and-arbitration-more-popular/>.

¹⁴ Eduardo M. Peñalver, *The Role of Skills Instruction in Legal Education*, 13 FIU L. Rev. 229, 229 (2018).

ture itself, attorneys tend to develop a bias in favor of the adversarial system, however subconscious, in that regard.¹⁵

The existence of this *litigation bias* within the legal community neither means that those operating under such a bias realize it, nor that it applies to every single member of the legal community. Remember, biases can be unconscious. In fact, in 2018, Eduardo M. Peñalver, Dean and Professor of Law at Cornell Law School, authored an article which addressed this issue and explained that it is caused by legal education's *litigation bias*. The article described that bias as reflected in contemporary legal education with its emphasis on studying appellate court cases which stem from litigation and therefore focus on that process, legal writing for the litigation context, and clinical offerings which are typically litigation oriented. The article stated that in developing their curricula, law schools need to focus on the kind of lawyers their graduates will become and the skills that would be most valuable to them in such careers. According to Peñalver, legal education's *litigation bias* fails to acknowledge the breadth of legal practice and the diversity of skills future lawyers will find useful in their careers.¹⁶ This exact cause of *litigation bias* has been explained specifically within the context of family law. For example, it was addressed in *The Family Law Education Reform Project: Final Report*.¹⁷ That Report explained how such a focus creates the *litigation bias*, as follows:

It subliminally conveys the message that what matters most in family law is what gets litigated. A family lawyer's central role, a student might conclude, is to design and present legal arguments to courts on a client's behalf The net effect of this imbalance in teaching materials is an emphasis on a very narrow range of skills (largely legal analysis and the preparation of legal arguments) which will prove decisive on only a small fraction of family law cases.¹⁸

This is why social science researcher Brene' Brown explains, "Lawyers [are] an example of a profession largely trained in win

¹⁵ BRENE' BROWN, *DARING GREATLY: HOW THE COURAGE TO BE VULNERABLE TRANSFORMS THE WAY WE LIVE, LOVE, PARENT, AND LEAD* 154 (2012); O'Connell & DiFonzo, *supra* note 9; Eddy, *supra* note 10; MP McQueen, *Lawyers Who Can't Pass a Bar: The Rate of Alcohol Abuse in the Legal Profession Remains Disturbingly High*, AM. LAW, Mar. 2016, at 12-13, at 12.

¹⁶ Peñalver, *supra* note 14, at 229.

¹⁷ O'Connell & DiFonzo, *supra* note 9, at 527-28.

¹⁸ *Id.*, at 528.

or lose, succeed or fail.”¹⁹ Dr. Brown is referring to *litigation bias* – a bias toward adversarial processes and approaches, which are based upon a win/lose paradigm.

For the following reasons, among others, for attorneys to “succeed,” they are trained in a win or lose, succeed or fail mentality and to be aggressive, judgmental, intellectual, analytical, emotionally detached, prudent, critical, and to conceal any weaknesses they may have:²⁰

1. Our societal culture;
2. A lack of social science backgrounds among future practitioners courted by law schools;²¹
3. The LSAT’s focus on analytic abilities and lack of focus on vital interpersonal and problem-solving skills;²²
4. Law schools’ need to prepare their students for the bar exam;²³
5. The nature of the work; and
6. The legal culture itself.

This *litigation bias* is a serious problem, which can influence daily practice decisions, but not be apparent to the practitioner. After all, winning a dispute is not the same as resolving a conflict or improving the parties’ understanding of each other. In 2015, two experienced clinical law teachers explained that by virtue of the very role they play as their clients’ advocates, lawyers are susceptible to pervasive biases, which promote “*we-they*” *thinking* and can intensify and perpetuate conflicts. According to the article, it is unreasonable, unrealistic, and contrary to social science evidence regarding bias to believe that all – or even most – lawyers in partisan roles can provide objective advice to the clients.²⁴ The old saying, “A lawyer who represents himself has a

¹⁹ BROWN, *supra* note 15 at 154.

²⁰ *Id.*; Hallie N. Love, *Positive Psychology for Lawyers – The Benefits of Positive Emotions*, NORTH CAROLINA LAWYER ASSISTANCE PROGRAM (2014), <https://www.nclap.org/positive-psychology-lawyers-benefits-positive-emotions/>; McQueen, *supra* note 15.

²¹ O’Connell & DiFonzo, *supra* note 9, at 545.

²² *Id.*

²³ *Id.* at 538.

²⁴ Douglas N. Frenkel & James H. Stark, *Improving Lawyers’ Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1, 17, 33 (2015).

fool for a client” pertains to the risks involved as a result of a loss of objectivity—and the foolishness can extend to clients other than the attorney’s own self. Contemplate the importance of such objectivity while reading the following description of what a lawyer’s duty to advocate means:

It is axiomatic that, as attorneys, we have a duty to advocate for our clients’ interests zealously within the bounds of the law. It is inherent in our role that we fight other people’s battles, but this duty encourages us to identify with our clients and view their battles as our own.²⁵

In fact, a vast body of research exposes that partisanship distorts objectivity, which is exactly what tends to occur when lawyers are placed in a partisan role.²⁶

To make matters worse, the legal culture is ultracompetitive because, in addition to its being adversarial in nature, there is a demand from the public for “aggressive” adversarial dispute resolution attorneys.²⁷ That demand is both real and perceived in that the media’s portrayal of family law is also absorbed into the minds of the practitioners themselves.²⁸ The greater the public’s demand, the larger the supply. Whether intentionally or unintentionally, attorneys fill that demand, and family law practitioners are no exception.²⁹

In addition to the amplification in aggression resulting from the public’s bias, the adversarial process lies at the heart of the American system of law because it is thought to be the royal road to truth, but it does embody a classic win-lose game: one side’s win equals exactly the other side’s loss. Competition is at its zenith.³⁰

Moreover, law school also does not tend to introduce students adequately or at all to mediation, collaborative law, cooperative law, and advanced techniques in negotiation.³¹ With

²⁵ John Keith, *From the Chair*, L.A. LAW. MAG., Oct. 2017, at 8.

²⁶ Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1640 (2015).

²⁷ BROWN, *supra* note 15, at 153; McQueen, *supra* note 15, at 12.

²⁸ O’Connell & DiFonzo, *supra* note 9, at 541.

²⁹ *Id.* at 540.

³⁰ Martin E.P. Seligman, *Why Are Lawyers So Unhappy?*, 22 CARDOZO L. REV. 33 (2001).

³¹ Bill Eddy, *Divorce Corp. Movie: All-or-None Thinking?*, UNHOOKED BOOKS (Jan. 11, 2014), <https://unhookedbooks.wordpress.com/2014/01/11/divorce-corp-movie-all-or-none-thinking/>; Lund, *supra* note 11, at 415; O’Connell & DiFonzo, *supra* note 9, at 525.

regard to mediation itself, law schools typically do not familiarize students with the different models of mediation – evaluative, facilitative, and transformative, along with hybrid processes and approaches, and the various techniques available to mediators.³² Once admitted to the bar, lawyers self-select the programs they attend to satisfy their mandatory continuing legal education requirement. Unless they specifically seek out programs on such topics, the programs they typically attend present information with a similar emphasis on litigation, which conveys the same subliminal message as they received in law school. To the extent that non-adversarial processes and approaches are mentioned in such programs, it is typically in passing. In a sense, it is much like lifelong vegetarians and vegans describing and educating others about the taste and texture of meat and how it compares to meat alternatives.

Family law attorneys' lack of familiarity with alternatives to the adversarial system and failure to present these alternatives to clients is unfortunate because of their unique role as gatekeepers with respect to their clients. "The concept of lawyers as gatekeepers is deeply imbedded in the Anglo-American legal tradition. . . . '[F]amily lawyers historically have been the gatekeepers in the adversarial family law system.'"³³ Considering that the public's biases feed into and thereby amplify those held by attorneys, because of attorneys' unique role as gatekeepers, it is important that attorneys recognize that they have these biases and that the biases influence decision-making.

The gatekeeping role is extremely important because family law attorneys, once retained, often guide their clients toward one option to the exclusion of others.

