

# Confronting the Challenge of the High-Conflict Personality in Family Court

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## Introduction

Those who interact with family law courts often wryly note the disparity between the term “family law,” conjuring up images of collaboration and warmth, with the reality of the knock-down, drag-out wars experienced by family law litigants. When people divorce and engage in financial fights and custody battles, emotions run high. Money, marital status, and parenting status go to the very heart of human identity, so it isn’t surprising that legal proceedings involving divorce or the breakup of a nonmarital relationship involving children trigger fear, anger, recrimination, and an array of other strong feelings.

In spite of these strong feelings, the vast majority of family law cases resolve outside court through some manner of settlement procedures. It is estimated that only 10 percent of family law disputes end up going to trial,

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whereupon they take up the lion's share of work for family law courts.<sup>1</sup> One might assume that these rare cases exclusively involve highly complicated divisions of property or particularly irregular custody disputes. Instead, a significant percentage of the most fractious family law cases do not involve complex legal issues, but rather they involve individuals who appear to be bafflingly unable to resolve their disputes.<sup>2</sup> Despite the existence of reasonable options and opportunity for resolution in which both sides relinquish some things and gain other things, these cases drag on for years, marked by voluminous filings, persistent relitigating of previously settled issues, introduction of new issues, multiple changes in attorneys and even in judicial officers, and a seeming inability to reach closure.

A litigious person with an axe to grind and sufficient money and time can file endless motions. This reality informs all litigation, of course. But the high emotional pitch of family law disputes is particularly prone to find parties who spend years fighting in court. The voluminous records in these high-conflict cases bear witness to the lengths to which family courts must go to hear each motion, consider each issue, and address each case on its own merits. It is a fundamental tenet of our judicial system that decisions can only be made once due process is served through the appropriate hearing or trial.<sup>3</sup> But as one long-time family lawyer jokingly put it, "Sure, everyone is entitled to their 'day in court,' but the question is, how many days before we cut them off?"<sup>4</sup>

Any number of factors might intensify the level of conflict in a family law dispute. And even the sanest, steadiest, most mentally healthy parties can get embroiled in litigation when it seems impossible to split the proverbial baby. As one oft-repeated saying puts it: "criminal judges see bad people at their best, while family law judges see good people at their worst." Which parent should be the primary caretaker for the children? Should the children move with the parent who is moving to another state? Should the house be sold? Who owns the family business? Issues like these can and often do

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1. Aaron Thomas, *What Types of Divorces Typically Go to Trial?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/family-law/divorce/what-types-of-divorces-typically-go-to-trial.html> (last visited Oct. 7, 2019).

2. For a detailed discussion on this body of cases, see *infra* notes 9–29 and accompanying text.

3. The Supreme Court has long-settled case law on this issue, concluding that due process is essentially the right of a party to be provided "notice" and "an opportunity to be heard" on all issues in dispute. *See, e.g.,* Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974) (holding "that some kind of hearing is required at some time before a person is finally deprived of his property interests").

4. Subject A, Interview with E. Rosenfeld (Apr. 5, 2018) (transcript on file with authors).

become hot-button topics during a divorce and can generate much conflict, expressed not only emotionally but also through litigation.

Yet in the majority of family law cases, in spite of the high stakes, the parties reach resolution relatively swiftly, presumably because they share the desire to reach closure and are motivated to seek stability and move on with their lives.<sup>5</sup>

What interests us here are the cases that do not reach closure. The family law literature, along with our research described herein, suggests that there is a significant subset of protracted family law conflicts that do not resolve because one or sometimes both parties do not want resolution.<sup>6</sup> Instead of the typical motivation toward settlement, these cases feature a party who is drawn toward, rather than away from, conflict. Whether animated by a genuine belief in their cause, anger over the loss of a relationship, a desire to harass their now-opponent, an affinity for the pageantry of court, or some combination of these factors and others, the litigious client presses the family law court into service.

The literature surrounding these cases tends to refer to these litigants as “high-conflict personalities” or “high-conflict people.”<sup>7</sup> It is a descriptive rather than a diagnostic term; there is no such category in the *Diagnostic and Statistical Manual*, the standard classification of mental disorders used by mental health professionals in the United States.<sup>8</sup> Instead, it is a useful way to describe the personality traits that so often surface in the divorce cases that defy settlement, in spite of reasonable and readily available terms.

This Article undertakes a comprehensive overview of the problems associated with high-conflict personalities in the family law system. Part I offers an overview of the relatively sparse literature on this topic in both professional family law journals and the popular press. This literature is typified by “war stories,” testifying to the toll these litigants take on would-be former spouses, offspring, lawyers, and the family law system as a whole.

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5. See Thomas, *supra* note 1 and accompanying text; *infra* note 42 (discussing “enlightened self-interest” as a motivating factor in facilitating marital dissolution).

6. See *infra* notes 48–80 and accompanying text.

7. BILL EDDY, HIGH CONFLICT PEOPLE IN LEGAL DISPUTES (2d ed. 2016) [hereinafter EDDY, HIGH CONFLICT 2016]; see *infra* notes 10, 25 (providing Eddy’s definition of “high-conflict personalities”).

8. Even if some percentage of these protracted disputes involve litigants with diagnosed personality disorders (such as narcissistic personality disorder, see DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645, 669–72 (5th ed. 2013) [hereinafter DSM-V]), many litigants in these cases lack formal diagnoses. See *infra* notes 31, 94, and accompanying text.

But other than identifying these challenges, to date the family law literature offers little more than individualized strategies and suggestions for managing the challenging client. The solutions are piecemeal, failing to yield a systematic understanding of the synergistic forces that perpetuate these protracted disputes, and still less of the prospects for ameliorating the downstream harms they occasion.

In response, we designed a qualitative survey that builds just such a systemic understanding by drawing together multiple first-hand experiences of family law practitioners, judges, and experts in handling high-conflict cases. Part II describes the methodology employed in our study, which consisted of a series of interviews with family law experts. Part III then identifies and analyzes the common themes that emerged from these interviews. Finally, Part IV proposes a series of responses to the challenges posed by high-conflict litigants in the family law setting. These solutions range from pragmatic strategies designed to facilitate case resolution to systemwide reforms, which offer long-term strategies for alleviating the burdens these cases place on the many stakeholders affected by them.

## I. Literature Review

In light of the disproportionate burden they place on the family court system, the literature on high-conflict cases is surprisingly sparse.<sup>9</sup> Rather than taking an academic approach to the subject, the leading books and articles tend toward a self-help tone, offering guidance for lawyers, spouses, and mental health professionals who are struggling to resolve protracted disputes. Read together, these books and articles offer both poignant testimony to the havoc wreaked by these cases and insight into the ways in which the family law system's defining characteristics tend to exacerbate the traits that are the hallmark of those with high-conflict personalities.

To begin, it is helpful to have some background on what is meant when family lawyers refer to "high-conflict personalities." Edward Budd, author of "The Impact of a Parent's Personality Disorder: On the Family Law Attorney, Staff, Evaluators, and Other Professionals," describes the toxic synergy that arises when individuals with certain personality disorders find themselves navigating family law disputes.<sup>10</sup>

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9. In Appendix B, we present a bibliography of the existing literature: a largely nonscholarly collection of books and articles written on the topic of high-conflict personalities in the family law system.

10. Edward C. Budd, *The Impact of a Parent's Personality Disorder: On the Family Law Attorney, Staff, Evaluators, and Other Professionals*, 34 *FAM. ADVOC.*, no. 4, Spring 2012, at 34.

The personality disorders to which Budd refers are not sharply defined; rather, they are diagnostic terms used to describe individuals whose personalities are typified by a set of defining characteristics or tendencies. The Mayo Clinic defines narcissistic personality disorder as “a mental condition in which people have an inflated sense of their own importance, a deep need for excessive attention and admiration, troubled relationships, and a lack of empathy for others.”<sup>11</sup> People with narcissistic personality disorders have problems accepting criticism or defeat; they are often self-centered, arrogant, and manipulative.<sup>12</sup>

Budd explains how the character traits associated with narcissistic personalities pose problems for family lawyers. First, they make it difficult for an attorney to discern what information a client is telling is actually true and therefore make it difficult for an attorney to advocate effectively for the client.<sup>13</sup> Second, a narcissist’s self-image will be threatened by any negative feedback or criticism that arises over the course of the legal proceedings.<sup>14</sup> Indeed, because they maintain an abiding conviction that they are right, when things do not go their way, narcissists are apt to blame others. As we will discuss later with illustrations drawn from our research, this character trait drives downstream conflicts such as the filings of grievances against lawyers.<sup>15</sup>

Another personality disorder to which Budd calls particular attention is borderline personality disorder, a mental health disorder that impacts the way one thinks and feels about oneself and others.<sup>16</sup> Common attributes associated with borderline personality disorder are an intense fear of abandonment, idealizing someone one moment and then suddenly believing the person is cruel or does not care enough, and rapid changes in self-identity and self-image.<sup>17</sup> People with borderline personalities tend to idealize, to invite boundary violations, and to “triangulate” by endeavoring to gain advantage over perceived rivals by manipulating them into conflicts with each other.<sup>18</sup>

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11. *Narcissistic Personality Disorder*, MAYO CLINIC (Nov. 18, 2017), <https://www.mayoclinic.org/diseases-conditions/narcissistic-personality-disorder/symptoms-causes/syc-20366662>.

12. *Id.*

13. Budd, *supra* note 10, at 36.

14. *Id.*

15. Beth Maultsby & Kathryn Flowers Samler, *High Conflict Family Law Matters and Personality Disorders*, 39th Annual Advanced Family Law Course ch. 7, at 1 (2013).

16. *Borderline Personality Disorder*, MAYO CLINIC (July 17, 2019), <https://www.mayoclinic.org/diseases-conditions/borderline-personality-disorder/symptoms-causes/syc-20370237>.

