It's Never Just About the Trees: Empowering Clients to Resolve Tree and Neighbor Disputes Collaboratively

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Is there any area of law more contentious than neighbor disputes? The answer is, yes, neighbor disputes about trees! Why is that? What is it that otherwise intelligent, level-headed, clear-thinking, individuals verge on the criminally insane, harboring malicious or even homicidal thoughts, when it comes to disagreements over trees? Even family law practitioners who deal with what would seem to be the most acrimonious and contentious of issues will admit that divorce law can pale by comparison to the Hatfield and McCoy-like world of tree law. At least in family law, they remind us, one party usually moves away.

This article explores tips and strategies to help clients resolve their matters by identifying, understanding, and defusing the psychological underpinnings that often plague these disputes. Warning: there will be no discussion of the black letter law here. The laws and precedent pertaining to tree disputes are already available to practitioners. Instead, these next few pages offer a unique approach toward problem solving, starting with the proposition that attorneys are, first and foremost, "counselors at law." This socially responsible philosophy reminds us that law, like medicine, can and should be a healing profession.

I. EMPOWERING VS. ENABLING YOUR CLIENTS

As lawyers, we are very good at analyzing problems and creating road maps toward solutions. We tend to be linear thinkers. When our clients come to us for help, we often start with wanting to know a chronology of events. Then, using the same formula reminiscent of a bar exam essay, once we have the story, we identify what legal issues may be involved, what rules might apply, how the application of those rules will likely play out, and voila—the likely outcome and conclusion to our client's dilemma magically appears.

This approach, while useful in certain contexts, has little utility in the context of tree/neighbor disputes. Clients come to us saying, "I want to know what the law says," or "I just want to know my rights," or "Do I have a case?" What they are really trying to communicate is, "I want help solving this problem," or "I would like to stop feeling bad in my own home," or "I want to stop feeling so helpless in my dealings with this other person."

Knowing the message behind the words is not only helpful in doing a good job for your client; it is indispensable. Anyone with payment of a filing fee and a cover sheet can file a lawsuit. It takes a skilled lawyer to help a client navigate through the rocky shoals of interpersonal conflict to resolve their problems without litigation.

Why, you may ask, should the avoidance of litigation by coaching your clients to resolve their own problems even be considered a goal, much less the *desired* goal in these situations? Old-school principles dictate that if the sharpest arrow in your quiver is a judicial determination, well then fire away—especially if you have calculated the odds and feel confident that you can "win." After all, is that not what we are here for? To be our clients' urban warrior leading them on to victory? And then there is the perceived self-serving

dilemma: "If I empower my clients to resolve their own problems, how can I earn a living?"

On the other hand, if we are of the belief that the law can (and should) be a healing profession much like medicine used to be, then putting the quiver down and looking for new tools and devices to help clients solve their problems may be the better way—not just for the profession, but for our clients, their neighbors, their communities, and society in general (a little more on that later in this article).

The answer is multi-dimensional. Although you might prevail in a lawsuit, you likely will have left behind a trail of destruction. It is doubtful that you will have improved the relationship between your client and her neighbor. Indeed, you may have set up a pattern of future retaliatory actions that will never end until one of them moves away—or is carried out on a stretcher. While you may have increased the balance in your children's college accounts, you will have depleted your client's funds. And your client, who could otherwise have been a source of referral or repeat business for you, now wants nothing do with you. She may even be withholding final payment, convinced that the "cost of winning" was way too high and that you did not properly warn her of what doing battle would mean from a financial, as well as emotional, standpoint. And then there is that scathing Yelp review.

This brings us back to the main question. If it is truly "never just about the trees," then what is it really about? How are we as professionals best equipped to help our clients solve their disputes? How do we uncover the dynamics creating the problem? Once we have a better handle on the emotional component underlying the dispute, how does that knowledge assist us in advising our clients?