One of a family lawyer's key tasks is helping the client choose the dispute resolution process that is most likely to resolve her case effectively. Clearly, this requires as a starting point understanding what the client's options are and the pluses and minuses of available alternatives They should be introduced to the uses and abuses of 'mandatory mediation.' . . . Lawyers [should] assist their clients in

³² O'Connell & DiFonzo, *supra* note 9, at 528.

³³ Lynn Wardle, *Counselors as Gatekeepers: The Professional Responsibilities of Family Lawyers in Divorce Cases*, 79 UMKC L. REV. 417 (2010).

making informed choices among them . . . and in courts only as a last resort.³⁴

However, if family law attorneys possess a *litigation bias* and are not familiar with or sufficiently educated about non-adversarial alternatives to litigation, they are less likely to present and recommend such options to their clients, effectively acting as inefficient gatekeepers.

As gatekeepers, lawyers also hold an extremely powerful role in the resolution of disputes because the beginning impacts the end. When separations and divorces are involved, *the beginning* is the beginning of the process of separating and divorcing – not the end of the romantic relationship, assuming one ever actually existed. First moves and decisions greatly impact whether the level of conflict, communication, and trust increases or decreases, among many other things. Therefore, the process and approach taken at the outset of the case significantly impacts how future events unfold.

In addition to litigation being a very expensive and time-consuming approach, it can cause the parties to become more deeply engrained in their positions.³⁵ Furthermore, it resolves legal disputes through coercion, which may well be a means of dispute resolution, but is very different from conflict resolution or management.³⁶

Conflicts of any type can be resolved through either force or diplomacy. In legal disputes, parties try to exert force on each other through the courts. “We call it an adversary system, but a better term would be a coercion system. The parties bash each other in order to persuade the judge to coerce the other person to do something they do not want to do,” says family court Judge Bruce Peterson of Hennepin County, Minneapolis.³⁷ The threat of having a judge pressure “a person to do something they do not want to do” unless they agree to certain terms, is itself coercive.

³⁴ Mark Baer, *Don't Confuse Conciliation Court with Mediation*, HUFFPOST (Sept. 11, 2017), https://www.huffpost.com/entry/dont-confuse-conciliation-court-with-mediation_b_59b432b5e4b0bef3378ce0bd; Eddy, *supra* note 31; Lund, *supra* note 11; O'Connell & DiFonzo, *supra* note 9, at 533.

³⁵ Lund, *supra* note 11, at 408; O'Connell & DiFonzo, *supra* note 9, at 540.

³⁶ Eddy, *supra* note 31; Lund, *supra* note 11, at 415; O'Connell & DiFonzo, *supra* note 9, at 540.

³⁷ Bruce Peterson, *Time, Perhaps, to Get Courts out of Divorce*, STAR TRIB. (July 12, 2012).

As a result of their biases towards the adversarial system (including litigation), which centers around the *legal theory* of fairness, lawyers tend to focus on only that which is legally relevant under that theory. This causes lawyers to dominate, and structure conversations they have with their clients and potential clients and to listen for facts relevant to the specific legal doctrines, to the exclusion of other information, including but not limited to the emotional content being conveyed.³⁸ The emotional content includes what Bill Eddy refers to as *emotional facts*.

According to Eddy,

much of today's legal disputes are about Emotional Facts – emotionally-generated false information accepted as true and appearing to require emergency legal action. . . . If family, friends, mental health professionals, and legal professionals would become more skeptical and avoid becoming Negative Advocates, High Conflict disputes would significantly reduce their presence in our legal system.³⁹

The importance of such skepticism should not be understated, considering that in 1991, psychologist Paul Ekman and professor of psychology Maureen O'Sullivan proved that among "professional lie catchers," the only group to do better than chance at deciphering truth from fiction based upon demeanor, regardless of their confidence in their lie-detection ability and in the absence of an existing close personal relationship were Secret Service agents.⁴⁰ Secret Service agents were also the only group in which they found a sizable correlation between experience and accuracy, the most accurate being under forty years of age. They tested law enforcement personnel, such as members of the U.S. Secret Service, Central Intelligence Agency, Federal Bureau of Investigation, National Security Agency, Drug Enforcement Agency, California police and judges, as well as psychiatrists, undergraduate psychology students, and working adults enrolled in courses on deceit. Other researchers have made similar findings with regard to jurors. This is different from catching family mem-

³⁸ O'Connell & DiFonzo, *supra* note 9, at 541.

³⁹ William Eddy, "It is All Your Fault!" – *Working with High Conflict Personalities*, CONTINUINGEDCOURSES.NET (2017), <http://www.continuingedcourses.net/active/courses/course093.php>.

⁴⁰ Eddy, *supra* note 39; Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913 (1991); John L. Kane, *Judging Credibility*, 33 LITIGATION 31 (Spring 2007); Myron Moskovitz, *Who Is Telling The Truth?*, L.A. DAILY J. (Oct. 2, 2018).

bers and friends in lies because of familiarity with them – and knowledge of their “base line.”⁴¹

Not surprisingly, while biases lawyers tend to have may help them resolve legal issues, those same biases can interfere with resolving the family crisis itself and actually worsen it.⁴² Some such examples were set forth in a 2019 article by psychologist Kenneth Waldron and lawyer Allan R. Koritzinsky,⁴³ as follows:

- Competitive (“us-them/win-lose”) behavior damages or further damages the relationship by promoting and escalating conflict and can cause the conflict to become intractable;
- Tends to decrease and worsen communication between the parties;
- “Unwanted compromises (losses) in settlement negotiations and trial outcomes might lead both parties to feel that they lost and lay the groundwork for future conflict and efforts at ‘getting even.’”
- By promoting anger and blame and avoiding the sadness of the loss, it can often cause parties to get stuck in an anger and blame mentality toward each other;
- The focus on anger and blame causes parties to lose sight of their long-term goals.

The adversarial approach lends itself to a decrease in transparency, which increases distrust and causes people to assume the worst.

And, even if lawyers did elicit and listen for information other than that which they believe to be relevant to the specific legal doctrines, including but not limited to the emotional content being conveyed, they would not necessarily be able to use it effectively.⁴⁴ They would need to have developed the knowledge and skills to reframe the problem from an emotional response involving negativity, blame, and attribution of fault to something relational because the “problem” is typically relational involving two or more people. “Family issues are best viewed not in isolation of a triggering action or a sudden reaction, but rather as in-

⁴¹ Moskowitz, *supra* note 40.

⁴² O’Connell & DiFonzo, *supra* note 9.

⁴³ Kenneth Waldron, & Alan R. Koritzinsky, *Ask the Experts: A Game Theory Perspective: Three Major Weaknesses in the Traditional Family Law System and Ten Tricks that Promote Divorce Conflict*, ASSOCIATION OF FAMILY AND CONCILIATION COURT ENEWS (2019), <https://files.constantcontact.com/6beb60a3701/eb1176b2-f0a6-4c25-98d4-8d967f9db7c9.pdf>.

⁴⁴ *Id.*; Eddy, *supra*, note 31; Lund, *supra* note 11, at 415.

terconnected events woven into a life story.”⁴⁵ By not discouraging, and possibly actually encouraging their clients to focus on the other party’s faults and behavior, lawyers are doing their clients “a serious disservice.”⁴⁶ As Dr. Brown states, prevailing under the win-or-lose paradigm is “not victorious by any metric that most of us would label ‘success.’”⁴⁷

People in long-term happy and healthy marriages and relationships likely realize that the need to win means choosing that need over the relationship. In other words, the adversarial practice of law is the opposite of relational. To the extent that the worldview that lawyers have, which serves them well professionally, has been found to be destructive when applied to relationships, lawyers should take heed of the distinction between their roles as attorneys and as counselors at law, and never forget that the first word in *family law* is *family*.

The fact that lawyers tend to have these biases is not the same as blaming them for it.⁴⁸ The purpose of this article is not to attribute fault or otherwise engage in lawyer bashing; rather, it is about raising awareness of such biases.