17. *Id.*

18. *Id.*

Here, too, Budd explains how these personality traits complicate the job of the family lawyer. The tendency to blur boundaries, for example, puts attorneys at risk of being placed in positions that are uncomfortable or even dangerous.<sup>19</sup> Blurring boundaries may lead to boundary violations.<sup>20</sup> For example, these clients might take to calling their attorney excessively, or asking their attorney to complete tasks outside the scope of the professional relationship, including attempting to seduce the attorney.<sup>21</sup> Clients with borderline personalities often idolize their attorney when things are going well, then quickly villainize the attorney when faced with adverse rulings.<sup>22</sup>

Attorneys who fail to recognize and manage these traits will find it challenging to meet their ethical obligations to serve as zealous advocates for their clients. The rapid fluctuations in their client's self-image and identity often trigger changes in the client's vision for the ideal outcome of the case.<sup>23</sup> This challenge requires the attorney to navigate the demands for ever-changing goals and strategies, and to be able to handle the vilification that results when the client feels disappointed or perceives any setback.<sup>24</sup> The inherently adversarial nature of the court system also heightens the chance of triangulation because it provides the client with ready-made opponents: the spouse, any offspring, the opposing counsel, and the judge.

Of course, it is not only the lawyer who struggles in these protracted conflicts. For insight into the impact of these cases on family members and others in the legal system, there is the work of Bill Eddy, a social worker and a lawyer, and the co-founder of The High Conflict Institute.<sup>25</sup> Eddy has authored several books offering tools and advice for managing high-conflict personalities in the legal setting.<sup>26</sup> His work offers rich insight into how and why the default structure of our family law system

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19. Budd, *supra* note 10, at 36.

20. *Id.*

21. *Id.* at 36–37.

22. *Id.*

23. *Id.*

24. *Id.*

25. Bill Eddy, *LCSW, Esq.*, HIGH CONFLICT INST., <https://www.highconflictinstitute.com/billeddy> (last visited June 3, 2019).

26. BILL EDDY, HIGH CONFLICT PEOPLE IN LEGAL DISPUTES (2006) [hereinafter EDDY, HIGH CONFLICT 2006]; BILL EDDY, MANAGING HIGH CONFLICT PEOPLE IN COURT (2008); BILL EDDY, IT'S ALL YOUR FAULT (2008); BILL EDDY, DON'T ALIENATE THE KIDS (2010); BILL EDDY & RANDI KREGER, SPLITTING: PROTECTING YOURSELF WHILE DIVORCING SOMEONE WITH BORDERLINE OR NARCISSISTIC PERSONALITY DISORDER (2011); BILL EDDY, BIFF: QUICK RESPONSES TO HIGH CONFLICT PEOPLE, THEIR HOSTILE EMAILS, PERSONAL ATTACKS AND SOCIAL MEDIA MELTDOWNS (2011); BILL EDDY, SO, WHAT'S YOUR PROPOSAL (2014); BILL EDDY, 5 TYPES OF PEOPLE WHO CAN RUIN YOUR LIFE: IDENTIFYING AND DEALING WITH NARCISSISTS, SOCIOPATHS, AND OTHER HIGH-CONFLICT PERSONALITIES (2018).

inevitably activates the traits that are the hallmark of those with high-conflict personalities.

Eddy’s central message draws on his observation that the dominant trait of a high-conflict personality is to view relationships as adversarial. The family law system activates this trait because it quite literally creates adversaries, pitting former couples against one another as opposing parties in litigation. In addition to the inherently adversarial nature of the family law system, Eddy notes how the procedural mechanisms by which family courts process cases play to the vulnerabilities of these high-conflict personalities.<sup>27</sup> In *High Conflict People in Legal Disputes*, Bill Eddy offers this side-by-side illustration of the various characteristics of high-conflict personalities as they interact with the standard features of family courts.<sup>28</sup>

*High Conflict People in Legal Disputes: Comparative Chart*<sup>29</sup>

| Characteristics of High Conflict Personalities | Characteristics of Court Process                      |
|--|---|
| Life-time preoccupation: blaming others.       | Purpose is deciding who is to blame; who is “guilty.” |
| Avoid taking responsibility.                   | The court will hold someone else responsible.         |
| All-or-nothing thinking.                       | Guilty or not guilty are usually the only choices.    |
| Always seeking attention and sympathy.         | One can be the center of attention and sympathy.      |
| Aggressively seeks allies in their cause.      | Can bring numerous advocates to Court.                |
| Speaks in dramatic, emotional extremes.        | Can argue or testify in dramatic, emotional extremes. |
| Focus intensely on others’ past behavior.      | Can hear and give testimony on others’ past behavior. |
| Punishes those guilty of “hurting” them.       | Courts are where our society imposes punishment.      |
| Try to get others to solve their problems.     | Try to get the Court to solve their problems.         |
| It’s okay to lie if they feel desperate.       | Lying (perjury) is rarely acknowledged or punished.   |

For all they teach us about why the most protracted disputes in the family law system disproportionately involve parties with high-conflict personalities, neither Eddy nor Budd envisions a systemic set of remedies that would facilitate resolution. Instead, their focus, like that found

27. EDDY, HIGH CONFLICT 2016, *supra* note 7, at 35–36.

28. *Id.*

29. *Id.*

in the bulk of the shorter articles on the subject, is on providing tools, coping strategies, and advice for those who find themselves stuck in such disputes.<sup>30</sup> As such, the current literature bears mute witness to the widespread problem of gridlock in these cases, just as the paltry discussion of solutions serves to underscore the intractable nature of the problem.

In the remainder of this Article, we offer broad-based solutions grounded in the experience of professionals working in the field. We begin by describing our research study, through which we elicited a broader and more precise understanding of underpinnings of these cases, and then conclude by laying out a framework of proposed reforms designed to empower players within the family law system to move these intractable cases toward closure.

## II. Terminology and Methodology

In order to gain a better understanding of these high-conflict cases, of the reasons underlying the family law system's struggle with them, and of the extent of harm caused by the delayed resolution, we sought to interview experts with deep first-hand knowledge of the problem. Before describing our study in the following section, a few words about terminology and methodology are in order.

### *A. Scope of the Study*

In the study described below, we refer to some of the litigants as having “high-conflict personalities.”<sup>31</sup> This terminology is fraught. As noted earlier, this term is not a precise diagnosis, but a description of personality traits associated with litigants who, rather than working toward settlement, seem intent on prolonging and intensifying family law disputes. In fairness, family law litigants and attorneys often view their opponents as aggravating the conflict; the issue here is one of degree. Added to the challenge of defining this category of cases is the reality that for any number of reasons, it is relatively unusual for litigants to have mental health diagnoses.<sup>32</sup> Finally, there is the problem of the stigma associated with mental illness in society. There is a present and dangerous risk that naming these personality traits as deviant will trigger unfounded bias and

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30. See *infra* Appendix B.

31. See *supra* notes 10, 25, and accompanying text (referring to Eddy's description of high-conflict personalities).

32. Note that many mental health issues do not come to light until litigation ensues.



discrimination against those whose only “crime” is being outside some nebulously defined norm.

With these caveats in mind, it is useful to begin our discussion by providing some background understanding of the ways in which mental health experts might understand and classify the behaviors observed in these high-conflict personalities. Note that under contemporary understandings of personality development and mental health, we ought not see these individuals as having chosen to be conflict driven. Instead, we might understand their behavior as deriving from one of two broad categories of mental illness: mood disorders and personality disorders.<sup>33</sup> A mood disorder is characterized by moods or emotional states that are not consistent with an individual’s circumstances. Classic examples of mood disorder are depression and bipolar disorder.<sup>34</sup> By contrast, personality disorders are characterized by fixed, pathological patterns of thought and behavior.<sup>35</sup> A person with a personality disorder often has difficulty interacting with other people because the person is fundamentally different from the majority of his peers, while a person with a mood disorder has normal interactions with others outside of their periods of extreme sadness or happiness.<sup>36</sup>

Both of these types of mental health disorders present challenges in the family court setting. Both may lead parties to engage in conflict-seeking behavior, whether by actively perpetuating the dispute and appearing to thrive on conflict, or simply by being seemingly unable to rationally assess and evaluate potential resolutions, and therefore resisting attempts at resolution. Yet, because episodic mood disorders typically can be managed by treatment, and by definition shift over time, they do not pose the same long-term challenges associated with personality disorders in the family court system.<sup>37</sup> When a party becomes unstable due to a mood disorder, lawyers and judges find work-arounds to manage the resulting problems, and cases involving such parties typically resolve once the episode has passed. Therefore, our study focused exclusively on the issues arising in family court surrounding litigants with personality disorders.

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33. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

34. *Id.*

35. *Id.*

36. *Id.*

37. For a discussion of the conflicts associated with litigants who have mood disorders, and a description of some techniques our experts recommended for managing such clients in family law disputes, see Appendix A.

### *B. Study Design*

Beginning in May 2018, we conducted a series of interviews with family law professionals, each of whom was selected because of his or her deep experience in a variety of family law contexts. Because Ms. Rosenfeld has practiced law in Northern California for over twenty years, she was able to use her extensive professional network in identifying key players for this study.

Our study design embraced a qualitative approach, aiming to capture the broadest possible range of insights and information. We opted to utilize conversational-style, in-person interviews, which better facilitate the ability of the interviewer to follow up on open-ended questions. Subjects included thirteen family law experts, twelve practicing in California and one in New York.<sup>38</sup> In addition to family lawyers, our pool of interviews also included family law judges from two different counties in Northern California, and a seasoned Northern California custody evaluator, frequently appointed by family courts in high-conflict cases. All of our interviewees were mid- or late-career professionals, each of whom had at least ten years of experience in family law. Most had significantly more than a decade's experience; indeed, one had forty-five years of experience in this field. To protect the confidentiality and anonymity of both the interviewees and the cases they discussed with us, we have altered identification markers in this Article.<sup>39</sup>

We solicited interviews by both email and telephone, explaining that we were studying the phenomenon of cases that were resistant to settlement, in spite of the existence of reasonable options for resolution. We framed our inquiry as seeking the reflections of family law veterans on the factors that drive these conflicts, and on strategies they have employed to facilitate resolution. All but one of the experts we contacted agreed to participate in the study.