To a certain extent, the answers to these questions are individual to the dispute and the disputants involved in each matter. However, after handling hundreds of tree disputes, certain patterns have begun to emerge. The important principles to keep in mind are: (1) each side has its part to play in the dispute; (2) it only takes one side to disengage for the dynamics to change; (3) both sides make assumptions about the motives of the other side that, quite often, are incorrect; and (4) it is rarely, if ever, personal. We will discuss these principles separately.

A. Each Side Has Its Part to Play

A client comes into your office distraught and at the end of his rope trying to deal with what he describes as his "neighbor from hell" (we'll call her, "NFH"). He then describes a litany of abuses and perceived slights. NFH puts her trash cans in front of his gate. She parks her car in front of his house in "his" parking spot. Her dog is constantly leaving "gifts" in which he steps when getting the morning paper. Perhaps the worst offense is that she has planted a row of fast-growing, non-native evergreens right up against the fence, which are now obstructing his views and blocking his light. The roots are lifting up his patio and are coming dangerously close to his foundation. The same trees are also messy as all heck, dumping loads of detritus all over his patio furniture and in his pool, requiring constant clean up and maintenance. Your client is also concerned that the limbs sometimes break off and fall, coming dangerously close to his children's play area.

Your client tells you all efforts to have a normal "neighborly" discussion about the problem have fallen on deaf ears. Every attempt to raise the subject results in not just a refusal to discuss collaborative options, but a hurtling of insults and epithets. Notes go unanswered. Phone calls are not returned. E-mails are blocked. This client, who also happens to be an attorney, has gotten so frustrated that he admits with a hint of embarrassment that he has installed cameras and floodlights, aiming them at the NFH's house, making sure to have the lights on a timer so they will blaze into her bedroom window all night long. Can you help him?

Based on the narrative, it sounds as though he truly is living next to a problem individual who needs to be taught a lesson for all of this harassing and seemingly spiteful behavior. Hearing it from his perspective, you might assume that this conflict is all one-sided (except for the floodlight part) and he is just an innocent injured party. Is this a safe assumption?

Consider the possibility that there may be something else at work. Perhaps your client's neighbor has already contacted an attorney because *she* feels wronged by her neighbor who, by the way, she knows is an attorney and is likely setting her up for a land-grab or lawsuit. In her intake (we will call her, "Samantha"), she tells her attorney that ever since that lawyer moved in next door (we will call him, "Joe"), Samantha has been constantly assaulted with unreasonable requests, demands, and not-so-veiled threats.

It all started when Joe cut down a hedge that had grown between the properties for years prior to his arrival without so much as a mention, much less a neighborly agreement. This created a gaping hole in the privacy screen that was perfect for shielding Samantha's teenage daughter's bedroom from "peeping toms." Indeed, every so often Samantha would see Joe standing in that side of the yard looking over the fence

as if he were trying to peer into her daughter's bedroom. In order to try and remedy the problem, Samantha planted a row of fast-growing evergreens along the boundary.

No sooner had she done so when Joe started ranting about his "view" and "sunlight," which appeared to be flimsy excuses for his otherwise seemingly deviant behavior. After all, Samantha tells the lawyer, she knows that there is no "right" to a view in California, and that this conniving lawyer was just trying to trick her with legal threats.

Instead of calling the police and/or getting a restraining order, which all of her friends were telling her to do, Samantha tells the lawyer she showed great restraint by just trying to ignore Joe's behavior by not answering his increasingly angry letters, e-mails, and phone calls. However, now the problems have escalated to a point where Samantha feels she cannot even take out the garbage or park her car on the street without being given the "evil eye" by Joe, and it is starting to creep her out. In fact, the other day when Samantha was out walking her dog, Joe stared at her and made some menacing remark while waiving his slipper in the air like a madman. That same night, Samantha and her husband were awakened at midnight by a floodlight pouring into their bedroom that stayed on the entire night—and every night since. Samantha is actually concerned that Joe might try and poison her dog.

The above example illustrates the adage that "there are two sides to every story." It also aptly demonstrates the principle "it is not necessarily what you do but how you do it," which can make all the difference in the world.

