

KNOWING LAW'S LIMITS: COMMENTS ON "FORGIVENESS:
INTEGRAL TO CLOSE RELATIONSHIPS AND INIMICAL TO
JUSTICE?"

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It is an honor and a privilege to have the opportunity to comment on Professor Fincham's thought-provoking paper about the relationship of forgiveness to our most important personal relationships and our concepts of justice.

I want to emphasize at the outset that I agree with much of what Professor Fincham has to say. It is certainly true that forgiveness is integral to close relationships, at least relationships that are healthy and nurturing.² Anyone who has maneuvered the complexities of an interpersonal relationship—which is to say any of us—likely can attest to the need for those in the relationship to seek and grant forgiveness from and to each other.

Professor Fincham is also correct that there is nothing in the nature of either forgiveness or justice that makes one inimical to the other.³ The experiences of restorative justice in the criminal context and of apology in medical malpractice litigation make this clear. Both movements demonstrate that it is fully possible for an individual who has suffered a criminal or tortious wrong at the hand of another to experience both justice and forgiveness.⁴ As Professor Fincham points out, and as the law understands, forgiveness does not mean forsaking the right to recompense.⁵ Thus, an individual convicted of assault is punished, regardless of whether the victim has forgiven the offender, and a physician whose care is negligent must compensate even a forgiving patient.

The issue becomes more complicated, however, once we enter the realm of family law, particularly when we focus on the law relating to the dissolution of marriage. This complexity stems from the nature of the relationships involved, the nature of the conduct at issue, and the stated expectations of the judicial system. In looking at these issues, I hope to

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² Frank Fincham, *Forgiveness: Integral to Close Relationships and Inimical to Justice?*, 16 VA. J. SOC. POL'Y & L. 357 (2009) (manuscript at 18-19, on file with author).

³ *Id.* (manuscript at 18).

⁴ See generally Aaron Lazare, *The Healing Forces of Apology in Medical Practice and Beyond*, 57 DEPAUL L. REV. 251, 263 (2008); Heather Strang and Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 28-29, 35 (2003) (noting ability of victims participating in restorative justice programs to both experience forgiveness and believe they had been treated fairly).

⁵ Fincham, *supra* note 2 (manuscript at 11).

draw from the two areas in which I teach: family law and legal ethics. Although the concepts addressed here can apply to all family members involved in a divorce, including children, I will focus particular attention on the spouses who are the actual parties to the divorce proceeding.⁶

First, the close family relationships at stake in a divorce case differ in a significant way from the interpersonal relationships involved in a typical criminal or tort case to which concepts of restorative justice are currently being applied. While there are certainly far too many instances in which a crime is perpetrated by one family member on another,⁷ in the typical situation in which principles of restorative justice are employed in the criminal justice setting, the victim and offender have no need or reason to remain in contact following resolution of the court proceedings. Likewise, in the medical malpractice context, even when a longstanding doctor-patient relationship is involved, the relationship is a professional, not personal, one. Terminating that relationship as a result of the tort suit carries little risk of long-lasting emotional harm to either doctor or patient.

In the family law context, on the other hand, the relationship in question is the most personal and intimate one we know: that of husband and wife. Moreover, the purpose of the court proceedings is not to *resolve* the dispute between the two, but to *dissolve* the legal relationship between them. Yet even as the legal relationship signifying the emotional bond between the couple ends, the practical necessity of interaction between the former spouses continues, particularly if there are children involved whose custody and care are at issue.

Professor Fincham stresses that reconciliation between the parties is not required following forgiveness.⁸ Indeed, in some relationships, such as abusive ones, reconciliation may be inappropriate.⁹ As he also emphasizes, however, forgiveness facilitates reconciliation.¹⁰ In the divorce context, we do not expect full reconciliation between spouses,

⁶ Solangel Maldonado, *Taking Account of Children's Emotions: Anger & Forgiveness in "Renegotiated Families,"* 16 VA. J. SOC. POL'Y & L. 443 (2009) (manuscript at 30, on file with author) [hereinafter *Taking Account*].

⁷ In these instances, the criminal conduct should be addressed within the criminal justice system, not the family court system. While the family court may appropriately take note of the criminal conduct in resolving issues in divorce such as child custody and visitation, family court is not the proper venue for adjudicating criminal responsibility. *See, e.g.,* American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.11 (limiting access to a child for a parent who has abused, neglected, or abandoned the child, or who has engaged in acts of domestic violence).