The interviews typically lasted between one and two hours. A majority of the interviews were audio recorded, but a small number of the interviewees requested we take written notes, rather than recording them. Our interviews were conducted over a period of approximately six months. At the conclusion of all our interviews, the conversations were transcribed. Then the researchers reviewed the transcripts and identified

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38. Two of the attorneys have both a legal and a mental health background and hence were able to offer a unique perspective into the mental health issues at issue.

39. Given the legally and ethically sensitive nature of the cases they discussed, we have ensured our interviewees' anonymity by identifying them solely through an alphabetical code, along with the date of the interview. All interviews took place in California in 2018 and 2019.

common themes and patterns. A detailed analysis of our findings follows in Section IV.

We began each interview by asking questions about the interviewee's family law experience in general, and then moved into more specific, though still open-ended, questions about their experiences with protracted disputes. Typically, we began by asking subjects to describe their most difficult cases, and why they found them so difficult. Our goal in these interviews was to deepen our understanding of the factors that contributed to a case being perceived as an outlier.

Given our review of the literature, our initial research plan focused specifically on one personality disorder we knew to be associated with these high-conflict cases: narcissistic personality disorder (NPD).<sup>40</sup> As a reminder, NPD is defined as a personality disorder with a long-term pattern of abnormal behavior characterized by exaggerated feelings of self-importance, excessive need for admiration, and a lack of empathy.<sup>41</sup> Someone with NPD is drawn to conflict for these very reasons, and might be resistant to the "enlightened self-interest" that brings most family law disputes to closure.<sup>42</sup>

As we began our interviews, though, we quickly discovered that NPD was too narrow a focus. Many of our experts noted that it is the rare case where there is an actual diagnosis on the record in family court.<sup>43</sup> But the lack of a common diagnosis does not mean that there is no discernable pattern to cases involving high-conflict personalities. Indeed, all of our interviewees identified cases in which individuals simply refused to work toward settlement and described the litigants who prolonged these disputes as being driven not by greed or anger, but rather, by what our experts viewed as a mental illness. Just as Justice Potter Stewart's definition of obscenity—"I know it when I see it"<sup>44</sup>—acknowledged a reality that is no less real for all the challenges inherent in articulating a definition, so too does the term "high-conflict personalities" point to a real, if loosely

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40. See Budd, *supra* note 10, at 34–39; see also EDDY, HIGH CONFLICT PEOPLE 2006, *supra* note 26.

41. See *supra* notes 11–12 (defining narcissistic personality disorder).

42. The term "enlightened self-interest" was used by one of our interviewees to describe the non-high-conflict, "normal" or "reasonable" family law litigant's approach to resolving family law disputes: an approach that takes into consideration all the factors, including the opponent's point of view, while keeping the litigant's self-interest front and center. Subject F, Interview with E. Rosenfeld, E. Lee & J. Bernard (May 18, 2018) (transcripts on file with the authors).

43. Subject A, *supra* note 4; Subject C, Interview with E. Rosenfeld (Apr. 24, 2018); Subject D, Interview with E. Rosenfeld (May 4, 2018); Subject F, *supra* note 42 (transcripts on file with the authors).

44. *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

defined, issue with which both family law attorneys and judges regularly wrestle. Our experts did not agree on a single diagnosis when discussing these cases, yet every single one of them described the challenge of disputes (often multiple ones) in which individuals seemed drawn to conflict, thereby thwarting settlements and prolonging the underlying dispute.

### III. Findings and Analysis

It is helpful, before reviewing the collective themes emerging from our interviews, to remember the context in which family law disputes arise. Our system of civil law governs all legal disputes outside of criminal matters, including marriage and divorce. But unlike corporations, marriage and divorce are not simply social constructs designed to facilitate arm's-length transactions. In modern society, we generally marry for love, or some approximation of love.<sup>45</sup> Our relationships are fundamentally emotional in nature; for the most part, spouses enter into the legal institution of marriage without attending to the transactional aspects of the value they will be conferring upon one another.<sup>46</sup> Spouses do not pay one another to be good parents, to bring each child into the world, to boost one's image with the boss, and so on; and if a party to a marriage falls short of his or her partner's expectations and wishes, that partner does not sue his or her spouse for damages.

Yet once parties seek to end their marriages, they are thrust into a legal system that focuses on liability and pecuniary compensation. Historically, this has meant that upon filing for divorce, soft notions of altruism gave way to hard-scrabble negotiations in which the parties, aided by their attorneys, present past grievances as evidence weaponized to contradict and undermine the other's version of the marriage that was. Although no-fault divorce laws and the advent of fixed formulas governing property distribution have reduced these subjective disputes in the context of marital property, when it comes to the matter of child custody, there is no avoiding

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45. Eli Finkel & Logan Ury, *The History of Marriage: Why Marrying for Love Is a Newer Idea Than the Printing Press*, THRIVE GLOBAL (Sept. 26, 2017), <https://thriveglobal.com/stories/the-history-of-marriage-why-marrying-for-love-is-a-newer-idea-than-the-printing-press/>.

46. The modern trend toward premarital agreements can be considered an exception. Yet even there, premarital agreements govern financial matters alone, and if they attempt to govern behavior, child-rearing practices, religion, and the like, such conditions generally are construed as violating public policy. *See, e.g.*, CAL. FAM. CODE ANN. §§ 1600–1617 (West 2019); Uniform Premarital Agreement Act., *id.* § 1612 (setting forth a restriction against contracting away a child's right to support in a premarital agreement).

the need for subjective assessments.<sup>47</sup> Added to these factors are the norms governing the attorney-client relationship. It is an attorney's obligation to secure the outcome that is in her client's best interest, an obligation that sometimes further polarizes individuals who already are emotionally at odds.<sup>48</sup> When one adds to the above mix a litigant with a personality that is drawn to the battle rather than eager for a resolution, you have the recipe for endless strife, stress, and waste.

Our interviews with family law experts underscored the patterns described in the preceding section's literature review about what goes wrong in divorce proceedings involving high-conflict personalities. They described these cases as their longest-running, most intensely litigated cases, characterized by unrelenting, intense emotions and, in retrospect, by the negative downstream damage to all of the actors involved.

For the purposes of this analysis, we will address these patterns in two parts. First, we discuss the cases themselves, describing two defining characteristics: the protracted nature of the disputes and their emotionally fraught nature. Then, we will turn to the negative impact these cases have on all those involved: the parties, their children, the attorneys, and ultimately the family law system as a whole.

### *A. Protracted Disputes*

Attorneys are hard pressed to define a "typical" timeline for a family law case. Each case has unique facts, and any number of factors may prolong a given dispute: challenges in valuing assets; the involvement of competing financial experts in settlement negotiations; reliance on custody evaluators or other third-party mental health professionals; crowded court dockets; availability of witnesses; the need for custody evaluations; unexpected

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47. For a description of the extent to which legal formulas have facilitated the settlement of marital property disputes, see Katharine Baker, *Homogenous Rules for Heterogenous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319 (2012); for a thoughtful overview of the ways in which child custody remains perennially contested territory, see JUNE CARBONE, *FROM PARTNERS TO PARENTS* (2000).

48. Consider, for example, how the heightened emotions of divorce might complicate the oft-cited obligation of a lawyer to use "zealous advocacy" in representing a client. *See, e.g.,* *People v. McKenzie*, 668 P.2d 769 (Cal. 1983) ("The duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law."). *See also* DR 7-101(A)(1); DR 7-102(A)(8); *see also Guidelines for Professional Conduct*, U.S. DIST. CT. N.D. CAL., [https://www.cand.uscourts.gov/professional\\_conduct\\_guidelines](https://www.cand.uscourts.gov/professional_conduct_guidelines) (last visited Oct. 6, 2019) ("These Guidelines should be read in the context of . . . all attorneys' underlying duty to zealously represent their clients. Nothing in these Guidelines should be read to denigrate counsel's duty of zealous representation. However, counsel are encouraged to zealously represent their clients within highest bounds of professionalism.").

illnesses, travel, or other delays on the part of a party, attorney, or judge. But even with the need to coordinate multiple schedules, the typical family law dispute resolves out of court within eight to twenty months of filing.<sup>49</sup>

It bears noting that, in nearly every divorce, the parties move at two different paces depending on their readiness and ability to process such a significant life transition. When two rational actors are involved though, each will possess some incentive to resolve the divorce and move on, and so the case will resolve, typically at the pace set by the party most resistant to action.

What distinguishes cases involving high-conflict personalities from these more typical disputes is that the individual with a high-conflict personality is not simply struggling to process a life transition. Instead, this individual is fueled by conflict; indeed, they obtain emotional or psychological gratification from it.<sup>50</sup> One of the hallmarks of these cases is that the conflict is so protracted that it becomes normalized. Rather than progressing toward resolution, as time passes in these cases, the idea of a settlement grows increasingly remote.

#### 1. ATTACHMENT TO CONFLICT

Our interviewees' stories help illustrate the ways in which these disputes differ from the typical divorce cases. One particularly clear example involves a case that lasted for ten years.<sup>51</sup> The attorney involved represented the child, rather than either of the divorcing spouses, and as a result, the attorney's perspective permits us enough distance from the parties to the dispute to allow us to notice both the irrational prolongation of the dispute and the impact of the dispute on a third party—the child.

The case was so extensively litigated that the court file consisted of thousands of pages of discovery, pleadings, orders, and custody documents.<sup>52</sup> Although the father did not have a formal mental health diagnosis, a review of the record yields ample evidence of his high-conflict personality. Indeed, at one point, the court sanctioned the father \$225,000 for his conduct.<sup>53</sup> He had hired and fired fifteen different

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49. *Divorce in California: How Much Does It Cost? How Long Does It Take?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/family-law/divorce/divorce-in-california.html> (last visited June 3, 2019).