So, what was each side's part in this increasingly contentious situation? First, Joe, who is the new kid on the block, changed the landscape between these neighbors. He did so without warning and without consultation. And the reason he did so was not to peer into Samantha's daughter's bedroom, but to make room and light for an organic vegetable garden—a lofty pursuit in this day and age.

But, you think, he had an absolute right to cut down his own hedge, assuming the landscape was all on his property—and you would be right, but that is not the point. The point is being able to understand that very few people are comfortable with change. Even good change can be perceived as negative if done without warning or at least a passing interest in the other person's feelings on the subject. Most people do not like to be disregarded or ignored. It makes them feel disrespected. Most people also do not like to feel helpless which, in acting without discussion, can certainly, albeit unintentionally, be the likely outcome.

Similarly, Samantha, feeling at a disadvantage against her attorney neighbor, tries to protect herself against what she is sure to be a legal maneuver by installing the largest, fastest-growing plant barrier she can obtain—also without warning or consultation. These actions, without any conversation with each other about the matter, are each perceived by the other as open acts of hostility which then fuel every other act and "jockeying" for position vis-à-vis their respective square footage.

B. It Only Takes One Side to Disengage and Change the Dynamics

In assisting clients with tree/neighbor disputes, it is important to help them see how their actions can be contributing to the problem. Most clients will come to your office in righteous indignation. They have been saints while their neighbor is "certifiable." It may be that, between the two, the neighbor is more "at fault" than your clients. However, given the first principle that each has his or her part, albeit small, helping your clients identify their role so that they can begin by changing their "part" is a key first step in helping them resolve the problem.

Maybe it is that your clients' dog is barking during the day when they are away at work and they have not worked diligently enough to address the problem. Maybe it is that their method of communication—e.g., via e-mail—is not being received by their elderly neighbors in the neutral way in which it was intended. Perhaps a face-to-face conversation, accompanied with a basket of cookies or a bottle of wine, is in order. Whatever it is, you as the "counselor" to your client can help identify and provide suggestions for alternative ways of communicating with the neighbor in the hopes that this change, even if slight, will provide a fundamental shift in the dynamics between them.

For example, when your client comes to you, they have been engaged in hand-to-hand combat—metaphorically kicking and punching at the problem, much like karate. Perhaps instead, we can show them that they could practice an Aikido[2] approach which, rather than fighting one's opponent head on, meets the energy of an attack with relaxation and a sense of center—using fluid, spiral movements to turn around an attacker's energy so that the attack defeats itself. When we help our clients understand the interpersonal dynamic, including their part in the battle, we arm them with the more powerful ability to disengage, allowing the neighbor to fall over when he lashes out and no one is there to absorb the blow.

C. Each Side Makes Incorrect Assumptions About the Other

In our example above, we can see how each side has made assumptions that not only are incorrect, but serve to escalate the conflict exponentially. Joe wanted a vegetable garden—not unfettered viewing access to Samantha's daughter. Samantha did not set out to spite Joe with her row of fast-growing trees; she wanted privacy and screening from what she thought was the pervert next door. Had Joe introduced himself when he moved in and, among other things, talked about his plans for the garden, all of this could likely have been discussed and dealt with through a mutually agreed upon and satisfactory plan. Instead, with each left to their own thoughts, or worst nightmares, about the other, battle ensues.

As counselors, we can step in and help break that cycle. Having seen these scenarios play out time and time again, we can offer alternative possible motives for the other side's behavior as a way of explanation that might not seem as nefarious. We can do so without directly contradicting the client who may not be able to hear right away that they made a mistake. It might sound something like this: "I can imagine how the situation must really be disturbing to you. I wonder, though, if maybe there aren't other factors here that you may have not considered. For example, did you speak to your neighbor about the hedge and why you were upset? Does your neighbor know that your daughter's bedroom is on that side of the house? Could there have been another reason why he took down the hedge, such as to plant a vegetable garden? Perhaps if he knew your concerns and was made aware of them, might he be willing to help remedy the situation?"