We do not set out to discriminate, make others feel ‘less than’ or make poor decisions. Our brain is wired for speed, for efficiency and to make associations of known with known Current research on implicit bias, as we shared with the Harvard class, offers encouraging news Challenging thinking and a different framing can impact and change behavior and, in turn, the complex cycle we’re trying to disrupt Your increased awareness is the first step in reducing bias to drive individual and organizational change.⁴⁹

Extensive research has been done on implicit bias, including by Project Implicit® based at Harvard University and the Unconscious Bias Project at Berkeley. In 1994, Timothy D. Wilson and Nancy Brekke provided scientific proof that bias could be avoided or eliminated by becoming aware of the bias and why it exists, having the motivation to overcome it, awareness of the direction and magnitude of the bias, and the ability to apply an

⁴⁵ O’Connell & DiFonzo, *supra* note 9, at 529. *See also* Lund, *supra* note 11, at 413.

⁴⁶ Eddy, *supra* note 31; Lund, *supra* note 11, at 415; O’Connell & DiFonzo, *supra* note 9, at 542.

⁴⁷ BROWN, *supra* note 15, at 155.

⁴⁸ O’Connell & DiFonzo, *supra* note 9, at 531.

⁴⁹ Woodhouse, *supra* note 1.

appropriate strategy to help reduce or otherwise manage the bias.⁵⁰

People's minds cannot be trusted because the biases are unconscious. While the most accurate means through which to develop awareness of biases involves therapy, it can be acquired through other means, including education.⁵¹ "Merely becoming aware of the subtle situational and cognitive forces, while no panacea, can help lawyers develop appropriate strategies to counteract biased decision-making."⁵²

Along those lines is one other related bias typically held by attorneys, which is the lack of recognition within the family law community that one reason for the decline in the public's retention of family law attorneys is actually "a rejection of the services lawyers offer in family disputes."⁵³

In 1994, the American Bar Association Standing Committee on the Delivery of Legal Services published an article citing several studies documenting an increasing percentage of self-represented litigants in divorce cases between the mid-1970s and the mid-1990s. That article mentioned that lack of affordability was not the only reason people were opting to represent themselves. As a result, it concluded that "law school curriculums may need to adjust to the changing needs of divorce clients by providing more education on conflict resolution and client counseling Legal education should prepare lawyers to help their clients psychologically by reducing stress and conflict during the divorce process."⁵⁴

⁵⁰ Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994), <http://people.virginia.edu/~tdw/wilson%26brekke.1994.pdf>.

⁵¹ Unconscious Bias Project, <https://unconsciousbiasproject.org/think-better/determine-your-ub/>; City of Des Moines, the City of West Des Moines, and the Des Moines Municipal Housing Agency (DMMHA), *2019 Analysis of Impediments to Fair Housing for the Des Moines-West Community-Based Statistical Area 11*, 68 (2019).

⁵² Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 799.

⁵³ O'Connell & DiFonzo, *supra* note 9, at 534.

⁵⁴ Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J. L. & FAM. STUD. 57, 83 (2010).

In 2017, the Association of Family and Conciliation Courts released a survey in which a variety of professionals involved in the field of family law indicated that they believed there had been a dramatic increase in self-represented litigants in the past seven years.⁵⁵ The professionals involved in that survey included lawyers, academics, court administrators, judges, mediators (private and court-employed), custody evaluators, and parent educators. Unless and until family law practitioners come to terms with this rejection of the services they offer in family disputes, the percentage of the population retaining them will likely continue to decline. Awareness of the issue and its causes can help to stop the decline from both continuing and increasing.

The American Academy of Matrimonial Lawyers apparently recognized this *litigation bias* and the harm it causes to families and attempted to address it by issuing its *Bounds of Advocacy* in 2000.

Noting that existing ethics codes provided inadequate guidance to the matrimonial lawyer, the American Academy of Matrimonial Lawyers issued its *Bounds of Advocacy* in 2000. The goal was to elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be preserved. These guidelines mark a clear break with the traditional view that a matrimonial lawyer's only job is to win. Instead, the guidelines encourage other models of lawyering and goals of conflict resolution in appropriate cases.⁵⁶

Unfortunately, as will be seen in the next section of this article pertaining to the use and selection of experts, that break has not been so clear, likely because little, if anything, is being done to even make lawyers aware of biases long known to impact them.

IV. Biases of Experts

The biases held by attorneys, which have already been amplified by their clients' biases, then impact the choices they make

⁵⁵ Michael Saini, *Access to Justice in Family Law Matters: Results of a Survey of Family Court Professionals – Executive Summary*, ASSOCIATION OF FAMILY AND CONCILIATION COURTS, Feb. 2017, <https://www.afccnet.org/Portals/0/Center%20for%20Excellance/AFCC%20Access%20to%20Justice%20-%20CEFCP.pdf?ver=2017-03-06-135632-510>.

⁵⁶ O'Connell & DiFonzo, *supra* note 9, at 540.

regarding the use and selection of experts, further magnifying the extent of the biases involved.

Experts are sources of information that can be useful in resolving factual disputes, explaining concepts, and influencing decision-making. As such, they play a significant and powerful role.⁵⁷ “In deciding which expert to retain, an attorney should be mindful of her purpose in retaining an expert.”⁵⁸ That purpose will determine whether the attorney is, in fact, seeking an expert he or she truly believes is both credible and impartial. “Whether or not she is willing to admit it, every attorney who retains an expert is hoping that the expert will reach opinions helpful to that attorney’s case That hope sometimes leads an attorney, perhaps unconsciously, to choose an expert who is likely to reach that opinion.”⁵⁹

Experts are supposed to be objective and impartial. “Experts share an understanding that it is their duty to be independent and uninfluenced by the exigencies of litigation, and to be objective and unbiased.”⁶⁰

However, many lawyers and experts seem to have lost sight of the fact that the adversarial process was based upon the presupposition that it is “the royal road to truth.”⁶¹ Playing to win and attempting to elicit the truth are two very different things.

As a result, many lawyers seek to retain experts who will testify to their desired opinions, regardless of the expert’s actual beliefs. The demand for and supply of “hired gun” experts stems from the adversarial process itself and the focus on winning, rather than trying to elicit the truth. Thus, the issue is hardly unique to the United States. In fact, the following quote is from an article published in Australia: “Parties to disputes often incur damage where ‘hired guns’ exaggerate or understate claims (depending upon whom they are acting for) and have testimony ex-

⁵⁷ *Id.*; Lund, *supra* note 11, at 410.

⁵⁸ Stephen D. Easton, *Damages: Expert Witnesses*, 37 J. DISPUTE RESOLUTION 37, 40 (2004). *See also* Lund, *supra* note 11, at 410.

⁵⁹ Easton, *supra* note 58.

⁶⁰ Itiel E. Dror et al., *Cognitive Bias and Its Impact on Expert Witnesses and the Court*, 54 JUDGES’ J. 9 (Fall 2015).

⁶¹ MARTIN SELIGMAN, *AUTHENTIC HAPPINESS* (2002).

posed under cross examination.”⁶² Even if lawyers do not deliberately seek out such experts, it is not uncommon for them to try to locate those who have demonstrated a “repeating pattern” they believe will benefit their side of the case.⁶³ Because of their biases, which have become obvious to outsiders, such experts become unintended “hired guns.”

Whether or not attorneys seek out experts who are intentionally or unintentionally “hired guns,” they still have a variety of tools available with which to shape their retained expert’s testimony. Ultimately, the attorney decides how, if at all, any given retained expert will be involved in the case. “Also, the attorney makes the expert a member of the trial team and thereby socializes the expert into the ‘us against them’ bunker mentality of litigation.”⁶⁴ And, even when lawyers make no effort to use “hired-gun” experts or otherwise influence their opinions, the experts are unfortunately susceptible to biases just by virtue of their being human.

Unless all experts on a particular issue would reach precisely the same conclusion, some degree of subjectivity is involved. The more subjectivity involved, the greater the potential for bias.⁶⁵ Experts base their opinions on certain theories and assumptions, which impact the results.