50. Beth Maultsby & Kathryn Flowers Samler, *High Conflict Family Law Matters and Personality Disorders*, STATE B. TEX. (Aug. 5, 2013), <https://www.gbfamilylaw.com/wp-content/uploads/2014/03/Beth-High-Conflict-Family-Law-Matters.pdf>.

51. Subject F, *supra* note 42.

52. *Id.*

53. *Id.*

attorneys. He repeatedly flouted court orders, keeping the child overnight when he was supposed to return her to the mother, and was repeatedly put on supervised visitation, only to resort to making his own rules again and ignoring court orders once visitation reverted back to unsupervised. Even the child's school had gotten involved in litigation: they obtained a restraining order against the father to foreclose his practice of appearing at school to try to be with his child without permission. There were multiple custody evaluations. Yet, even when the father obtained equal custody, his supposed end-goal, he continued to violate orders. The child's lawyer described the case as being in court "every two to three weeks."<sup>54</sup>

Despite the father's combative conduct, the child was attached to both parents. Our interviewee, the attorney representing the child, worked hard to honor that bond by securing an equal timeshare with both parents, something the attorney believed was best for the child. The attorney observed that although the father was unable to separate his own needs from those of his child, "Setting aside that 'minor' defect, I think he is a competent, caring father."<sup>55</sup>

The attorney was baffled when, despite achieving equal custody, the father continued to pursue the litigation, filing motions and resisting settlement. At that point, the attorney realized that the father's constant court battles were not about obtaining a particular result or securing a fair resolution. Had that been the case, the result he had ostensibly been seeking—equal custody—should have brought some measure of peace. Instead, the attorney came to understand that the courtroom had become a kind of stage upon which the father wanted or needed to keep performing. Despite the mental, emotional, and financial costs involved, the father kept filing motions and violating orders. As we spoke, the attorney wondered aloud whether the father actually enjoyed this constant negative engagement with his ex-spouse and with the court system.<sup>56</sup> It certainly seemed that way to the attorney.

As noted, our experts' stories typically did not involve parties with known, diagnosed mental health challenges. Instead, the cases they described were marked by the professionals' gradual recognition that one of the parties involved was not behaving rationally. In conversation after conversation, our interviewees recalled what might be termed an "aha" moment—often well into a dispute—when it became clear that the relevant

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54. *Id.*

55. *Id.*

56. *Id.*

party was expending more time, money, and energy on prolonging the case than resolving it.

## 2. INFALLIBILITY

Another theme emerging from the high-conflict litigants our experts described was a fixed belief in the rightness of their position. They viewed themselves as infallible and rejected any efforts at compromise, along with any court rulings that suggested they might be wrong.

For example, consider a case described by one lawyer, who had represented the wife in one of his longest-running cases—nearly eleven years at the time of this writing.<sup>57</sup> At the outset, the husband was represented by counsel, but after eighteen months, he fired his lawyer and has been self-represented for the past nine years. As opposing counsel, this lawyer had to deal directly with the husband and gained a deep and disturbing familiarity with his sense of entitlement.

The husband's words and actions reflected the belief that only he knew what was right in any given situation. This power dynamic had manifested throughout their marriage. Indeed, one of the sticking points in the divorce involved the disposition of rights to twenty parcels of real property acquired during the marriage. At different points during the marriage, the husband had obtained the wife's quitclaim on all the properties by pressuring her to sign documents in a hurried manner. The wife had no inkling of what she was signing; the husband simply put piles of paper before her, pulled out the relevant pages and ordered her to sign. Given the uneven power dynamic, she acquiesced time and again, never realizing she was relinquishing her rights to valuable community property.

The wife's lawyer, our interviewee, succeeded in obtaining a reversal of all the property transfers by demonstrating that the husband had breached his fiduciary duty to his wife. However, even years after winning that hearing, thereby restoring the wife's entitlement to the marital property, the deeds, along with all other marital assets, remained in the husband's name, tied up in the ongoing litigation.

It is telling that, nine years into divorce proceedings, the husband still maintained a genuine belief that the wife did not really wish to divorce him. He routinely told the wife's lawyer that only he had her best interests at heart. His sense of infallibility and the accompanying certainty that there should be no divorce has fueled almost a decade's worth of legal proceedings. Asked what it would take to end the conflict, the wife's

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57. Subject C, *supra* note 43.



attorney shrugged and wryly observed, “(He) needs to keep engaging with her. He just cannot let her go.”<sup>58</sup>

### 3. WHEN BOTH PARTIES ARE CONFLICT-DRIVEN

Although it takes only one high-conflict personality to prolong a family law dispute, sometimes both parties are attached to the conflict. The result can be astonishingly costly, both literally and figuratively. Consider the following custody dispute, described by one of our experts.<sup>59</sup> Like the preceding example, it has been ongoing for over nine years. Our interviewee represented the mother in the case, whom she described as “intense, hyper-analytical and constantly pushing dad’s buttons.”<sup>60</sup>

The mother had been fighting for full custody of the young child from the start, based in part on the father’s long history of significant mental health issues, beginning with an involuntary commitment to a mental hospital when the child was an infant. Unwilling to settle for anything less than full custody, by the time of our interview the mother had paid her attorneys close to \$1,000,000 in fees.<sup>61</sup>

The father, too, was wedded to the conflict. In the four years that our interviewee served as the wife’s lawyer, the father had filed no fewer than sixteen appeals of the judgments limiting his custody rights, none of which were successful.<sup>62</sup> Nor were his motions limited to the custody dispute. In addition, he had filed motions for malpractice and other complaints against two of his prior counsel as well as against the child’s guardian ad litem.<sup>63</sup> The father’s third lawyer, whom our interviewee described as “crazy in her own right,”<sup>64</sup> enabled the flood of legal motions to continue, leading the family law judge to sanction both the father and his attorney for frivolous litigation.<sup>65</sup>

While the parties fought on, their son, who by now was a teenager, was suffering. Recently diagnosed with an attachment disorder, his parents’ court battle over him is all he has ever known of family life.<sup>66</sup>

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58. *Id.* For a discussion of the creative solutions this lawyer developed for working with the husband in this case, see *infra* Part V and notes 101–22 (and accompanying text).

59. Subject E, Interview with E. Rosenfeld & M. Oberman (May 16, 2018) (transcript on file with authors).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

## 4. ONGOING SENSE OF CRISIS

In addition to the protracted nature of these cases, the other striking feature our experts noted was the extent to which they are emotionally fraught. To be sure, divorce cases are always emotionally challenging. As an attorney-psychologist we interviewed noted, “The adversarial process itself brings out psychopathology.”<sup>67</sup> Even in the best of cases, he explained, “Family law issues go to the litigants’ very identity. What they are fighting for is their need to survive, so neurologically, it triggers the fight-or-flight response.”<sup>68</sup> This response is even more pronounced when one or both of the parties struggle with mental health issues.

The result, as we repeatedly heard in our interviews, is that lawyers and judges alike experience these cases and clients as emotionally intense and exhausting. Lawyers described their high-conflict personality clients as being in a constant state of “high alert.”<sup>69</sup> Numerous experts described the dramatic stories their clients told of how the other side had deeply wronged them, or was out to get them, and how drastic measures were needed to protect the client, and sometimes the children, from the extreme evil of the other side.

This “high alert” problem is tricky in family law disputes because every family lawyer knows that there are numerous situations where a client truly needs immediate legal intervention in order to protect his or her well-being.<sup>70</sup> What distinguishes the cases involving litigants with high-conflict personalities is that for such individuals, the crisis is chronic—it defines the tenor of the entire case, even if it lasts for years.

The fevered emotional pitch of these cases is integrally related to the protracted nature of the disputes because of the tendency of these individuals to resist or reject court rulings they dislike. Lawyers described the challenge of representing clients who defied court orders and settlements because they felt they knew better than the court, and therefore should not follow the “wrong” orders the court had entered.<sup>71</sup> As one of our interviewees put it, “They don’t think anything that anyone else has to say is applicable to them.”<sup>72</sup> Even—or especially—when judges made

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67. Subject B, Interview with E. Rosenfeld (Apr. 10, 2018) (transcript on file with authors).

68. *Id.*

69. Subject A, *supra* note 4; Subject B, *supra* note 67; Subject C, *supra* note 43; Subject F, *supra* note 41; Subject L, Interview with E. Rosenfeld (Aug. 14, 2018) (transcript on file with authors).

70. For example, a client experiencing intimate partner violence will need a restraining order. See CAL. FAM. CODE ANN. §§ 6200–6320 (West 2019).

71. Subject C, *supra* note 43; Subject L, *supra* note 69.

72. Subject L, *supra* note 69.

orders that would move the case toward resolution, the high-conflict client would not abide by the orders, resulting in a new layer of litigation to address the noncompliance with court orders.<sup>73</sup> In effect, as time went on, their clients created new crises.

Consider the story told by one lawyer, who described a case involving a client who had been diagnosed with narcissistic personality disorder.<sup>74</sup> Over the course of seven years, the case was regularly in court. As in all of the cases our experts described, this client's file was thick with multiple filings, covering everything from *ex parte* applications on visitation issues to a host of emergency motions.<sup>75</sup> In addition, the lawyer described the ways in which the client consumed a disproportionate and eventually overwhelming amount of her time. There were lengthy phone calls with the client, including on weekends, during which the attorney spent a great deal of time listening to the client's woes, offering support, and coaching the client on how to communicate with her ex-spouse. After seven years and numerous junctures at which the client rejected reasonable settlements, the client ran out of money to pay for legal services. The attorney substituted out of the case and does not know whether the case eventually resolved, or whether it remains in the courts.<sup>76</sup>

Nor is the emotional fever pitch of these cases limited to the desire for retribution against their spouse. Indeed, the experts almost universally reported conflict within the attorney-client relationship, particularly when things did not go the way they wanted in court.