Initially, the client may show resistance and respond by saying, "I think that is highly unlikely. The guy is just a jerk and he did it on purpose." Allow for the possibility that the client might be right—because, after all, she might be. "You might very well be right—you certainly know him better than I do. But, wouldn't it be a relief if it turned out you weren't right? It is at least worth exploring, don't you think?" Then, you can hold up the mirror and demonstrate how the same thing might be happening on the other side of the fence. "You know, Joe might be thinking that you planted that row of trees just out of spite. If he is not aware of your concerns about your daughter, he could be scowling in his house saying the same things about you, when all you are trying to do is recreate the screening you had. At least through some dialogue we can start to figure out what is really going on for each of you instead of just assuming the worst."

Unfortunately, if we're not careful, we may be tempted to feed into our client's projections of their opponent, wanting to demonstrate our allegiance by "taking their side" in the guise of being their advocate without first really trying to objectively assess the situation. How many times have you observed an attorney making what turned out to be a false accusation, even a serious one like trespass or vandalism, based solely on what their client reported? If we blindly take on our client's cause without a healthy dose of independent investigation, analysis, and perspective, we become part of the problem instead of the vehicle for a solution.

D. It is Rarely, if Ever, Personal

This leads us to the fourth point. When we make assumptions about the other person's motives, we tend automatically to make it about us. "He is doing this to spite me." "She must know that this bothers me." "Why else would they behave that way if not to make our lives miserable?" Although it may be the rare case where one neighbor really is out to get another neighbor (which this author has yet to see in over three decades of practice), in general, a person's actions have more to do with what is going on in their own lives than anything else.

Many people feel that certain aspects of their lives are completely out of control. They have just lost their job. Their marriage is failing. They, or a loved one, have just been diagnosed with a serious illness. Or maybe they are suffering from a psychological disorder.

When people feel out of control in one or more areas of their lives, they tend to focus on the one area they believe they can control: their home and property. Never mind that this control is for a large part (if not entirely) illusory. The need to believe the control is real is exacerbated by the emotions that stem from hearth and home. Internally, they may say: "This is my castle, my domain, my respite from the world outside. It is my responsibility to protect my home and my family from outside intruders and those who would disrupt my harmony and the peace and sanctity of my home and all it represents."

Quite often we find a larger percentage of these "problems" arise in more affluent areas such as Marin County, Silicon Valley, Pacific Heights, or West Los Angeles. These neighborhood battles often generate the "perfect storm" trifecta of people with a little too much disposable income, a little too much time on their hands, and an overdeveloped

sense of entitlement ("What is mine is mine and what is yours will someday be mine as well"). Combine that with misguided attorneys who salivate at the opportunity to wage battle on behalf of these titans, seeing an opportunity to create an annuity for themselves rather than help their clients solve their problems in the most cost-effective, socially responsible manner, and it is no wonder our courts are clogged with these sandbox wars.[3] Helping your clients to depersonalize the problem will allow them to view it with more clarity and, with your guidance, make decisions based on rational choices rather than emotional reactions.

II. STRATEGIC KEYS TO HELPING CLIENTS

While knowing the law is an important and critical first step to helping your clients, it is just as important to know how to help them problem-solve. Although clients come to you because you are the "expert" in the legal issues, what they really want is a practical solution for their dilemma. Sometimes this involves an in-depth understanding and discussion of the law. Most of the time, however, it requires a basic appreciation for the psychological aspects underlying a dispute, honed listening skills, and a pragmatic approach to problem solving. The following tips can help get your clients from panic to peace in the shortest time span.

A. Initial Client Meeting: The Unspoken Agenda

Keep in mind that for most clients involved in a neighbor dispute, this may be their first visit to a lawyer. They may be anxious and will be looking to you not just for answers, but peace of mind. It is important that you put them at ease with the office surroundings and with your and your staff's demeanor.

It is definitely important to elicit, listen to, and record the factual history of the dispute. But what might be even more important is to listen to what is not being said. After detailing a scenario, a client might ask you, "What are my rights?" But what they really are saying is, "I feel wronged by my neighbor and I want someone to validate my feelings." A client might ask you, "Do I have a case?" But what they really want to know is how do they resolve a problem they are having.