⁸ Fincham, *supra* note 2 (manuscript at 11).

⁹ *Id.* (manuscript at 30).

¹⁰ *Id.* (manuscript at 11).

which would eliminate the need for the judicial proceedings entirely. Instead, the most we realistically hope for is a semi-reconciliation of sorts, where the spouses repair the relationship sufficiently to be able to interact without conflict in the future, even though not well enough to continue the marriage.

The problem is that even this partial reconciliation cannot occur without forgiveness. Yet in the divorce context, this partial reconciliation may leave the forgiving spouse feeling less than satisfied. As Professor Fincham notes, forgiveness requires significant effort.¹¹ In a divorce, the forgiving spouse may feel that he has expended significant effort with little to show for it. This is particularly the case if the forgiving spouse believes that the other spouse has not made reciprocal efforts to forgive or to adequately express remorse for problems that occurred during the marriage. The forgiving spouse may also feel dissatisfied if he has hoped for a restoration of the marital relationship through full reconciliation but the other spouse is resistant and continues to pursue divorce. When the forgiving spouse was not the one to initiate divorce proceedings, then following forgiveness, the forgiving spouse is left in a situation he does not want, forging a life he did not imagine. It is not surprising, then, if at least in the short-term, forgiveness may not seem worth the effort.

Research confirms what we all know from personal experience: the ability to forgive depends, at least in part, on the emotional state of the forgiver. Thus, a spouse who feels insecure is unlikely to forgive the other spouse even on days when the other spouse is being warm and supportive.¹² Likewise, hurt feelings lead to anger, which inhibits the ability to forgive.¹³ Few situations are more likely to cause a spouse to feel insecure and hurt than divorce, particularly when the other spouse has initiated the separation. These feelings of anger and insecurity, no matter how well-founded, are inimical to forgiveness.

Second, the conduct that must be forgiven in the dissolution context differs in significant ways from the conduct at issue in the restorative justice arena. In the criminal or tort context, no matter how grievous the injury, the victim generally must focus on forgiving a single action or set of actions on the part of the wrongdoer.¹⁴ In divorce, on the other hand, even if the dissolution is prompted by a cataclysmic event such as

¹¹ *Id.* (manuscript at 7).

¹² Phillip R. Shaver et al., *What's Love Got to Do with It? Insecurity and Anger in Attachment Relationships*, 16 VA. J. SOC. POL'Y & L. 491 (2009) (manuscript at 14, on file with author).

¹³ Mark Leary, *Losing Perspective: Emotion, Ego, and Overreactions to Undesired Events*, 16 VA. J. SOC. POL'Y & L. 425 (2009) (manuscript at 6-7, on file with author).

¹⁴ Lazare, *supra* note 4, at 255 (describing types of harm caused to patients in a medical practice).

adultery, each spouse is likely to perceive that the other has committed a multitude of sins great and small during the course of the marriage.¹⁵ The sheer volume of the accumulated wrongs may make forgiveness more difficult. In Professor Fincham's terms, what is at issue is not a specific hurt, but a "hurtful relationship," in which each new wrong triggers memories of the old.¹⁶ Furthermore, even when both spouses recognize that the marriage is fatally flawed, the decision by one spouse to actually seek divorce is likely to be perceived by the other as yet another injury that itself requires forgiveness. If the spouse who has been left has attempted to remain committed to the relationship throughout the marriage and has worked to forgive the other's transgressions in the past, the final betrayal through the other spouse's departure from the marriage may be the last straw that makes further forgiveness impossible.¹⁷

Third, while there is more at stake in terms of the relationships in family law than in criminal or tort proceedings—or perhaps *because* there is more at stake—our system of justice currently tries to accomplish less in family law than in other contexts. In the criminal justice system, there is an explicit understanding that because the offender has caused harm to the victim, the victim and society are entitled to redress. Likewise, in the tort context, the law recognizes that an individual who has been harmed by the negligent or intentional act of another is entitled to a legal remedy, most often in the form of monetary compensation.¹⁸ Even in contract actions, where the relationship between the parties is one of arms-length dealing, the law acknowledges the harm caused by broken promises and awards monetary damages and equitable relief for breach of those promises.