One attorney described winning a relocation trial for the client, permitting the client to make her long-desired move from California to another state, along with her children.<sup>77</sup> At that point, the client wrote the attorney a lengthy, complimentary email thanking the attorney for the wonderful work and successful outcome. Then, having exhausted her resources, the client opted to pursue the child support portion of the trial on her own.

When the client ultimately lost her petition for child support, she turned on her former lawyer, blaming her for the outcome even though the attorney had not been involved in that piece of the case.<sup>78</sup> The client began to slander and defame the attorney on social media and lawyer

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73. Subject C, *supra* note 43; Subject L, *supra* note 69.

74. Subject A, *supra* note 4.

75. *Id.*

76. *Id.*

77. Subject A, *supra* note 4.

78. *Id.*

review websites. The attorney reached out to the former client, politely requesting the client desist from her behavior and hoping to clear up any misunderstanding.<sup>79</sup> The attorney soon realized the client was on a fact-blind crusade, and nothing would stand in her way. The attorney had little recourse. As the attorney put it, “There was nothing I could do at that point. In retrospect, it seems clear that when the client makes you out to be the rescuer, they are always going to be the victim.”<sup>80</sup>

Another of our experts attested to the same sort of role-reversal with a former client: “You don’t see it at first. But looking back, I was the client’s savior for the first few months of the case. Then, she flipped, and now it seems that according to her, I can’t do anything right.”<sup>81</sup>

These examples illustrate how family law disputes involving individuals with high-conflict personalities become particularly resistant to resolution. From the voluminous filings alone, one can see the ways in which these disputes are a costly burden on the family law system. Less visible to the public, but no less costly, are the negative consequences these cases have on those whose lives they touch. Indeed, the defining features of these cases are not simply their length and intensity, but also the amount of collateral damage they generate.

## *B. Collateral Damage*

### 1. IMPACT ON THE NONLITIGIOUS SPOUSE

There is little surprise, but much heartache, in noting the impact of these protracted, high-intensity disputes on the litigants involved. The would-be ex-spouse wants to move on with his or her life, yet the ongoing litigation typically ties up their marital estate, effectively depriving them of the financial resources essential to building their new life. Then there are the economic costs of these years-long legal battles. There are lawyers’ fees accumulating with every new filing.<sup>82</sup> There are days missed from

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79. *Id.*

80. *Id.*

81. Subject L, *supra* note 69.

82. The typical family law attorney in California’s Bay Area charges an hourly fee that ranges from \$350 to \$700.

work because of hearings and court appearances. There are the costs of expert evaluations.<sup>83</sup>

And, of course, the costs are not limited to the financial realm. The emotional toll of a never-ending divorce is hard to overstate. One finds evidence of the negative emotional impact among Internet communities, support groups, and the popular literature. Consider the titles of Bill Eddy's various books on the subject: *Quick Responses to High-Conflict People*; *It's All Your Fault! Managing High Conflict People in Court*; *High-Conflict Parenting Survival Guide*; *High Conflict People in Legal Disputes*.<sup>84</sup> Also, there are the plethora of online articles and posts offering guidance by veterans of the struggle to divorce a spouse with a high-conflict personality.<sup>85</sup>

In interview after interview, our experts spoke of a consistent set of traits that mark their most protracted disputes. Many of them noted that for every case that drags on, there are cases in which the exhausted spouse simply caves in. In a sense, it is hard to draw the line between the typical divorce settlement and the case where an exhausted spouse capitulates in a bid to stop the ongoing engagement with her high-conflict ex-spouse. What distinguishes the latter cases is that, even after the capitulation—even after the opposing spouse agrees to all the terms of a settlement sought by the high-conflict party—the high-conflict personality will avoid closure by actively pursuing more litigation.

Recall the example of the father who, even after obtaining his stated goal of equal custody, continued to file new motions.<sup>86</sup> This dynamic was baffling and frustrating to the minor child's attorney, who had supported and advocated for equal custody, and to the mother and her attorney. Our interviewee put it this way: "If the other side has personality issues and they have some lawyer who keeps litigating, what can you do? What can

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83. The costs of various family law experts vary, but in the experience of Ms. Rosenfeld, typical family law experts such as psychologists, custody evaluators, and forensic accountants can run the range of \$300 to \$500 per hour. It is not unusual for a client to spend between \$15,000 and \$75,000 on experts over the course of a normal marital dissolution. These costs increase exponentially in high-conflict cases.

84. See *supra* note 26.

85. See Appendix B; Linda Esposito, *Forget Co-Parenting with a Narcissist, Round 3*, PSYCHOL. TODAY (Nov. 24, 2018), <https://www.psychologytoday.com/us/blog/anxiety-zen/201811/forget-co-parenting-narcissist-round-3>; Macaela MacKenzie, *8 Signs You're Totally Divorcing a Narcissist*, WOMENS HEALTH (June 18, 2018), <https://www.womenshealthmag.com/relationships/a21599606/divorcing-a-narcissist/>. Quora.com is a popular web-based forum for layperson experience on managing high-conflict personalities.

86. See interview with subject F, *infra* notes 104–05, 112, and accompanying text.

the courts do? If one side wants to keep fighting, you either have to keep fighting them or you just run out of ammunition and you quit.”<sup>87</sup>

## 2. IMPACT ON CHILDREN

When a case is unnecessarily prolonged, children suffer. No matter how well divorcing parents may try to shield their children from court processes, children can at the very least pick up on the stress and anxiety surrounding them. Even without knowing the details of their parents’ dispute, children may develop anxiety and depression.<sup>88</sup> The longer the conflict lasts, the greater the acrimony, stress, and anxiety that litigating parents experience, and the more exposure the child has to these negative feelings.

As time goes on, a child inevitably will develop an increased awareness of their parents’ ongoing legal battle. When they are old enough to read and comprehend court documents, children can find and read court papers left around the house (whether they are left lying around wittingly or not). As their children become emotionally more sophisticated, litigating parents may attempt to enlist them as allies in their battle, something to which our attorneys collectively attested.<sup>89</sup> Such bids for loyalty take many forms, and may be subtle or blatant, but making a child pick favorites is never good for the child. Indeed, the literature about the impact of divorce on children, even in routine cases, cautions parents to shield their children or risk them suffering short-term and long-term emotional harm.<sup>90</sup> In describing the impact of these high-conflict cases on children, our experts pointed to a wide range of mental health struggles they had witnessed: alienation from a parent, anxiety, damaged self-esteem, relationship problems, depression, and attachment disorder.

## 3. IMPACT ON ATTORNEYS

Given the emotional intensity of the disputes they are called upon to help resolve, it is no wonder that family lawyers report high levels of professional burnout.<sup>91</sup> If handling a garden-variety divorce can be

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87. Subject A, *supra* note 4.

88. Catherine M. Lee & Karen A. Bax, *Children’s Reactions to Parental Separation and Divorce*, 5(4) PEDIATRIC CHILD HEALTH 217 (2000).

89. Family law attorneys and judges know this as parental alienation of the child. Alienation is the “programming” of a child by one parent to denigrate the other. See Edward Kruk, *The Impact of Parental Alienation on Children* (Apr. 25, 2013), <https://www.psychologytoday.com/us/blog/co-parenting-after-divorce/201304/the-impact-parental-alienation-children>.

90. Teresa Matich, *A Guide to Evergreen Retainers for Law Firms*, CLIO (June 13, 2018), <https://www.clio.com/blog/evergreen-retainers-law-firms/>.

91. Lee Rosen, *What to Do When You Can’t Take Family Law Anymore*, ROSEN INST., <https://roseninstitute.com/family-law-anymore/> (last visited June 3, 2019).

stressful for a lawyer, it is easy to see how much harder the work will be when a dispute involves a high-conflict personality. Our experts all testified to the excess workload generated by their high-conflict clients. The voluminous records in these cases speak to the extraordinary amount of work they generate for lawyers.

To be sure, lawyers get paid for such work. Family law attorneys bill on an hourly basis, typically in increments of a tenth of an hour, so the more time spent working on a case, the more the attorney earns. Additionally, many lawyers structure their payment according to an “evergreen retainer system,” wherein the retainer must be replenished back to the original amount once it dips below a specified number. Evergreen retainers are intended to ensure the lawyer is paid on a timely basis.<sup>92</sup> As such, one might think some lawyers would welcome these cases, pursuant to their bottom-line incentive to pursue aggressive litigation strategies as a means of running up the bill. However, pursuing every path the client wants to take and thereby running up his or her fees is neither an ethical nor an effective mode of advocacy.<sup>93</sup>

Regardless of whether or not a lawyer is well-compensated, the income does not eliminate the emotional toll taken on lawyers involved in cases with high-conflict clients. Our experts all spoke of the struggle to manage the urgent emails, phone calls, and text messages sent by their high-conflict clients. Several of our interviewees described lengthy calls after hours and on weekends, in which they found themselves coaching their client through a seemingly endless number of fresh disputes.<sup>94</sup> In response to their clients’ emotional neediness, the attorneys reported feeling increasingly stressed and frustrated, as though no matter how much coaching, support, and encouragement they provided, the client never graduated to a higher level of independent and productive functioning.

Given this level of dysfunction in the lawyer-client relationship, it is perhaps unsurprising that there is a great deal of lawyer turnover in these cases. But the problems generated for family lawyers do not always end when their high-conflict clients move on to other lawyers. Instead, these former clients sometimes become vindictive. In our small sample of interviews, no fewer than four lawyers reported having suffered, or having watched colleagues suffer, reputational damage as a result of actions taken

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92. Matich, *supra* note 90.

93. CAL. R. PROF. CONDUCT r. 1.1 (duty to act competently); *id.* r. 1.3 (duty to act diligently); *id.* r. 1.5 (not charging or collecting an unconscionable fee); *but see id.* r. 1.2 (client directs the purpose of representation within limits imposed by law and lawyer’s professional obligations).