For example, psychological theories are routinely presented to courts by custody evaluators, and in at least some (and perhaps many) cases, they form the basis for the court’s order [It is essential that lawyers] have at least a rudimentary understanding [of such things because] of the roles, contributions, and limitations of these experts and their testimony.⁶⁶

⁶² K. Lovegrove, *Why Australia Should Regulate Expert Witnesses* (2014), <https://sourceable.net/why-australia-should-regulate-expert-witnesses/> (available by use of archives).

⁶³ Easton, *supra* note 58.

⁶⁴ *Id.*

⁶⁵ Dror et al., *supra* note 60.

⁶⁶ Easton, *supra* note 58. *See also* Eddy, *supra* note 39; Lund, *supra* note 11; Philip S. Watts et al., *Ask the Experts: Ten Lessons Learned from 100 Years of Custody Evaluations*, ASSOCIATION OF FAMILY AND CONCILIATION COURTS ENEWS (2019), <https://files.constantcontact.com/6beb60a3701/9eaf731f-9fda-435e-928e-14d9d56631f2.pdf>.

This is particularly important, considering the lack of information regarding the reliability and validity of custody evaluations and the various interventions recommended by evaluators.⁶⁷

Certain types of experts who are members of professional organizations with established and mandatory reporting standards, such as appraisers, are required to set forth in their reports the methods and techniques and all special assumptions and limiting information they used that might have affected their opinion(s) and conclusions(s).⁶⁸ Experts without such professional obligations may or may not include some or all of that information in their reports. Those underlying assumptions can make a huge difference and it is therefore essential for the decision-makers and those with influence over the decision-makers to be aware of and understand those assumptions and how they impact the results.

Furthermore, cognitive science shows how and why bias impacts the way in which experts, even the most dedicated and committed experts, perceive and interpret information, make judgments and reach decisions.⁶⁹ In addition to the subjective elements involved, this may include overstating the precision and strength of the evidence. Such errors in judgment and decision-making can occur when experts are overconfident and overestimate their own abilities and can occur subconsciously as a result of their recruitment to work on a particular team in a non-neutral environment and posture.⁷⁰

It bears mentioning that jointly-retained and court-appointed experts have many of those same biases, even though they are not retained to join one side's team, and lawyers have been known to take advantage of them. Three forensic psychologists who perform custody evaluations and serve as expert witnesses stated as follows:

One of the most prevalent problems within the domain of child custody evaluations is politics where people's ideology around rights of men, rights of children, or the rights of women overtake the use of science and collective knowledge. . . . Best outcomes, both individu-

⁶⁷ Lund, *supra* note 11, at 412; Watts et al., *supra* note 66.

⁶⁸ Robert J. Grossman & Melissa A. Bizyak, *Understanding the Business Valuation Process* (2016).

⁶⁹ Dror, *supra* note 60.

⁷⁰ *Id.*; Lund, *supra* note 11, at 413.

ally, and for the profession, come when people focus on what the science teaches and not what they personally believe is best. Opinions should change as knowledge changes, not when politics change Custody evaluators . . . [should] strive toward aspirational goals [such as] managing our risk of biases, including implicit biases; . . . having the appropriate scientific mindset to approach the evaluation neutrally, with no preconceptions; [and] . . . be prepared to understand the various risks of suggestibility for what we hear from children.⁷¹

When it comes to the use of experts, their influence on decision-makers is such that bias can lead to inequitable and unjust results, whether the matter is resolved through settlement or court intervention.

V. Biases of Mediators

Attorney biases that have been amplified by their clients, and possibly magnified further by the involvement of experts, influence the way in which they use mediation, the type of mediation they use, and their selection of particular mediators.⁷²

Furthermore, just as lawyers who are unaware of their biases tend to lead their clients down an adversarial path, mediators who are unaware of their biases typically guide their clients to a process that more closely resembles one mediation model to the exclusion of others. As mentioned previously, the mediation process and therefore the mediators themselves can be evaluative, facilitative, transformative, or some hybrid. If the clients (on their own or through their attorney) select a particular mediator without an adequate understanding of the differences between the various models and mediation techniques, the gatekeeper issue is once again involved.⁷³ Unless they possess adequate information on their own, clients cannot make voluntary and informed decisions regarding process and approach without first obtaining such information. If, by virtue of retaining any given mediator, the clients receive that mediator's default process without specifically selecting it, mediator bias is involved. This is separate and apart from the nature and extent of the mediator's

⁷¹ Watts et al., *supra* note 66.

⁷² Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative*, NATIONAL ASSOCIATION FOR COMMUNITY MEDIATION NEWSLETTER, <https://www.mediate.com/articles/zumeta.cfm> (last visited July 27, 2019).

⁷³ *Id.*

knowledge, training, and skills with regard to the various mediation models and techniques.

It appears that it would be helpful for mediators at the very least, to articulate to parties and attorneys the style(s) they generally use, and the assumptions and values these styles are based on. This will allow clients to be better and more satisfied consumers, and the field of mediation to be clearer on what it is offering. It can only enhance the credibility and usefulness of mediation.⁷⁴

In fact, in 2017, the ABA Section of Dispute Resolution issued its *Report of the Task Force on Research on Mediation Techniques*.⁷⁵ That Report states in pertinent part as follows:

Whether expressly or implicitly, mediation programs, trainers, and practitioners make assertions about which mediator actions and approaches are ‘best,’ often based on untested assumptions and beliefs The Task Force was created to learn what existing empirical evidence tells us about which mediator actions enhance mediation outcomes and which have detrimental effects and to disseminate that information to the field, with the ultimate goals of fostering additional empirical research and enhancing mediation quality Forty-seven studies, thirty-nine involving only mediation and eight involving another process in addition to or instead of mediation, were included in the Task Force’s review.

Another word for “untested assumptions and beliefs” is biases. The information provided in that Report is educational, which is a first step towards unbiassing people. However, that is only possible to the extent that those whose biases are involved are actually aware of such information, and what, if anything, they opt to do with it. The following information from the Report is relevant to such biases, since they pertain to domestic relations disputes:

1) “Pressing or directive actions” contain elements of pressure and coercion and have the *potential* to increase the likelihood of settlement, while also *potentially* further damaging the parties’ relationship, which increases the risk of future litigation. Examples of such actions include assessing the strengths and weaknesses of a case and suggesting a particular settlement.

2) “Offering recommendations, suggestions, evaluations, or opinions” *does not* contain elements of pressure and coercion and has the *potential* to increase the likelihood of settlement and on attorneys’

⁷⁴ *Id.*

⁷⁵ ABA Section of Dispute Resolution, *Report of the Task Force on Research on Mediation Techniques*, American Bar Association (2017).

positive impression of the mediation process, while also *potentially* impacting the parties' relationship in positive and/or negative ways.

3) "Eliciting disputants' suggestions or solutions" has the *potential* to both increase the likelihood of settlement and improve the parties' relationship. No downsides were found.

4) "Giving more attention to disputants' emotions or relationships" can *potentially* improve the parties' relationship, while impacting the likelihood of settlement, either positively or negatively.

5) "Working to build trust, expressing empathy or praise, and structuring the agenda" can *potentially* increase the likelihood of settlement and improve the parties' relationship. "Other 'process' actions" such as summarizing, reframing and using a facilitative or non-directive style can *potentially* increase or decrease the likelihood of settlement.

6) Using pre-mediation caucuses for the mediator to establish trust and build a relationship with the parties has the *potential* to increase the likelihood of settlement and reduce the parties' post-mediation conflict. However, when such caucuses are used to get the parties to accept settlement proposals, they only have a *potential* negative effect on both the likelihood of settlement and the parties' post-mediation conflict.

7) With the exception of matters involving labor-management, the use of caucusing during mediation has no effect on the likelihood of settlement, while *potentially* negatively impacting the parties' relationship. Furthermore, the more time spent in caucus, the greater the *potential* for future litigation. With regard to labor-management issues, it tends to increase the likelihood of settlement.⁷⁶

This is the type of information that clients should be informed about so they can choose a particular process and approach with appropriate information about that method and the pros and cons associated with each technique. While the potential for something to occur does not mean it will definitely occur, it is a risk that does not exist in the absence of such potential. To the extent that parties will have an ongoing relationship of some sort with each other through their children or otherwise, or the court will have ongoing jurisdiction over child-related issues, child support, spousal support, and/or any other issues, clients would likely want to know how particular mediation techniques may impact such things.