In each of these situations, the law promotes a key requirement for forgiveness: the need for the victim to acknowledge that he has been wronged and to demand the right to better treatment.¹⁹ As Professor Fincham points out, it is impossible for forgiveness to take place unless the forgiver recognizes that he has suffered harm.²⁰ While forgiveness can occur without the wrongdoer acknowledging the harm she has caused, acknowledgment by the wrongdoer or others aids the forgiveness

¹⁵ Fincham, *supra* note 2 (manuscript at 25); *cf.* Maldonado, *Taking Account*, *supra* note 6, (manuscript at 32-33) (regarding child forgiving a parent).

¹⁶ Fincham, *supra* note 2 (manuscript at 28).

¹⁷ *Id.* (manuscript at 28).

¹⁸ Lazare, *supra* note 4, at 260 (discussing monetary and nonmonetary reparations to medical patients).

¹⁹ Fincham, *supra* note 2 (manuscript at 7). This discussion assumes that the law functions as intended. If the legal system malfunctions, by not adequately punishing a wrongdoer or compensating a victim, the victim may find it much harder to forgive. In this situation, the initial injury is compounded by the separate injury inflicted by the justice system itself.

²⁰ *Id.* (manuscript at 3).

process.²¹ In the typical criminal, tort, or contract proceeding, the ability of the law to demand recompense, however inadequate, facilitates forgiveness for wrongs done, because there is public acknowledgment through the justice system that one individual has suffered at the hands of another. Moreover, because the law imposes penalties on or demands compensation from the wrongdoer, the need for vengeance on the part of the victim is reduced. The victim therefore is likely to have at least some sense that the law is attempting to achieve justice, even if its efforts are inadequate. Thus, the relationship between forgiveness and justice is certainly not an inimical one.

In the family law arena, however, the move toward no-fault divorce aims to remove a spouse's wrongdoing from consideration entirely. From the earliest days of divorce in this country until the 1960s, grounds for divorce were based on fault. A spouse seeking a divorce had to establish that the other spouse had committed a grievous injury that warranted ending the marriage, such as adultery, desertion, or mental or physical cruelty.²² Divorce proceedings in court required evidence establishing the spouse's wrongful conduct, and the granting of a divorce served as judicial recognition of harm caused by one spouse to the other.²³ Consideration of the behavior of one spouse toward another also shaped the law relating to the award of spousal support, so that the wrongdoing spouse was penalized financially for actions during the marriage.²⁴

The rise of no-fault divorce that began four decades ago has aimed to change this approach. Although many states still retain fault as a consideration, particularly regarding issues relating to support and custody, the model no-fault divorce laws on which numerous state statutes are patterned seek to take blame out of the mix.²⁵ Thus, in a no-fault divorce regime, neither spouse is viewed as a victim of the other. The move toward no-fault divorce thereby strives to prevent spouses from using the courtroom to attack each other as had been common in a

²¹ See *id.* (manuscript at 9).

²² See generally Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce*, 43 WAKE FOREST L. REV. 441, 459 [hereinafter *Cultivating Forgiveness*].

²³ *Id.* at 460-61.

²⁴ *Id.* at 461-62.

²⁵ American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.10 (2000) (limiting consideration of spousal misconduct in property division to financial misconduct); UNIF. MARRIAGE AND DIVORCE ACT § 301 (1973) (grounds for divorce limited to finding of irretrievable breakdown in marriage or existence of serious marital discord affecting one or both parties); UNIF. MARRIAGE AND DIVORCE ACT § 308(b) (marital misconduct not to be considered in awarding spousal maintenance).

fault-based regime.²⁶ The current system allows a judge instead to focus on what courts are believed to be most capable of deciding: property valuation and equitable distribution, and assessment of the best interests and needs of minor children.

This seemingly straightforward conceptual shift to no-fault divorce is complicated by the dual nature of marriage. It is generally understood that in the eyes of the law marriage both acknowledges a contract between the parties and bestows a status on them. Marriage requires consent of both spouses to a set of implicit and explicit obligations assumed toward each other and any children of the marriage. At the point the marriage is entered into, the state confers legal rights and responsibilities on the marital partners.²⁷

Under traditional approaches to divorce law, predating the move to no-fault, courts focused on the marital contract and breach of the promises that underlay it as a basis for deciding whether to grant a divorce and impose spousal support obligations.²⁸ This approach created numerous problems. In a traditional contract case, the ability to reduce an agreement to writing allows a court to invoke principles such as the parol evidence rule and the “four corners” doctrine to establish predictability in contract interpretation and eliminate the need for relying on the parties’ recollections. In the marital context, on the other hand, agreements about how spouses will share parenting duties and make career decisions for each spouse turn on the particular circumstances of the relationship and thus vary widely. Reducing spousal contracts regarding such multifarious understandings to writing is not only cumbersome, but is discouraged by the law, which long has refused to enforce agreements that attempt to regulate the day-to-day interaction of the spouses.²⁹ This judicial reluctance to enforce marital contracts has arisen partly because of our historical notions of what the marital relationship means, and partly because of the divide that the law has

²⁶ Maldonado, *Cultivating Forgiveness*, *supra* note 22, at 459.