94. Subject A, *supra* note 4; Subject D, *supra* note 43; Subject L, *supra* note 69.

by their former clients. Angry litigants can also file attorney malpractice suits, and even if the lawsuit is baseless, it takes time and money to defend against such claims. Although none of our interviewees had been sued, several spoke of the psychological toll taken by the latent threat of litigation.

But litigation is more expensive and time-consuming than the easier form of vengeance: posting negative reviews online. In today's technology-fueled world, the Internet provides a forum for disgruntled family law litigants. One merely needs to run a few Google searches to find damning information about family law attorneys written by former clients or opposing parties, information that goes well beyond a rational assessment of the attorney's particular strengths and weaknesses. In California, dissatisfied litigants created a website, purportedly dedicated to the public, on which they have posted invasive personal attacks on their former lawyers and judges, along with latent threats such as those inherent in the posting of personal details, photos, and slurs.<sup>95</sup>

Although it is difficult to ascertain the extent to which the reputation-slashing phenomenon involves high-conflict personalities, it was striking to hear so many of our experts provide examples of this particular form of harm from their individual experiences with high-conflict cases. At the very least, one can say that the availability of online venues for reviewing lawyers provides yet another platform in which the high-conflict litigant can vent and relitigate his or her frustrations, small and large.

#### 4. IMPACT ON FAMILY LAW SYSTEM AS A WHOLE

Finally, there are the ways in which these protracted cases each reflects a hidden bill paid by the state taxes levied to cover the costs of running our family courts. Let's just consider the basics. As with all sorts of public services, keeping a courtroom open costs money. Court personnel from janitors to judges must be paid; electricity bills must be paid; physical structures, furnishings, and technology must be purchased and maintained. These costs are borne by the taxpayers of a given state, so each of these overlitigated cases is ultimately paid by the citizens.

In addition to the costs to taxpayers, these high-conflict cases take up a disproportionate time in any given family law docket. A hearing that runs overtime generates excessive costs to parties to other conflicts, who may have taken time off from work, arranged child care, and planned for their day in court, only to find that the court is unable to hear them because

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95. JANE & JOHN Q. PUB., <https://www.janeandjohnqpublic.com> (last visited June 3, 2019).



of the time consumed by someone else's high-conflict case. Although it is difficult to calculate these indirect costs to third parties, there is little doubting the reality that they must be enormous.

It also bears noting that these cases take a literal and emotional toll on judges. The protracted and intense nature of these conflicts makes it hard for judges to manage their docket of cases. These high-intensity conflicts, with their voluminous filings, take valuable time away from the judge's other work, as they must review and rule on each of the motions filed. Added to the challenge is the extent to which the clients in these tend to run through a series of lawyers. With every new lawyer, there are delays.

All told, between the revolving set of experts and lawyers, the onslaught of motions, and the challenges of reaching closure on even simple issues, these cases exact a real toll on family law judges. Nor are judges immune to the irrational reactions and actions of high-conflict personality litigants.

One of our interviewees, a judge, recounted her four-year ordeal with a high-conflict case.<sup>96</sup> As is common in such cases, the case generated a voluminous number of filings and judicial hearings. The judge's description calls attention to the link between these filings and the systemwide costs these cases generate: "There have been eight judges on this case; I was number seven. And I had about 40 or 50 court appearances with (the parties)." Although the high-conflict litigant involved did not have a formal diagnosis, the judge speculated that the behavior reflected either a borderline or a narcissistic personality disorder.

When confronted with a litigant who abuses the legal system by multiple, frivolous filings, judges can opt to declare the party a "vexatious litigant" and to levy fines against him or her.<sup>97</sup> In this case, the judge described a long history of sanctions issued against the father, ordered both by himself and by previous judges, and totaling between \$300,000 and \$400,000.

Nor are judges immune from the psychological toll taken by these cases. In this case, the litigant did not wait until the case resolved before taking to the Internet. "He created a website and blog dedicated to 'court reform,'" the judge said, "in which he attacks a number of judges."<sup>98</sup> In this blog, the litigant accused people associated with the family law court system of crimes and posted photographs of attorneys and their children. "It's gotten to the point where it's a security concern," the judge said, describing an incident in which the judge was accosted when leaving the

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96. Subject M, Interview with E. Rosenfeld, E. Lee & J. Bernard (Aug. 24, 2018) (transcript on file with authors).

97. See, e.g., CAL. CIV. PROC. CODE §§ 391–391.8.

98. Subject M, *supra* note 96.

building. The litigant and two of his friends had been waiting for him outside the courthouse's employees' exit, and they followed him down the street, spewing vitriol.<sup>99</sup>

Our subject reflected soberly on the costs inherent in this protracted case: “[This litigant] is one of those people whose only occupation for the last six years has been ‘court reform’ and working on his case. He has a background in advertising; he could have gone out and worked and supported himself, but he hasn’t done that. . . . Instead, he has created an immense amount of havoc for the individuals and for the system.”<sup>100</sup>

#### IV. Solutions

As we have seen, when litigants with high-conflict personalities enter the family law system, disputes are prolonged, courts experience backlog in their dockets, and collateral damage results to parties, children, attorneys, the court, and even, indirectly, taxpayers. The advice most consistently heard in our interviews and from our collective review of the literature about these cases is that the best way to respond to high-conflict personalities is to recognize the pattern of behavior and to disengage from the conflict.<sup>101</sup> It will take training to learn to recognize and disengage from conflict-driven litigants. Toward this end, our research elicited a series of pragmatic solutions. Our proposals fall into two broad categories: education and training for lawyers in terms of managing these individuals, whether as clients or as opposing parties, and education and training for judges about how to facilitate settlement in cases involving individuals with high-conflict personalities.

##### *A. Education and Training for Lawyers*

Family law attorneys simply are not sufficiently educated or trained in how to recognize and de-escalate these protracted disputes. With time and experience, attorneys and judges begin to spot recurring patterns and red flags in these cases and some evolve their own ways of handling these cases—or avoiding them altogether. But being able to spot a litigant with a

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99. *Id.*

100. *Id.*

101. *See, e.g.*, Budd, *supra* note 10, at 35 (arguing that when an attorney is not initially able to spot a high-conflict personality and instead believes the client at face value, the attorney may find him- or herself in a difficult situation); Maultsby & Samler, *supra* note 15, ch. 7 (arguing that it is nearly impossible to stop or slow down high conflict if the professionals involved are not educated on how to deal with high-conflict personalities).

high-conflict personality and to predict upcoming behaviors is just the first step. To manage these cases, lawyers need a broad skill set.

We believe that one of the most efficient ways to remedy the problems associated with high-conflict personalities in family law disputes lies in continuing education for family lawyers. The existing literature consists largely of collected “war stories,” which are no substitute for the training that lawyers need in order to move these cases toward resolution.<sup>102</sup> Lawyers must be taught to identify behavioral patterns, to hold personal and professional boundaries, and to communicate effectively and efficiently so that their client will stay focused on legal strategy. It takes skill to learn how to manage a client’s heightened emotional states and discernment to know when to bring in outside services to assist in creative problem solving.

Continuing legal education requirements vary by jurisdiction, but in order to maintain a license to practice law, any practicing family lawyer will be expected to complete a minimum amount of continuing education (CLE) every year.<sup>103</sup> Many continuing education courses are area-specific, providing family lawyers with the opportunity to stay abreast of current developments and to deepen their understanding of their field. The typical CLE family law course offering is somewhat general in format, providing an overview of various aspects of family law practice and principles, reviewing and analyzing new cases, and discussing practical aspects of running a family law office.<sup>104</sup>

Given the pervasive nature of these problem cases, the family law bar would be well served by course offerings that focus specifically on managing cases involving litigants with high-conflict personalities. Below, we discuss the core components we envision for such a program, as gleaned from our interviews and our review of the literature.

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102. See *infra* Appendix B (representative list of existing literature).

103. For example, California attorneys must complete twenty-five hours of minimum continuing legal education (MCLE) every three years and to file a report with the State Bar attesting to the completion of these requirements, along with maintaining records proving compliance in the event of a random audit. Of these, attorneys must take at least four hours of legal ethics, at least one hour on competence issues, and at least one hour in recognition and elimination of bias in the legal profession and society. *MCLE Requirements*, CAL. B. ASS’N, <http://www.calbar.ca.gov/Attorneys/MCLE-CLE/Requirements> (last visited June 3, 2019).

104. See, e.g., *CLE Online Catalog*, SANTA CLARA CTY. B. ASS’N, <https://santaclara.inreachce.com> (last visited June 3, 2019); *Approved Online CLE Courses*, CAL. B. ASS’N, <https://cla.inreachce.com> (last visited June 3, 2019).

## 1. COMMUNICATING WITH HIGH-CONFLICT CLIENTS

The first key to working with a client with a high-conflict personality is to recognize that the client's relationship to conflict is dramatically different from that of the typical family law litigant. Rather than being eager to settle the fight, they are drawn to it. As one of our interviewees, quoting a forensic psychologist, explained, "Their inner life is so painful that conflict and strife actually benefits them because it allows them to look externally, to escape their present reality. . . . [W]in, lose or draw—they always enjoy it."<sup>105</sup>

In such cases, irrational arguments cannot be overcome by rational rebuttals. These clients will not change their minds or alter their behavior in response to strong, persuasive arguments; losing motions; or even court orders. Instead, an effort to pressure or force them into compliance often will backfire, fueling their need to prove themselves right and thereby resulting in additional litigation. Communication strategies are therefore among the most important keys to moving toward closure in a family law dispute involving a high-conflict client.

Our experts spoke about learning over time to be careful not to personalize their interactions with such clients. They ignored the outrageous claims and worked to keep communications concise, factual, and impersonal. The key, several noted, was refusing to engage in battles over who is right and who is wrong, and instead, keeping the conversation future-centered and focused on potential outcomes.