It bears mentioning that the above research only pertains to mediation techniques. The extent to which those techniques are

⁷⁶ *Id.*

used depends upon both the mediation model used and the particular mediator involved.

In evaluative mediation (sometimes referred to as “soft arbitration”), the mediator typically assists the parties in resolving their disputes by pointing out the strengths and weaknesses of each party’s positions. As a result, the mediator’s focus is on each of the parties’ rights under the law, and not on the particular needs and interests of the parties. The mediator helps the parties in evaluating the case and analyzing the costs and benefits of a mediated versus litigated resolution of the matter.

Evaluative mediation tends to involve the use of judges and lawyers who are retained for their subject matter expertise, rather than for their actual formal mediation training and skills. The mediator has a similar influence over the decision-makers to that of the experts discussed in the prior section. Evaluative mediation involves elements of pressure or coercion in that the mediator is using his or her perceived subject matter expertise to influence a party into doing something that party would likely not otherwise want to do. This type of coercion was referenced in the attorney section of this article. Because of their subject matter expertise, such mediators tend to believe they know how the case should be resolved under the law and use their influence to help the parties to arrive somewhere within that realm. The more evaluative the mediator, the more that mediator uses his or her perceived expertise to directly influence the outcome of the mediation.

Unless the facts are undisputed, the person responsible for evaluating a case must make factual determinations before applying the law. After all, even if the law is crystal clear, its application typically depends upon the underlying facts and such factual findings are often based upon credibility assessments. Furthermore, bias does not just come into play with regard to the credibility findings mediators make when the facts are in dispute. Unless the law is unambiguous, the law itself is subject to interpretation, as is its application, and this will include the exercise of discretion. Thus, bias comes into play there, as well. In addition, mediators’ focus on the *legal theory* of fairness and preference for separating the parties and shuttling back and forth between

them are themselves biases.⁷⁷ As with expert witnesses, the more subjectivity involved, the greater the potential for bias.

Attorneys really relate to this type of mediation because it is consistent with their culture. It is based upon the *legal theory* of fairness and a win/lose paradigm, which falls squarely within the scope of their knowledge, skill set and training. As a result, evaluative mediation tends to be more lawyer-directed than the other mediation models. The attorneys typically choose the mediator and are actively involved in the process itself.⁷⁸ As with experts, depending upon their purpose in utilizing mediation, attorneys can select particular evaluative mediators because they believe they understand their biases and that those biases may benefit their client's position.

While not evaluating the case, mediators who tend to be more facilitative in nature want the clients to make voluntary and informed decisions. Facilitative mediation requires that the mediator asks questions in order to uncover the underlying reasons behind each party's position, and assists the parties in addressing those concerns. Such mediators may offer information they deem necessary to effectuate voluntary and informed consent. This type of mediation primarily or exclusively involves joint sessions.⁷⁹

Biases come into play with regard to the nature and extent of the information any given mediator deems necessary for such purposes. Among other things, this will depend upon whether or not the mediator believes that any given decision is voluntary and informed and how he or she subjectively defines such things.

Transformative mediation is based upon the understanding that biases held by mediators can and do interfere with the parties' self-determination. Therefore, transformative mediators do not engage in any evaluative work, do not tend to provide any outside information, and do not utilize caucusing. They operate

⁷⁷ Kentucky Bar Association, *Mindful Mediation: Ethical Dilemmas for Attorneys and Mediators* (2019); Maryland Judiciary Mediation and Conflict Resolution Office, *Maryland Program for Mediation Excellence: Mediation Framework Descriptions* (2010), https://cdn.ymaws.com/www.kybar.org/resource/resmgr/2019_convention/materials/mindful_mediation_-_ethicqal.pdf.

⁷⁸ Zumeta, *supra* note 72.

⁷⁹ Maryland Judiciary Mediation and Conflict Resolution Office, *supra* note 77.

on the premise that clients can obtain information on their own outside of the mediation, to the extent they deem necessary. While this reduces the subjectivity involved and therefore the likelihood of mediator bias impacting the parties' decision-making, people do not know what they do not know. The mediator does not provide information to educate the clients in that regard or to challenge any biases the clients may hold, which may impact the outcome. An exception to such mediators not providing outside information to the clients can occur when the clients would otherwise be entering into an agreement the mediator knows would be illegal or in violation of public policy.⁸⁰

As mentioned earlier, hybrid processes and approaches exist, mediators vary in terms of how strictly they adhere to any given mediation model and can be fluid in their use of mediation techniques. Considering that nobody and nothing is perfect and therefore everything has pros and cons, how strictly a mediator adheres to any given mediation model and when and how they use any given techniques is based, at least in part, on their biases in terms of process and approach.⁸¹ And, regardless of the mediation model and techniques used, mediators are human and their personal biases can and do impact the outcomes of mediations in ways most people fail to consider.

If a mediator is unable to identify their emotions with respect to the subject of the mediation, the parties to the mediation and the progress of the mediation, the emotional candour of the mediator may inadvertently manifest itself in biased words, interventions and behaviors. If a mediator is unaware of their own feelings, and the impact of the parties upon their own feelings, they are not in a position to self-assess the impartiality of their process. [Daniel] Goleman lends support to the importance of mediator self-awareness when he contends that the "personal emotional competency of self-awareness contributes to self-regulation, which in turn undergirds the development of social skills (such as conflict management)."⁸²

⁸⁰ Robert A. Baruch Bush and Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 90 (Dec. 2002).

⁸¹ ABA Section of Dispute Resolution, *supra* note 75.

⁸² James Duffy, *Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein*, 10 QUEENSLAND U. TECH., L. & JUST. J. 58 (Sept. 2010).

Therefore, while mediation is touted as a process used to help parties in dispute to maintain control over the outcome, that outcome is almost certainly impacted by the biases held by the parties, their attorneys (if any), the experts involved (if any), and the mediators themselves. On the other hand, by turning control over the outcome to a judge, parties also implicitly agree to accept how the judge's biases directly influence that outcome.

VI. Biases of Judges

By the time a case makes its way to a proceeding before a judge, the biases of all those involved up to that point have influenced each side's perception of the case, which they then place in the hands of the judge to decide. To the extent possible, strategic determinations may have been made with regard to the particular courthouse in which the case is filed. Unless such a choice is merely about location, it involves determinations regarding the perceived experience, quality, and biases held by the various family law judges available in a particular courthouse and whether those factors may work for or against the originating party. And, if possible, either or both parties may challenge the assignment of a particular judge to their case for a variety of reasons, including judicial bias they believe would work against them. Again, such efforts are strategic because the judge assigned to the case will be determining the outcome of any and all issues submitted to the court.

Biases of judges for the purposes of this article refers to the ultimate judges hearing the cases and whose biases do not rise to the level that would cause a judge to be recused or render a decision that could be reversed on appeal as a result of judicial bias.