²⁷ See *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (“Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.”).

²⁸ In a number of states that still use fault as a factor in divorce, it is relevant in the context of spousal support. Support may be unavailable to a spouse who is deemed to have breached the duties owed to the other spouse. Thus, for example, an otherwise needy spouse who has committed adultery may be ineligible to receive spousal support. See, e.g., N.C. GEN. STAT. § 50-16.3A(a).

²⁹ See, e.g., *Graham v. Graham*, 33 F. Supp. 936, 938 (D. Mich.1940) (refusing to enforce contract specifying career and domicile decisions by couple). In recent years, premarital and marital contracts that pertain strictly to property ownership and division between the spouses have been held enforceable and are not at issue here. See generally UNIF. PREMARITAL AGREEMENT ACT § 3 (specifying issue with respect to which parties may contract).

recognized between public and private life.³⁰ It also reflects an understanding of the evidentiary difficulties posed by a divorce case. Establishing a breach by one spouse of the promises made to the other necessarily pits the recollections and testimony of one spouse against another. The conflicting memories of the parties and the strong emotions at issue make it difficult for a judge, even one very skilled in family law matters, to discern the “truth,” to the extent a single truth exists.

What the no-fault system does is abandon this effort entirely. The effect of the move toward no-fault divorce has been to shift the emphasis from the contractual nature of marriage to the status aspect of marriage. No-fault divorce concentrates on altering the legal status of the spouses by dissolving the marital partnership created by the state at the time of the marriage. As with the dissolution of any partnership, the law endeavors to allocate to each partner—here a spouse—an appropriate share of the partnership’s financial assets and of any ongoing partnership obligations—which in the case of divorce can include not only debt incurred during the marriage, but also custody and support obligations that derive from the family relationship.³¹ In contrast to dissolution of a business partnership, however, where courts routinely rely on written agreements between the partners that allocate partner obligations,³² a court applying no-fault divorce laws aims to treat both spouses as equal partners in the marital relationship.

There is a persuasive argument that justice is better served by the law’s current approach, which focuses not on assessing blame in the marriage, but on adjudicating the division of assets and future responsibilities between the spouses, so that each is able to build a new, productive life after divorce. Nevertheless, focusing on the parties’ legal status as spouses rather than on the agreements made between them during the marriage has ramifications for their ability to forgive. In any marriage the spouses share a host of understandings about how they will conduct their marriage that depend on the particular circumstances of their specific relationship, promises that are almost always broken through the events leading to the dissolution of a marriage. Removing

³⁰ Kathryn Abrams, *Law and Emotion: Some Implications of a New Paradigm for Family Law*, 16 VA. J. SOC. POL’Y & L. 301 (2009) (manuscript at 8-16, on file with author).

³¹ UNIF. MARRIAGE AND DIVORCE ACT § 307 (providing for equitable distribution of marital property); *id.* § 309 (permitting court to order one or both parents to pay child support); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08 (2000) (allocation of custodial responsibility); *id.* § 3.04 (principles governing child support); *id.* § 4.09 (specifying that spouses are to receive equal shares of marital property).

³² REVISED UNIFORM PARTNERSHIP ACT § 103 (specifying that subject to limited exceptions, “relations among the partners and between the partners and the partnership are governed by the partnership agreement”).

fault from the divorce determination means that a spouse who believes he has suffered a breach of the marital contract is unlikely to receive any acknowledgment from the judicial system that he has suffered harm, and therefore he is deprived of the first step toward forgiveness.³³ Forgiveness is not inimical to justice in this setting. It is simply *irrelevant*, at least from the point of view of the law.

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What does this mean for the future of forgiveness and justice in family law?

I am not suggesting a return to a fault-based system for divorce law. The problems with such a system are many and well documented. Among other things, basing resolution of a divorce proceeding on a finding of fault encourages deception, vengefulness, and simple meanness by the divorcing spouses that are themselves inimical to justice.³⁴ While the goals of a no-fault system have not been fully realized, the move away from a fault-based system is a step in the right direction.