After you have taken down the client's history of the case, the best way to elicit the information you really need to help your client is to ask targeted, open-ended questions to find out what is really going on with them. "What would you like to accomplish?" "What are your goals?" "How would you like to see this resolved?" "What is your wish list for taking care of this problem?"

For example, you may find out in a trespass case that the client primarily wants to make sure it does not happen again. You might discover in a view dispute, that a client does not just want their view back, they would like not to have future interactions with their neighbors over the same issue and therefore would like a self-effectuating agreement. Sometimes clients want retribution. Sometimes they want "justice" however they perceive it to be. Whatever it is, be sure to explore the concept further—i.e., "What would 'justice' look like to you on a day-to-day basis?"

Once you are clear on what the client would like to accomplish, you can then have a meaningful discussion on the law, its limitations, what is doable and what is not, what is truly in their best interest, and what might be self-destructive (i.e., "an eye for an eye leaves everyone blind").

B. Visiting the Site

It is not necessary with every new client to see the subject property. However, if the matter involves more than just an initial consultation, it will likely be critical at some point early on in the process to see the issues for yourself.

If the dispute concerns the loss of a view, you can provide an objective second set of eyes to give your clients a critical reality check on the strength or legitimacy of their claim. If the client is complaining of a nuisance, you can evaluate whether the alleged interference is unreasonable and substantial or if it is just one of those trifling annoyances that one is expected to accept as part of living in a neighborhood. If the claim involves a trespass and damage to trees, you can (and should) assist with the selection of the right expert and methodology based on your observations of the site conditions. And so on.

C. Early Involvement of Arborists or Other Experts

In other types of cases, an attorney may not bring in an expert until later stages of a lawsuit. However, in just about every type of tree matter, the opposite should be the case. We should not consider filing an action until an expert has weighed in on the issues.

For example, in view disputes, most city or county ordinances require you to document the view obstruction and evaluate the factors that help determine first whether there is an unreasonable obstruction, and second, if so, what restorative actions are needed. Having an arborist go through this exercise is not only proper, it is extremely persuasive. Front-loading a matter with this analysis can actually help keep the matter out of litigation, as the recipient will take

the demand letter accompanied by an arborist's report much more seriously.

In a tree trespass case, knowing the universe of damages is a critical first step in determining strategy. Having the arborist perform an appraisal is one of the first steps in coming up with the right approach. How you word the demand letter may depend, at least in part, on where this matter is headed if you cannot reach a negotiated resolution. Is this a small claims matter—which now has a jurisdiction of $10,000? Is this potentially a superior court action? Might there be a basis for attorneys' fees because there is a vineyard, orchard, or horse ranch involved?

In a personal injury or wrongful death matter, causation will be critical. The arborist is the primary expert who will perform the forensic investigation necessary to determine the cause of failure of a limb, trunk, or tree, and whether such failure was something that could have been predicted and prevented. The more time that passes, the more difficult it is to reconstruct what occurred; the tree itself may be removed, witnesses may disappear, the site may be drastically altered, and new landscape may be installed in its place. Being able to see it firsthand while the tree and/or debris is still on site can be indispensable.

In selecting the right arborist, it is important to understand an arborist's qualifications. There are significant differences between a certified arborist, a consulting arborist, an urban forester, or someone with a pickup truck and a chainsaw. A certified arborist is someone who has passed an examination issued by the industry's primary trade organization, the International Society of Arboriculture (ISA). Virtually anyone can become a certified arborist if they sit for the exam and pass it. They do not need to be a certified arborist to have their own tree care company, but they do need to be a licensed contractor with a D49 specialty license. See Business and Professions Code § 7026.1 (a) (4). However, a certified arborist, or tree care contractor, will likely not be the person who you will want to select as your expert or consultant.