The judge's job involves making factual findings when the facts are in dispute, and interpreting and applying the law, which includes exercising judicial discretion. All of the biases that can impact an expert's opinion apply equally well to judges. A major difference, however, is that experts should have subject matter expertise and the judge deciding a family law matter does not necessarily qualify in that regard. Judges assigned to a particular courtroom to hear and decide certain types of cases may never have practiced that type of law as an attorney and they are essentially receiving "on the job training." Arthur Gilbert, a presiding

justice of California's 2nd District Court of Appeal, Division Six recently explained this as follows:

I publicly state what I thought when I was practicing law, and what I knew for certain when I became a judge so many decades ago: Judges are not always knowledgeable. This is not an indictment, but an acknowledgment that we decide cases involving a myriad of subjects about which we know . . . nothing. Through motions and evidence, we acquire the knowledge it takes to correctly, we hope, apply the law. Judges are perpetual students. Attorneys, who write briefs, motions and arguments for them to read and hear, are teachers. Whether admitted or not, everyone in our profession knows this. And the peculiar nature of this relationship is that the students, the judges, have all the power.⁸³

Even if lawyers were of the mind to educate the judges they appear before, the judges must have the humility to be educated and be afforded the resources and time to benefit from it before rendering their decisions. In addition, and regardless of a judge's subject matter expertise, they lack the ability to fully understand any particular case. Bill Eddy explains it as follows:

The judge or jury is the decision-maker, *not an investigator*. The burden of gathering evidence, knowing all relevant theories, and presenting it is *on the parties* (and their attorneys). The judge or jury must decide who is most persuasive – usually with many restrictions on the information they are allowed to see and consider In court – especially with interpersonal disputes – the factual information is often skimpy and directly in conflict Important information may be excluded by legal objections, and the decision-makers usually do not see the parties interact – the most useful information about interpersonal disputes, aggressive behavior, and personalities [I]n the legal process, verbal persuasion and suppression of evidence are the rules of the game.”⁸⁴

Yet, judges may equate the power of their role with such expertise and be overconfident and overestimate their own abilities. In 2001, law professors Chris Guthrie and Jeffrey Rachlinski and Judge Andrew Wistrich conducted a series of studies which demonstrated that judges are susceptible to a variety of biases, including those resulting from “egocentricity – overconfidence in

⁸³ Albert Gilbert, *Taking Credit or Blame for the Future*, L.A. DAILY J. (Feb. 3, 2020.)

⁸⁴ Eddy, *supra* note 39.

one's abilities."⁸⁵ As they explained, to the extent that judges are unaware of their biases and how they impact their decision-making, no amount of extra time and resources will cause them to make better decisions.⁸⁶ That research was referenced in a white paper by the American Judges Association titled *Minding the Court: Enhancing the Decision-Making Process* that was published in 2012.⁸⁷

Meanwhile, as Kenneth Cloke, Director of the Center for Dispute Resolution, stated in his book *Mediating Dangerously – The Frontiers of Conflict Resolution*, “Judges have the most intractable bias of all: the bias of believing they are without bias.”⁸⁸ Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, and Jennifer K. Elek and others have confirmed Cloke’s assessment. They have found that most, if not all, judges sincerely believe that their decisions are made based exclusively on the facts and the law and that their decisions are fair and objective.⁸⁹ This is incredibly important because the first step required for a person to reduce or otherwise keep his or her biases in check is admission that those biases exist.

Those biases, whether explicit or implicit, impact the information judges hear and consider as well as how they interpret that information. John Roberts, the Chief Justice of the U.S. Supreme Court, has said, “[I]t’s my job to call balls and strikes, and not to pitch or bat.”⁹⁰ In the sense that judges and justices determine the outcome, Chief Justice Roberts is correct in his assessment. Regardless, a judge’s role typically involves far more subjectivity than does that of an umpire. And, the more subjectivity involved, the greater the potential for the influence of bias,

⁸⁵ Chris Guthrie, Jeffrey Rachlinski, & Andrew Wistrich, *Inside the Judicial Mind*, 96 CORNELL L. REV. 777, 818 (2001).

⁸⁶ *Id.* at 820.

⁸⁷ Pamela Casey, Kevin Burke, & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 5 INT’L J. CT. ADMIN. 45 (Feb. 2013).

⁸⁸ KENNETH CLOKE, *MEDIATING DANGEROUSLY – THE FRONTIERS OF CONFLICT RESOLUTION* (2001).

⁸⁹ Pamela M. Casey, Roger K. Warren, Fred L. Cheesman & Jennifer K. Elek, *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 65 (2013).

⁹⁰ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearings before the Committee on the Judiciary, United States Senate, 109th Congress, U.S. Government Printing Office, 2005, at 56.

which constrains the information actually heard and considered. This, in turn, leads to impaired critical thinking. It bears mentioning that while many different types of biases exist and may have different causes, the impact of bias is the same, regardless of type.⁹¹

Myron Moskowitz, an appellate attorney in Northern California admitted to the State Bar of California in 1965, explained that at some point in his career, he transformed from a “legal formalist” to a “legal realist” and explained how that influenced the manner in which he approaches his work. He described that his many years in the field have caused him to realize the following:

A judge is a judge. When a judge believes that a certain result is the fair one, he or she will often find a way to reach it [To obtain] some particular desired result, an appellate judge might bend the words of the statute a bit or reinterpret some dicta to justify that result.⁹²

Once Moskowitz came to that realization, he recognized his need to have “some idea of what makes appellate judges tick” in order to persuade them, which he stated is the “advocate’s goal.”⁹³ As an aside, he called Chief Justice Roberts out for his ongoing claim that judges are umpires and have no interest in who wins the game. In fact, he said, “Trump is right. And he trumped the Chief Justice of the United States.”⁹⁴

This is incredibly important because appellate judges have less opportunity for bias to influence their decisions than do trial judges, as Moskowitz explained.⁹⁵ He cited studies which have found that appellate judges are actually more likely than trial judges to make correct factual findings, because they only see transcripts and are focused on inconsistencies in content. Trial judges, on the other hand, tend to be led away from the truth because of the ways their biases impact their credibility assessments of the parties’ and witnesses’ appearance and demeanors.

⁹¹ Casey et al., *supra* note 87, at 1-2.

⁹² Myron Moskowitz, *From Legal Formalist to Legal Realist*, L.A. DAILY J. (May 6, 2019), <http://social-appellate.blogspot.com/2019/05/formalism-versus-realism.htm>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Myron Moskowitz, *Let’s Play, ‘Let’s Suppose,’* L.A. DAILY J. (Oct. 15, 2018).

In fact, in their 1991 study, Paul Ekman and Maureen O'Sullivan proved that California judges fared no better than random chance in making factual findings based upon demeanor.⁹⁶ And, it bears mentioning that the length of time a judge has been on bench does not improve their ability to decipher truth from fiction, although it likely causes them to be overconfident and overestimate their own abilities in that regard. Meanwhile, as Moskowitz explains, those mistaken beliefs "can and will be manipulated."⁹⁷

According to the research cited by Moskowitz, this information has been known and readily available since 1991. Research cited by William A. Eddy, attorney and social worker, on this same topic, as it pertains specifically to family law judges, dates back to 1985.⁹⁸

In complete alignment with the above information, John L. Kane, senior district judge for the federal district of Colorado in Denver, describes trial judges' ability to make credibility determinations as follows:

Reliance on demeanor vests wide discretion in the fact-finder [The] stress on courtroom demeanor results in an entirely subjective evaluation [Impartiality] requires you to dredge the subconscious for your own prejudices and predilections [a.k.a. biases]. To deny that you have prejudices is illusory; to recognize them is an act of relentless searching. Only when the prejudice is recognized can it be removed from the decisional process We bring to the facts our feelings, our experiences, and our desires. What we believe is what harmonizes the totality of this combination.⁹⁹

Of course, a judge's factual findings also pertain to the information, opinions, and recommendations set forth by expert witnesses, upon which they tend to rely.¹⁰⁰ Along those lines, "judges' orders are in accord with custody recommendations in about 85% of cases."¹⁰¹ This is true in spite of the fact that very little science or research exists to support the reliability of the

⁹⁶ Ekman et al., *supra* note 40.

⁹⁷ Moskowitz, *supra* note 95.

⁹⁸ Eddy, *supra* note 39.

⁹⁹ Kane, *supra* note 40.

¹⁰⁰ Dror, *supra* note 60.