I am suggesting, however, that we need to acknowledge how *little* the law can do. The law is perfectly capable of creating a workable system for valuing assets and dividing them equitably. It may even be capable of devising a means for assessing the best interests of a child, although doing so fairly may require determination on the part of a judge faced with divorcing spouses who insist on attacking each other's parenting abilities.³⁵ What the law cannot do with any degree of accuracy is to successfully delve into the emotions and minutiae of the average marriage and determine who is at fault.

Spouses are better served, therefore, if they lower their expectations about what the law can accomplish in the context of divorce. Reasonable expectations can be liberating. If a spouse fully understands that the justice system has no mechanism for acknowledging, much less remedying, the emotional and personal harm caused in marriage, he may

³³ Maldonado, *Cultivating Forgiveness*, *supra* note 22, at 465.

³⁴ See Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121 (1936) (describing collusion to create appearance of fault to enable a couple to divorce); Maldonado, *Cultivating Forgiveness*, *supra* note 22, at 460 (discussing alienation of affection cases brought by vengeful spouses).

³⁵ For this reason, the American Law Institute has advocated quantifying and objectifying parenting conduct in a way that removes the emotional component from this assessment, by focusing on the parenting tasks performed by each parent during the marriage. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08 (2000).

be more willing both to grasp what the law can give and to look elsewhere for resolution of the accompanying emotional issues, including the need to forgive.

Achieving this understanding depends in large part on the effort of lawyers as they counsel clients. The role of the lawyer as counselor has recurred as a theme throughout this conference, and I cannot emphasize strongly enough the importance of this role. The lawyer's ethical obligations to confer with a client about the objectives of the representation and communicate with how those objectives are to be achieved are fundamental to any attorney-client relationship.³⁶ Moreover, a lawyer is encouraged to draw on a wide range of considerations beyond the law when counseling a client, something that is particularly important in the emotionally fraught world of divorce.³⁷

So what should a lawyer do to help a divorce client emerge from the legal process ready to forgive a former spouse?

First, the lawyer needs to explain not just the letter of the law, but the purposes behind the law. One significant problem, particularly in the family law setting, is the tendency of a client to confuse what the law—the justice system—can do with what the client believes is just—that is, “Justice” with a capital “J.” Understanding why the law is as it is may help the client form reasonable expectations about what the law can accomplish. The lawyer should explain that the law aims to remove emotion from the process precisely because emotions are so volatile, with the goal of finding a way to fairly divide assets and continuing responsibilities in a way that allows all parties to move forward.

If the client understands the limits of the law, then—assuming the law functions as it should—the client may be more likely to come away from the experience with a sense that the process was fair and that justice—to the extent the law can bestow it—was achieved. In addition, if the client understands that the law cannot consider emotion in resolving issues, the client may be more willing to keep emotion out of the equation, or at least keep emotion in check. In this regard, a lawyer's

³⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (mandating that “a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued”), R. 1.4(a)(2) (mandating that a lawyer “promptly consult with the client about the means by which the client's objectives are to be accomplished”).

³⁷ *Id.* at R. 2.1 (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”).

modeling of polite, appropriate behavior toward opposing counsel and the other spouse can be essential to helping the client do the same.³⁸

Second, the lawyer should make clear the process for achieving the law's goals. Doing so will allow a client to understand how court proceedings, mediation, or collaborative lawyering will proceed, and what the result is likely to be. Encountering the legal system is difficult for a non-lawyer in virtually any setting. In the area of family law in particular, the conflict between the highly personal nature of the issues at stake and the impersonal nature of the process can be frightening. The fear and sense of lack of control induced by what is often an unfamiliar and seemingly hostile process may further heighten the client's anger and insecurity. These emotions in turn make forgiveness much more difficult to undertake.

Recent developments in family law have made great strides in smoothing the process for participants, through mechanisms such as collaborative lawyering and court-ordered mediation. Although the primary goal of these programs is to achieve a mutual and acceptable resolution of issues relating to property, support, and custody, they often have the added benefit of creating an atmosphere that may foster forgiveness. The opportunity to meet in a setting less intimidating than a courtroom and to work with the aid of professionals to reach acceptable compromises may go a long way toward dissipating the animosity between divorcing spouses. Nevertheless, the law cannot demand that the spouses forgive each other, and that is not the aim of such programs.³⁹ Moreover, given the private and deeply personal nature of many of the wrongs that occur in marriage, it may be inappropriate to provide the sort of public opportunity to seek and offer forgiveness that now occurs in other contexts through restorative justice programs.