A consulting arborist,[4] on the other hand, is generally an arborist who has been in the field for a number of years and has, through education and experience, developed expertise in forensic issues. Consulting arborists are authoritative experts on trees, consulting on tree disease, placement, prevention, and dispute resolution. The leading professional organization for consulting arborists is the American Society of Consulting Arborists (ASCA). According to ASCA, "The role of the Consulting Arborist is to bring a comprehensive, objective viewpoint to the diagnosis, appraisal and evaluation of arboricultural issues."[5] To be eligible to join ASCA, the arborist must have at least five years of experience in arboriculture plus one of the following educational requirements: 1) possess a four-year degree in arboriculture or a closely related field, such as urban forestry, horticulture, plant pathology, entomology, forestry, or plant biology; 2) be a Board Certified Master Arborist; or, 3) have a minimum of 240 approved CEUs. There are also ongoing continuing education requirements.[6] It also offers the designation of Registered Consulting Arborist (RCA) for those ASCA members who have fulfilled additional requirements. Specifically, besides being a current ASCA member, the arborist must also be a graduate of ASCA's Consulting Academy and must have earned 420 continuing education units to meet the continuing education requirement.[7]

There are also professional foresters and urban foresters. In California, a Registered Professional Forester (RPF) is a person licensed by the State of California to perform professional services that require the application of forestry principles and techniques to the management of forested landscapes. The requirements include seven years of experience in forestry work (a BS in forestry may count toward four years of work experience), having good moral character and a reputation for honesty and integrity, and passing a comprehensive written examination administered by the Professional Foresters Examining Committee.[8] A certified forester has demonstrated a high level of knowledge and experience in urban forest management.

California used to have a certification program through the California Urban Forests Council, but that program transitioned over to the national program sponsored by the Society of American Foresters (SAF) a few years ago.[9] The education requirements to become a Certified Forester are either an earned degree at the baccalaureate or master's level from a SAF-accredited degree program or an eaned degree at the baccalaureate, masters, or doctorate level in forestry or related natural resources, such as environmental studeies, wildlife management, range management, or ecology. There are also a certain number of semester credit hours required in specified forestry-related coursework.[10] The experience requirements to become a Certified Forester are five or more years of qualifying professional forestry experience within the past ten years in two out of four designated experience areas. There are also 60 hours of continuing education units required every three years to be eligible for recertification.[11]

Within these various categories of arborists are specialists in different areas such as tree risk assessment, appraisal methodology, utility line clearance, pest application and control, timber harvest plans, and fire ecology. Selecting the right arborist for the job includes becoming familiar with a particular expert's areas of specialty.

There may be other experts with whom an early consultation may be important. Will a surveyor be necessary? What about a real estate appraiser? Do you need a soils engineer or other geotechnical expert? These are questions to ask at the beginning of a tree case, not when you are headed for trial. An extreme case in point: There was a tree failure that occurred along a roadside that killed a pedestrian who happened to be walking by at the exact moment of failure. A lawyer decided to take a drive with an arborist colleague to examine the site shortly after the tragedy occurred, simply for educational purposes. Weeks later, that same attorney was hired to represent a family member of the deceased pedestrian in the wrongful death claim arising from that tree failure. Having the photography and evidence at the ready was a significant key to negotiating a fast and successful resolution for the family member.

D. The "Right Tree in the Right Place"

There is a saying in the arboricultural community, "The right tree in the right place."[12] As the Arbor Day Foundation states on its website: "A healthy community forest begins with careful planning."[13] This sentence is equally applicable to healthy neighbor relations. When clients come in wanting to plant running bamboo in order to block out the neighbor who has put on the new two-story addition, or has plans to purchase a dozen redwoods to place along the boundary line to block the views of the neighbor who blasts his stereo at all hours, we can help them realize why sowing the seeds of future contention may not be in anyone's best interest (except the lawyers). We can and should assist our clients with making good management decisions for their properties, and by extension, their relationships.

E. Collaborative Problem Solving: Teaching the "Golden Rule"

"Love thy neighbor as thyself." Although this passage from Leviticus (19:18) is the most ancient iteration of what has come to be known as the Golden Rule, it is by no means unique to the Bible. The ethic of reciprocity has its roots in a wide range of world cultures, religions, traditions, and secular movements. Sometimes a client needs a gentle reminder to treat his neighbor as he would want to be treated. It can be as simple as asking him, "If the roles were reversed, how would you want to see it handled?" It is amazing how teaching empathy can refocus the dispute and help your client to imagine other more constructive ways of dealing with whatever the problem happens to be in a more collaborative and creative fashion.