"Always keep in mind that the narcissist lives in an altered reality," said one expert.<sup>106</sup> Another added that, "In dealing with high-conflict people, I am always navigating the fine line between making them feel we are on good terms, and pushing them forward, but not too much."<sup>107</sup> Another attorney echoed this point and took it one step further: "It becomes a process of letting (the client) feel that they came up with the solutions."<sup>108</sup>

Exhibiting courtesy and respect at all times is not only good general practice, it is essential to avoiding further inflaming cases involving individuals with high-conflict personalities. For example, one might employ noncommittal statements such as, "You may be right," followed by open-ended suggestions such as, "How about we try \_\_\_\_\_?" or "Do you think \_\_\_\_\_ will work in this situation?" or even "What do you suggest we do?" Such approaches work, in the experience of our

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105. Subject F, *supra* note 42.

106. *Id.*

107. Subject C, *supra* note 43.

108. Subject E, *supra* note 59.

experts, because they are couched in deferential language that solicits the client's input and appeals to the client's sense of authority. This allows the client to maintain his or her self-image as the ultimate boss in charge. This is not always intuitive for attorneys, who are accustomed to being in charge. Keeping in mind that nothing the attorney can say or do will "cure" the client of a personality disorder, and that agreements can and frequently are reached even between people with two alternate views of reality, the wise attorney must learn to adjust her or his messaging. Indeed, doing so is the best way to permit the attorney to perform the work of marital dissolution for which she or he was hired.

Finally, careful, thorough recordkeeping—important to any attorney-client relationship—is vital to the relationship between the family lawyer and a client with a high-conflict personality. Written records of all communications and agreements help avoid misunderstanding down the line. Follow-up emails or letters summarizing substantive discussions between attorney and client are essential. Given the litigious nature of these clients, and the likelihood that conflict will escalate in the event of any unfavorable rulings or outcomes, such records are a lawyer's best defense.<sup>109</sup>

## 2. SETTING DEFAULT EXPECTATIONS AND BOUNDARIES

One of the challenges inherent in representing the high-conflict client is that the lawyer typically does not realize his or her client's predisposition at the outset of the attorney-client relationship. As such, attorneys are well-advised to adopt defensive policies at the start of every attorney-client relationship that will permit a family lawyer to navigate with greater ease many of the challenges that arise in working with clients who are drawn to conflict.

In addition to the obvious ways to safeguard boundaries, like refusing to give clients their personal phone numbers, one of our experts described this useful strategy she implemented after representing a particularly troubled client.<sup>110</sup> As part of her standard retainer agreement, she includes a clause stating that, if the client takes a position that in the attorney's assessment is contrary to the child's best interest, she will ask to withdraw

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109. Subject A, *supra* note 4.

110. Subject D, *supra* note 43.

from the case. Such a clause may provide a meaningful response to one of the central problems seen in these cases—that of excessive legal filings.<sup>111</sup>

We have seen how the individual drawn to conflict will prolong a dispute by insisting that their attorneys raise an ever-growing list of issues. A retainer agreement committing to safeguard a child's best interests may not entirely resolve this problem, but it does enhance the attorney's ability to set limits with her client, thereby strengthening her capacity to move the case forward, or if that goal proves impossible, to exit the relationship.

### 3. WORKING WITH OPPOSING PARTIES WITH HIGH-CONFLICT PERSONALITIES

Many of the above strategies apply with equal force when it is the opposing party, rather than one's own client, who has a high-conflict personality. The same communication skills for disengagement and de-escalation will serve the opposing counsel well.<sup>112</sup> Doing so often means the attorney must check her own ego and let smaller skirmishes go in favor of the bigger battles. As one of our interviewees described:

Sometimes it means looking at the person's bad conduct and asking yourself, you know, I can have this fight, I'm entitled to it, but is the fight worth it? And normally, I'd say to myself, yes, if I give in here, they will just keep pushing; I need to fight this because I need to set boundaries. But with these cases, you're never going to set boundaries. Ever. You're not training them like you are a normal litigator dealing with a normal opponent. That's my philosophy. It's unfair to my client, yes. But that is the person they married and are now divorcing. You have to do a cost-benefit analysis of where you want to spend your time, energy, and money.<sup>113</sup>

In addition, the lawyer whose client is divorcing from a spouse with a high-conflict personality typically is called on to help her client extract herself from deeply entrenched, negative ways of communicating with her spouse. The acrimony that typifies divorcing spouses is only intensified when one of the parties is prone to seeking conflict.

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111. Sample language might include the following: "If you take a position or request LAW FIRM to support you in a position in a custody matter that is NOT in the best interest of the child[ren], LAW FIRM will ask you to execute a substitution of attorneys immediately." (*See generally*, <https://www.advocatemagazine.com/article/2019-february/terminating-the-attorney-client-relationship>).

112. *See infra* Part V.A.1–2.

113. Subject F, *supra* note 42.

Many of our experts described the ways in which they have learned to assist their clients in communicating more productively with their former partner. The attorney acts as a kind of communication coach, modeling for the client ways to convey his or her message without provoking negative reactions. Equally important is learning to respond only to what requires a response, separating the proverbial wheat from the chaff.

Several of the attorneys we interviewed noted that they advised their clients to restrict the bulk of their communications to email in order to prevent face-to-face episodes, which consistently and predictably spun out of control. The written correspondence also provides a tool for educating and serving the client's needs, as the attorneys could review emails and texts between the client and the opposing party and help them craft straightforward, factual, and nonpersonal responses that resisted the tendency toward conflict escalation.

There are some effective tools that can facilitate de-escalation and disengagement, the most popular of which are technology-based communication programs such as Our Family Wizard and Talking Parents.<sup>114</sup> These programs are web-based and are designed to enable users to avoid face-to-face conflicts, and to streamline all communication and information about a child in one central place. Each of the programs has its own set of special features that assist users in co-parenting. For example, Our Family Wizard has a "tone-meter" that tracks the tone in the communication between the parents, operating as an emotional spell-check.<sup>115</sup>

Although lawyers and judges report satisfaction with these web-based programs in that they reduce the need for in-person negotiations and provide a written record of compliance or noncompliance in protracted disputes, they are limited solutions at best. Moreover, while a court can encourage parties to use these programs, or conceivably order litigants to do so, they are costly and are available only through monthly or yearly subscriptions.<sup>116</sup> And, of course, they offer more of a shield between the parties, rather than an incentive to move them toward resolving their dispute.

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114. OUR FAMILY WIZARD, <https://www.ourfamilywizard.com> (last visited June 3, 2019); TALKING PARENTS, <https://talkingparents.com/home> (last visited June 3, 2019).

115. See OUR FAMILY WIZARD, *supra* note 114.

116. Our Family Wizard subscriptions start at \$99 for a one-year subscription and can cost up to \$209.97 for a two-year subscription; Talking Parents costs between \$0 and \$4.99 a month, depending on the plan. See *supra* note 114.

*B. Judicial Education, Training, and Reforms*

There is perhaps no greater challenge to resolving these protracted family law disputes than that of judicial rotation. In many jurisdictions, family law judges rotate out into other branches of the judiciary every two to three years, which means that anytime a case extends beyond that mark, it is likely to be heard by more than one judge. As we have seen, cases involving litigants with high-conflict personalities tend to linger for years. Each time a new judge hears the case, there is a ramp-up period during which the judge becomes familiar with the personalities and the issues. For the high-conflict party, each new judge presents an opportunity to raise new issues and to relitigate old ones. “These rotating judges are another failure in the system,” remarked one of our interviewees.<sup>117</sup>

Our research suggests two possible remedies for this problem: The first is a longer-term proposal to alter the pace, if not the entire system, of judicial rotation. The second is to recognize that these high-conflict personalities exploit the formalism in the court’s proceedings, and to encourage judges to embrace informal, in-chambers settlement conferences to a greater degree.

As to judicial rotation, it bears noting that the structure of the judiciary in general, and of the family law bench in particular, varies from state to state. But whether they are elected or appointed, family law judges do not receive sufficient formal training in how to manage high-conflict personalities prior to serving on the bench. As such, they learn on the job what works—and what does not work—when handling such cases. And as we have seen from our interviews, these cases generate a lot of work for judges.

Part of the problem inherent in the relatively high level of turnover on the family law bench is that the system consistently loses its experts. Although some judges are dedicated to family law and opt into ongoing service, most judges rotate on and off the bench. When judges assume their new posts in family court, a state may endeavor to provide some intensive training. For example, in California, new family court judges typically attend a week or two of “judge school,” where they receive a crash course in family law. Given the scope of material that must be conveyed in such sessions, with the narrow exception of domestic violence issues, little time and attention are devoted to the types of mental health issues driving these high-conflict cases.<sup>118</sup>

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117. Subject E, *supra* note 59.

118. Subject H, Interview with E. Rosenfeld (May 31, 2018) (transcript on file with authors).



As such, family law judges often begin their service lacking the practice-specific legal background and technical skills they need to understand these cases and move them toward settlement. Then, when they rotate out of family court, there is no means for them to pass on their hard-won expertise to the judges who will replace them.

The easiest remedy for this problem lies in developing issue-specific continuing education programs for judges, similar to those discussed in the preceding section for lawyers. The challenge involves both time and money. The existing structure for continuing judicial education seems, at first blush, like it would support such programs. Like lawyers, judges are required to fulfill continuing education requirements. For example, under California Rules of Court 10.463, a judge or subordinate judicial officer whose primary assignment is to hear family law matters must complete basic family law education within six months or a year (depending on the size of the court) of beginning a family law assignment.<sup>119</sup> In addition, all family law judges must complete a “periodic update on new developments” in California family law and procedure, and “(t)o the extent that judicial time and resources are available, the . . . judicial officer must complete additional educational programs on other aspects of family law including interdisciplinary subjects relating to the family.”<sup>120</sup>

These requirements might be read to provide the structural foundation for educating judges about best practices for handling high-conflict litigants in the family law setting. In practice, though, these regulations are more aspirational than mandatory. Indeed, according to the long-term family law judges with whom we spoke, it is rare that judges’ training includes course offerings dealing with high-conflict personalities at all, let alone within six to twelve months of a judge’s assuming the bench.<sup>121</sup> One put it plainly: “There is not enough training statewide on the mental health issues judges encounter on the family law bench. Of course, it varies greatly from judge to judge, but many don’t correctly read the situations unfolding before them in court.”<sup>122</sup>

Given the disproportionate demands that these personality-driven, high-conflict cases place on judges, the idea of requiring training in the form of continuing education should not be controversial. But in view of the realities that limit the scope and duration of judicial training, there is

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119. CAL. R. CT. r. 10.463.