¹⁰¹ Lund, *supra* note 11, at 410.

assertions, interventions, and recommendations set forth by custody evaluators.¹⁰²

And judicial bias can result in their making factual findings so as to reach their desired result (a.k.a. rewriting history). Moskowitz touches upon that reality when mentioning how judges will often find a way to reach their desired result, although doing so leads to legal injustice. He also discusses how appellate judges interpret the law to justify such a result. If appellate judges do such a thing, trial judges are no less likely to do so. The more vague and ambiguous a term or phrase in a statute and with the allowance for judicial discretion, the more room there is for judicial bias of all types to play a part in defining it. To the extent that judges interpret the law and exercise their judicial discretion for such purposes, why would doing so with regard to their factual findings be off limits? Meanwhile, as Moskowitz points out, these realities “go to the heart of our trial system – and our appellate posture of deference to trial court findings.”¹⁰³

As has been mentioned throughout this article, emotional self-awareness is essential to de-biasing because it is impossible to reduce or otherwise manage that of which people are unaware. Emotional self-awareness is not only an aspect of emotional intelligence [EI], it is “the foundation of emotional intelligence.”¹⁰⁴ However,

studies show that lawyers score high in intelligence but below average in emotional intelligence And emotional awareness [of emotions in themselves and others] is the EI skill that lawyers usually score lowest in Law schools have been unwitting collaborators in emotionally dumbing down lawyers for generations To start, we have evidence that the LSAT tends to prefer applicants . . . [with] an emotional management deficit. Further, there is research showing that these low EI tendencies accelerate during law school.¹⁰⁵

This information is in the judicial bias section although it applies to lawyers because lawyers become judges and they do not suddenly acquire such skills through osmosis once they become

¹⁰² *Id.* at 412. *See also* Watts et al., *supra* note 66.

¹⁰³ Moskowitz, *supra*, note 40.

¹⁰⁴ Daniel Goleman, *Self-Awareness: The Foundation of Emotional Intelligence* (Jan. 12, 2017) <https://www.linkedin.com/pulse/self-awareness-foundation-emotional-intelligence-daniel-goleman/>.

¹⁰⁵ ABA *How Emotional Intelligence Makes You a Better Lawyer*, American Bar Association Blogs (Sept. 26, 2017).

judges. Fortunately, emotional intelligence and its various competencies can be developed.¹⁰⁶

None of this is intended to discount the important role judges play in the American legal system and society, and the reality that litigation will always be necessary, and even wise in some cases.¹⁰⁷ However, among other things, it is meant to make clear that far more subjectivity and therefore judicial bias is involved in legally imposed decisions than people tend to realize.

Maybe this is why Thomas Trent Lewis, former Supervising Judge Family Law Division of the Los Angeles County Superior Court, said:

The family court is to be a last resort for family resolution When personal safety is not at issue or compromised, mediated and collaborative negotiated resolution of disputes can achieve favorable and more durable outcomes for parents and children. . . . “Mediate when you can, and litigate only when you must.”¹⁰⁸

However, doing so involves lawyers’ unique and powerful role as gatekeepers and how lawyers choose to wield that power. It bears mentioning that when the government perceives that certain professionals are not exercising such power responsibly, it intervenes, as described in the following section. The degree to which such a perception is steeped in reality and how any legislative intervention plays out depends, to a great degree, on the influence of bias.

VII. Biases of Lawmakers

Laws vary greatly from state to state, and country to country, and change over time. Inevitably, biases on the part of the legislators and those influencing them play a part in the law-making process. Take judicial discretion, for example. The real world and the people inhabiting it are complex and there are no one-size-fits-all answers. As such, judicial discretion is incredibly important. However, at the same time, the more discretion judges are given, the more room exists for judicial bias to come into play and impede legal justice.

¹⁰⁶ *Id.*

¹⁰⁷ O’Connell & DiFonzo, *supra* note 9, at 533.

¹⁰⁸ Thomas Trent Lewis, *Helping Families by Maintaining a Strong Well-Funded Family Court That Encourages Consensual Peacemaking: A Judicial Perspective*, 53 *FAM. CT. REV.* 407 (2015).

In an effort to quell perceived and actual harms and inequities resulting from the exercise of judicial discretion, lawmakers sometimes step in to broaden or limit it to some degree. Such changes may be as simple as replacing the word “may” with “shall” or “will” in a statute (or vice versa), establishing or eliminating a rebuttable presumption, or requiring or eliminating the need for judicial findings to be explicitly made. Recently, an increasing number of states have been establishing a presumption of equal parenting because, among other things, certain judicial biases lead to parenting plans that are perceived or are actually unfair to fathers and not in the best interest of children.¹⁰⁹

Of course, if judges were made more aware of their biases, they would be able to reduce them and otherwise keep them check. Unfortunately, the results of research on efforts to help judges to reduce or otherwise manage their biases have been rather disappointing. In fact, the research has shown that the effects of the training, if any, for most judges “generally declined after two weeks,” as set forth by the Federal Judicial Center.¹¹⁰ To be clear, this does not mean that such efforts are entirely ineffective.

As has already been said many times throughout this article, “admission is the first step to recovery.” Unless people are required to take courses at which they learn about specific biases, how they are formed, their impact, and what a person can do to try to reduce or otherwise manage bias, people self-select the types of information to which they will and will not even expose themselves. Thus, those most in need of acquiring such information are typically the least likely to receive it, particularly if they believe they are not biased and that their explicit biases exist for good reason. Therefore, the only way to even attempt to promote awareness is through education programs and by requiring attendance – something the legislature can do.

¹⁰⁹ Michael Alison Chandler, *More than 20 States in 2017 Considered Laws to Promote Shared Custody of Children After Divorce*, WASH. POST (Dec. 11, 2017). See also Mark B. Baer, *Commentary on ‘The Dad Dilemma: Lisa Ling Meets up with Dads on the Losing Side of Custody Battles’*, Mark B. Baer, Inc., APLC blog. (Nov. 14, 2018).

¹¹⁰ Federal Judicial Center, *Federal and State Cooperation: Effectiveness of Implicit Bias Training*, <https://www.fjc.gov/content/337738/effectiveness-implicit-bias-trainings>, (last visited Feb. 19, 2020).

Of course, being exposed to such information and actually allowing oneself to receive and try to understand it are two very different things. Furthermore, such exposure does not necessarily cause a person to become aware – to admit to themselves – that they have any given bias. And, even if it does help them to develop such awareness, they must be motivated “to do more to correct for bias in their own judgments and behaviors.”¹¹¹ Fortunately, by raising awareness, such educational programs may help to establish such motivation.¹¹² After all, what is required for a person to reduce or otherwise manage any given bias they hold is similar to that which is required for a person to change habits.¹¹³ As set forth in *Helping Courts Address Implicit Bias: Resources for Education* published by the National Center for State Courts, when judges become aware of their own biases, and the need to manage them, and they possess the requisite motivation to do so, they can.¹¹⁴ The motivation to be fair matters.¹¹⁵ This is where empathy comes into play. It is another aspect of emotional intelligence and is dependent upon emotional self-awareness, which is the foundation of emotional intelligence. The connection between the two is set forth very clearly by John Lee West, Roy M. Oswald, and Nadyne Guzman in *Emotional Intelligence for Religious Leaders*, as follows:

The trait of Emotional Self-Awareness is foundational to the rest of EQ development. Without it, we are unable to embrace the humility needed to grow as individuals . . . Moving beyond ourselves, we need to have the trait of Empathy for others to refrain from judging or condemning those we encounter . . . Empathy requires that we respect a person enough to listen and do our best to comprehend their perspective. As one pastor explained: ‘I step back and try to put myself in their shoes.’ . . . As Brene’ Brown explains . . . , ‘Empathy is incompatible with shame and judgment. Staying out of judgment requires

¹¹¹ Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, & Jennifer K. Elek, *Helping Courts Address Implicit Bias*, NATIONAL CENTER FOR STATE COURTS 2 (2012), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.259.1089&rep=rep1&type=pdf>.

¹¹² *Id.* at 2.