Thus, while reforming the divorce process may achieve greater civility and cooperation between the parties, a client who expects acknowledgment of the pain he has suffered in the marriage and recompense for that pain may emerge from the process disappointed,

³⁸ American Academy of Matrimonial Lawyers, *BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS* § 1.3 (2000) ("An attorney should refuse to assist in vindictive conduct and should strive to lower the emotional level of a family dispute by treating all other participants with respect.").

³⁹ For example, a typical collaborative lawyering agreement to which both spouses and their lawyers are parties specifies that spouses "will try not to focus on the problems that may have contributed to the breakdown of the marital relationship but on the issues that need to be resolved for both [spouses] to move forward with [their] lives." and that the collaborative lawyering process "is not designed to eliminate personal differences and mistrust which may have existed" between the spouses. *See Collaborative Participation Agreement*, at §§ 1 (d) ii, 9 (e) (on file with author).

regardless of the financial outcome. In this regard, the devices used to facilitate settlement in divorce differ significantly from those used in restorative justice, which deliberately foster forgiveness through the opportunity for apology and the acknowledgment that a wrong has occurred.

For this reason, the lawyer also needs to counsel the client about how to best achieve the client's long-term goals, looking beyond the divorce proceedings toward how the client will build a new life. Understanding the client's goals requires the lawyer to actively listen to the client with attentiveness and empathy, something that should be the aim in any attorney-client relationship. It is perfectly appropriate for the lawyer to help start the client on the path toward forgiveness by emphasizing its benefits of improved interpersonal relationships and reduced emotional and physical stress.⁴⁰

Likewise, it is within the scope of the lawyer's role as counselor to alert the client to the risk that an emotional overreaction to what is occurring in the divorce proceedings may impair the client's ability to make reasoned decisions.⁴¹ A client whose judgment is clouded by anger and a desire for retribution is likely to make demands in the divorce proceedings that may serve the client's short-term interests in seeking vengeance against the other spouse, but not his long-term ones with respect to ongoing relationships with children, the former spouse, and other family members. Although the client may not be happy to receive this message from the lawyer, it is important for the lawyer to deliver it if she is to fulfill her ethical duty as counselor to the client. I am by no means suggesting that the lawyer step into the role of mental health counselor to the client. I am suggesting, however, that the attorney is well within the bounds of her fiduciary relationship with the client to discuss emotionally charged issues and to explore with the client the need to find appropriate ways to resolve them so that the client can move forward.⁴²

⁴⁰ See Maldonado, *Cultivating Forgiveness*, *supra* note 22, at 481 & n.188 (citing studies).

⁴¹ See MODEL RULES OF PROF'L CONDUCT R. 2.1 cmts. 2 & 5 (stressing that a lawyer may refer to moral and ethical considerations in giving advice to a client and may offer unsolicited advice if a client's proposed course of action is likely to result in adverse consequences); see also Leary, *supra* note 13 (manuscript at 6-7) (discussing the obligation to forewarn client of risk of egoic overreaction).

⁴² While the lawyer should not serve in the role of mental health professional for the client, it is well within the scope of the lawyer's role to recommend that the client consult with mental health experts or other professionals when needed. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 4 ("Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work. . . . Where consultation with a professional in another field is

Helping a client take the long view is particularly important since, as Professor Fincham stresses, forgiveness is a process, sometimes a very lengthy one.⁴³ In the context of divorce, for a client to expect to have achieved forgiveness by the time the divorce is final is often unrealistic. What is realistic is for the client to understand that finding ways to start down that path during the legal proceedings will have long-term benefits by allowing him to look to the future rather than the past.

Thus, from the perspective of the law, while forgiveness is not inimical to justice, it may be irrelevant to achieving justice in the family law setting. That does not mean, however, that a spouse's sense of whether the system has been just is irrelevant to his ability to forgive. It is the lawyer's job to help the client understand the goals and limits of the legal system, so that once the legal process has run its course, the client is free to forgive the former spouse and move forward in the new, reconfigured relationships created by divorce.

itself something a competent lawyer would recommend, the lawyer should make such a recommendation.”).

⁴³ Fincham, *supra* note 2 (manuscript at 21).