120. *Id.* r. 10.463(c).

121. Subject H, *supra* note 118; Subject M, Interview with E. Rosenfeld, E. Lee, and J. Bernard (Sept. 4, 2018) (transcript on file with authors).

122. Subject H, *supra* note 118.

a vital need to identify better ways to contain the direct and indirect costs of such cases by harnessing and sharing the expertise of long-time family law judges.

A more ambitious solution to the problem of judicial turnover on these cases might lie in having the case follow the judge until it is resolved. This solution would streamline these high-conflict cases and reduce the possibilities of playing the system. Alternately, a jurisdiction might opt out of the rotation system altogether by creating a permanent (or longer-term) family law judiciary. There are challenges to this approach, as many judges struggle with the emotional nature of these cases, but perhaps with an opt-in system, we might find that a cohort of expert family law judges would make great strides in moving these cases toward closure.

Our faith in the ability of experienced judges to better handle cases involving high-conflict litigants grows directly out of our interviews. When asked to describe effective strategies for resolving these protracted disputes, many of our interviewees described having learned to leverage the power of the informal settlement meetings in order to bring the parties together. While the adversarial style of courtroom judicial proceedings seems to intensify conflict, conversations held in a judge's chambers present an opportunity for de-escalating conflict and even reaching resolutions.

As noted, many individuals with high-conflict personalities have a deep need to be heard and to feel their concerns are taken seriously. When a judge with good mediation and listening skills takes the time to sit in chambers, to hear the parties' concerns, to offer sympathy, and then to make suggestions on legal courses of action, it can go a long way toward resolving existing issues and foreclosing future ones.

"It really does help to work things out in chambers," said one judge. "Even with the ones who are narcissistic or 'not all there,' you can have discussions you don't have on the record in the courtroom." The judge went on to describe her ability to actively listen and reflect back the party's concerns, thereby helping them feel that they have the judge's attention and understanding. "I try to 'give them a piece of candy,' which is about really listening to them, hearing them, validating what they're saying. You've got to validate as much of their world as you can," in order to move the case forward.<sup>123</sup>

There are numerous opportunities for such informal judicial hearings, as every marital dissolution case requires status conferences and pretrial

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123. Subject H, *supra* note 118.

settlement conferences. The experienced family law judge will see in these conferences an opportunity to move the parties toward settlement. Indeed, the “success stories” recounted by our experts featured judges who welcomed the opportunity for additional informal meetings with parties. Some family law judges made themselves available for phone conferences, upon stipulation of the parties. Others held multiple in-chambers meetings. Our interviewees generally reported that the more access the conflict-prone individual had to the judge in an informal setting, the more likely the case was to settle.<sup>124</sup>

## V. Conclusion

An examination of protracted family law disputes reveals a profoundly dysfunctional subset of cases involving individuals whose propensity to seek, rather than avoid, conflict is met by an adversarial system that seems to facilitate ongoing conflict. We have shown the ways in which such cases are fueled by the negative synergies that arise when parties with high-conflict personalities find themselves facing marital dissolution. Because there is no treatment that will “cure” such individuals, the optimal means for resolving these cases lies in recognizing that the high-conflict party is drawn to the conflict, rather than to settlement, and devising effective means of disengaging and de-escalating the dispute.

By calling attention to the consistent features of these cases and by gathering and synthesizing the experience of seasoned experts, this Article points the way to pragmatic, systemic reforms. To work more effectively within existing court systems, family law attorneys and judges alike would benefit from thoughtful education aimed at deepening their understanding of personality disorders and learning effective ways to communicate and work with such individuals. In the end, by empowering family lawyers and judges to take control and help move these disputes toward resolution, our suggestions will benefit all parties to these troubling, costly cases.

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124. In addition to affording the judge an opportunity to move the case toward settlement, these informal conferences may yield insight into the need for an intervention in order to protect the child’s best interests. Judges have the option of ordering evaluations along these lines. In addition, in a protracted dispute, a judge may opt to appoint a lawyer for the child. *See, e.g.*, CAL. FAM. CODE ANN. §§ 3150–3153; CAL. R. CT. r. 5.240. While the cost of such appointments precludes the routine employment of minor’s counsel, the presence of a lawyer bound exclusively to represent the child’s needs can help the court cut through the various claims and counterclaims and assist the court in understanding the child’s true needs.

## Appendix A

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### *Episodic Mood Disorders and Managing Intermittent High-Conflict Personalities*

An interesting subset of cases that emerged from our research involved clients with episodic mood disorders such as bipolar personality disorder. Although the conflicts arising around these cases may resemble those associated with high-conflict personalities, the trajectory of these conflicts is distinct and merits separate discussion.

When a client experiences an acute phase of a cyclical mood disorder, such as a manic episode, the attorneys described struggling to effectively represent their clients' interests because of the ways that the episode affects the client's capacity to negotiate. Individuals in the midst of mania, for instance, typically exhibit an exaggerated sense of their own power and capabilities, an unrealistic assessment of the negative evidence that will be introduced against them, an inflated ego, and an uncompromising attitude. In some instances, the mania involves full-blown delusions, putting the party that much farther afield of the reality of the courtroom or the negotiating table. And, in the event that the lawyer for a manic client manages to negotiate an agreement, the client may well object to the agreement when he or she cycles out of the mania. Moreover, attorneys representing clients who wish to actively engage their case during a manic phase must be mindful of the legal and ethical obligation to ensure that their client is competent and capable of making a knowing and voluntary agreement, with the accompanying waiver of a right to trial.<sup>125</sup>

In contrast to the stories our interviewees told about their struggles to work with clients with high-conflict personalities, though, our experts found creative, effective ways of working with these clients. This was particularly true in regard to clients with bipolar disorder. Bipolar disorder does not present itself uniformly, but many people with this disorder are extremely high functioning, managing their disorder with medication and therapy and leading full, satisfying, and productive lives. When clients were capable of understanding the cyclical nature of their condition, they were able to engage with their lawyer in anticipating the challenges and managing the risks, including those related to the need to protect the well-being of any children. In one example, the party had created a written

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125. See CAL. R. PROF. CONDUCT r. 1.1 (defining competency); *id.* r. 1.16(b)(8) (defining lawyer's obligation when a client is incompetent).

chart of behaviors, thoughts, and feelings that were her early indicators of slipping into mania. She consulted the list whenever her daily routine deviated from normal because she knew that such deviation increased her odds of becoming destabilized. The chart included remedial measures she would take to avoid mania and a psychotic event. Her ability to self-regulate saved her from losing custody of her child.

When a client is less able to self-regulate his or her mood disorder, the attorneys described challenges around the timing of court hearings. One particularly challenging ethical quandary arises when a client's mood disorder is not part of the court record. The stigma around mental illness may understandably lead a client to want to hide the diagnosis from the court. One of our experts described the struggle between honoring the duty of loyalty to the client and the client's desire for privacy, with the concern that real harm might result to a child while in the care of a manic parent.<sup>126</sup>

Attorneys in this situation reported a pragmatic solution: They attempted to time court hearings around the client's cyclical phases. That is, if a court hearing was scheduled during their client's manic phase, they moved to continue it to a later date, when the client was likely to be out of the manic phase. This was not always easy to do, as in some instances they needed to provide to the court a medical basis for continuing a court hearing, while being careful not to reveal confidential information that might harm their client's position.

Mental illness is stigmatized both in society at large and in the courtroom, and even a client who was taking medication for bipolar disorder and taking full responsibility for her treatment could be demonized in the custody battlefield. Therefore, the attorney had to walk a fine line between providing enough information to support good cause for a continuance, while at the same time protecting the client from having the bipolar condition revealed, which might in turn open a Pandora's box of questioning, examination, claims, and allegations relating to the client's parenting.

One of the judges we interviewed had had a great deal of experience with bipolar clients, both as an attorney and while serving on the family court bench. This judge had developed an effective approach for ensuring children's safety while maximizing the child's contact with both parents, including the bipolar one. Working with the parties and their attorneys in voluntary in-chambers settlement conferences, where his caring and sensitivity to their situation was visible to them, the judge was able to

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126. To understand the duty of loyalty to a client, see CAL. R. PROF. CONDUCT r. 1.7 cmt. 1.

mediate agreements between the parties whereby the treating psychiatrist would report directly to the judge on a regular basis. The nature of the reporting was very limited: The psychiatrist simply confirmed that the client was appearing for scheduled appointments.<sup>127</sup> The judge knew from experience that when a bipolar client begins missing regularly scheduled appointments, he or she most likely is not taking prescribed medication and is at risk of cycling out of control. By the parties' own agreements, when the therapist reported missed appointments, the judge immediately suspended visitation. In this way, the judge not only protected the child's well-being, but also incentivized the party with the mood disorder to remain actively engaged in treatment.

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127. Subject H, *supra* note 117.

## Appendix B

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### ***Resources for Lawyers and Litigants in Family Law Disputes Involving High-Conflict Personalities***

Budd, Edward C., *The Impact of a Parent's Personality Disorder: On the Family Law Attorney, Staff, Evaluators, and Other Professionals*, 34 FAM. ADVOC., no. 4, Spring 2012, at 34.

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