¹¹³ *Id.*

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.* at A-8.

understanding In order to stay out of judgment, we must pay attention to our own triggers.’¹¹⁶

Meanwhile, in 2002, professor of bioinformatics Karen M. Page published an article which demonstrated how empathy leads to fairness.¹¹⁷ Such empathy involved making offers to others that you would accept if you were in their shoes. . . . However, this all requires well-developed and well-balanced emotional intelligence. And, remember, the research shows that lawyers, as a group, tend to have below average emotional intelligence, which is not surprising because they tend to score poorly in emotional self-awareness, the very foundation of emotional intelligence.¹¹⁸ This is worth repeating because while emotional intelligence consists of soft skills that can be developed, judges and justices are lawyers and they typically receive no training to develop such skills. Politics aside, as President, Barack Obama repeatedly expressed his belief that a good judge needed to have developed the skill of empathy.¹¹⁹ California Governor Gavin Newsom has said the same thing in a different way, referring to humility as the characteristic that “‘anchors all those other qualities’ desired in judges.” He explains that humility “includes the ability ‘to listen’ – the most important attribute to look for in applicants for judgeship.”¹²⁰

To make matters worse, in 2011, Sara H. Konrath, Edward H. O’Brien, and Courtney Hsing demonstrated that between 1979 and 2009, the average level of perspective-taking – the very core of empathy, had declined by 34%.¹²¹ Their findings were

¹¹⁶ JOHN LEE WEST, ROY M. OSWALD, & NADYNE GUZMAN, EMOTIONAL INTELLIGENCE FOR RELIGIOUS LEADERS 56, 57, 103, 104 (2018).

¹¹⁷ Karen M. Page, *Empathy Leads to Fairness*, 64 BULL. MATHEMATICAL BIOLOGY 1101, 1111 (2002). See also Mark B. Baer, *If You View Empathy as a Sign of Weakness, Think Again: When Empathy Is Evenly Distributed, Justice and Fairness Follow*, PSYCHOL. TODAY (Dec. 17, 2016).

¹¹⁸ ABA *supra* text at note 105.

¹¹⁹ Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1945 (2012).

¹²⁰ *Newsom Will Look for ‘Humility,’ Above All, in Appointing Judges*, METROPOLITAN NEWS-ENTERPRISE (Apr. 22, 2019), <http://www.metnews.com/articles/2019/humility042219.htm>.

¹²¹ Sara H. Konrath, Edward H. O’Brien, & Courtney Hsing, *Changes in Dispositional Empathy in American College Students over Time: A Meta-Analysis*, 15 PERSONALITY & SOC. PSYCHOL. REV. 180, 186 (2011).

based upon 72 studies conducted over that thirty year period. And, most of the decline had taken place since 2000, and there was no evidence to suggest that the decline was leveling off going forward.

It is far easier to just reduce or eliminate judicial discretion, even though that creates inflexible uniform standard solutions. Nevertheless, if the intention is to reduce legal injustice at the hands of judges, the answer is not to pretend that context and complexity do not exist because that forces judges to dispense legal injustice. There is absolutely no need for judges even to attempt to administer justice when their hands are tied in that regard through legislation. In other words, the more power legislators have over the outcome, the greater the impact of their bias because it becomes more institutionalized than localized and therefore produces systemic inequities.

Speaking of institutionalized bias through legislation, laws pertaining to legal process seem particularly relevant to the information set forth in this article. In that regard, examples of how public policy has been used to force a reckoning with bias and change the culture compared to how it can be used to ingrain and worsen existing bias seems fitting.

Over a decade ago, the state of New Jersey enacted the Uniform Mediation Act and a variety of corresponding court rules that changed the default process from the very outset of civil cases (including family law cases) from litigation to mediation. Court Rules 1:40-4 & 6 pertain to the mediation program for Civil, General Equity and Probate cases, and Rules R. 5:4-2(h), 5.5, and 5:8 pertain to Family Law. Such a major change met with resistance because of a preference favoring that which is familiar over something new and different. The neighboring state of New York recently enacted similar legislation because of how well that change played out in New Jersey.

John Kiernan, a past president of the New York City Bar Association described that response as follows:

“The overarching impression that you get by talking to the leadership of the judiciary and court administrators in New Jersey . . . is that, now that the program is basically settled in as a matter of practice, they kind of have a hard time imagining why any court system would not have this procedure in place” One striking development in New Jersey, he said, was how strongly attorneys bought into the program after it was implemented. Court officials from the state told Kiernan

and the [Advisory Committee on ADR] that some lawyers who were cautious about the initiative to begin with now favor it over the previous system. “They commented, for example, that there were categories of practitioners who were initially resistant to mandatory presumptive mediation who now, if you try to take it away from them, would be rioting in the streets because they so strongly buy into this being a better mechanism for resolving disputes” Attorneys practicing matrimonial law have been particularly smitten with the change.¹²²

Compare that to recent developments in California in that regard.

California has no rule requiring lawyers to advise their clients of non-adversarial processes and approaches from which they could make voluntary and informed decisions. However, effective January 1, 2019, in the event that lawyers represent or consult with clients utilizing the mediation process, they are first required to obtain their clients’ informed consent regarding a particular risks associated with the mediation process. That risk is not new, but was raised by a California Supreme Court Justice in his concurring opinion in a particular case involving mediation confidentiality and the possibility that “it will effectively shield an attorney’s actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive.”¹²³

For good reason, various bar associations and others insisted that something be done to protect the public from such a risk. As a result, the California Law Revision Commission spent years trying to come up with a workable solution to address the concern. The issue was extremely contentious because of the need to balance the risk of harm to the public with the preservation of mediation confidentiality, which exists “to encourage the candor necessary to a successful mediation.”¹²⁴

Ultimately, the solution involved legislation requiring that prior to utilizing the mediation process in any particular case or

¹²² Dan M. Clark, *New York Courts to Begin Presumptive Mediation for Civil Cases Later This Year*, N.Y.L.J. (May 16, 2019), <https://www.law.com/new-yorklawjournal/2019/05/16/new-york-courts-to-begin-presumptive-mediation-for-civil-cases-later-this-year/>.

¹²³ *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. Ct. App. 2011) (Chin, J. concurring).

¹²⁴ *Id.* at 1083.

otherwise representing or consulting with clients involved in mediation, attorneys must have their clients sign a very specific Mediation Disclosure Notification and Acknowledgment, which spells out the above-referenced risk associated with mediation.

On its face, this law may seem like a reasonable solution, especially considering the importance of voluntary and informed consent. However, research clearly shows that people who receive lopsided information will be biased accordingly and make decisions in accordance with such bias. This research indicates “that people do not compensate sufficiently for missing information even when it is painfully obvious that the information available to them is incomplete.”¹²⁵

The reason the information is “lopsided” is because lawyers are not required to provide their clients with any other information pertaining to the pros and cons associated with any given process and approach, except with regard to this particular risk associated with mediation. As such, members of the public are “protected” by increasing their fear of using the mediation process without providing them with any warnings of the risks associated with the adversarial process.

People’s biases can and do impact public policy and public policy then influences people’s biases.

VIII. Conclusion

The importance of all of this information “assumes that the truth matters.”¹²⁶ In that regard, attorneys should never lose sight of the fact that “the adversarial process lies at the heart of the American system of law because it is thought to be the royal road to truth.”¹²⁷

Furthermore, remember that this particular organization – the American Academy of Matrimonial Lawyers – released its *Bounds of Advocacy* in 2000 for the purpose of discouraging lawyers from zealously advocating when families are involved, and encouraging them to utilize a counseling and problem-solving approach. That document referred to the lawyer taking this ap-

¹²⁵ Lyle A. Brenner et al., *On the Evaluation of One-sided Evidence*, 9 J. BEHAVIORAL DECISION MAKING 59 (Mar. 1996).

¹²⁶ Moskowitz, *supra* note 95.

¹²⁷ Seligman, *supra* note 30.

proach as “a counselor” and called this approach “constructive” for the welfare of families and society’s preservation. It made clear that lawyers should be familiar with non-adversarial processes and approaches for resolving family law matters, such as mediation. And, most importantly, it stated, “At its best, matrimonial law should result in disputes being resolved fairly for all parties, including children.”¹²⁸

However, as a result of all of the biases set forth herein, among other reasons, the goals set forth by this very organization almost two decades ago have yet to be achieved. While attorneys cannot imbue others with emotional self-awareness or control, what, if anything, they do with it, attorneys can work to develop their own emotional intelligence, a first step of which involves education – the ultimate purpose of this article.

¹²⁸ American Academy of Matrimonial Lawyers, *Bounds of Advocacy: Goals for Family Lawyers* (2000).