Why should teaching the Golden Rule be a goal? If one believes that the practice of law is first and foremost a tool to help people solve their problems (as opposed to embroiling parties in battles to be waged), then educating your clients on how to become their own peacemakers will, in most cases, likely be the quickest, most cost-effective, and long-lasting way to achieve success. For those situations where those efforts do not have the desired effect, you always have "Plan B" (i.e. litigation) as a last resort.

F. Coaching Behind the Scenes

The first step in teaching a client to be their own peacemaker is to provide them with the words needed to approach their neighbor. Some lawyers make the mistake of surfacing too quickly in a neighbor dispute, before the client truly has exhausted all efforts to handle the matter himself, neighbor to neighbor. This can have the effect of escalating the dispute, unnecessarily making it much more difficult to resolve. Before writing the lawyer letter, make sure that the client, with your help and coaching, has done the "right thing."

Remembering that "it is never just about the trees," can help your client to understand the psychological aspects of the dispute that are likely at work. Is the neighbor a control freak? Utilize this information by coaching the client how to speak with the neighbor so that the neighbor feels they are in control—e.g., asking open-ended questions such as, "What are your ideas for how we can resolve this?;" "Where would you like to meet?;" "How should we go about choosing an arborist?"

Remind your clients to reward good behavior. If the neighbor acquiesces to a request, send a thank you note with some baked goods or a bottle of wine. If the communications are in writing, have your client run a draft by you first before it is sent so that you can vet it for conciliatory language that can be better heard and received.

Coaching your clients to "take the high road" is not just the right thing to do, it makes strategic sense. In the words of Alexis de Tocqueville, it is a form of "self-interest rightly understood" or "enlightened self-interest."[14] First, it may be the most direct route to resolution so that your client benefits most from the situation. If the matter does not

resolve and eventually turns into litigation, demonstrating that your client made all efforts to handle the matter in a neighborly fashion will go a long way with the judge or jury having to decide issues of competing credibility and equities.

G. Collaborative Representation

Assuming your client's direct efforts were unsuccessful and the lawyer letter becomes necessary, it can and should be drafted so as to invite the neighbor to engage in a process that can lead to collaborative problem solving, such as direct negotiations or mediation. If or when the neighbor obtains representation, seeking to get the dispute into a posture in which all necessary players can come to the table again will be your best opportunity to resolve the matter.

Collaborative negotiations do not always require a third-party neutral. You can have successful negotiations by arranging a meeting, oftentimes at the properties, with the neighbors, respective counsel, and arborists to discuss what are each side's needs and interests, and what creative solutions there may be to address those needs and interests.

A real-life example best illustrates this point: Clients were living next door to neighbors who had a row of eucalyptus trees that were constantly shedding debris, pods, sap, bark, and leaves onto their property. In addition, limbs would regularly fall, often causing significant damage such as spearing through the roof and breaking patio furniture. The situation had become intolerable and all efforts to talk with the neighbors directly were ignored. The lawyer letter was sent setting forth the facts as understood, the applicable law, and an invitation to meet, with respective counsel and arborists (either with or without a mediator), to discuss the situation.

The invitation was accepted. Both couples, their attorneys, and their respective consulting arborists met at one of the lawyer's offices. On the day of the meeting, the attorney representing the aggrieved clients provided food and beverages, thanked the other side for agreeing to meet, and then—instead of spouting positions and arguments—showed interest in the tree owners' concerns and desires. The attorney asked open-ended questions such as: "Clearly the trees are very important to you. Can you help us to understand what the trees mean to you? What do you appreciate about them?" From such simple, straightforward and compassionate inquiry came the explanation. The couple grew up in another country where similar trees grew, and the trees reminded them of home. But, more significantly, one of the trees supported an atrium that had birds flying in and out which they enjoyed watching. Two of the trees acted as posts for an outdoor movie screen on which the couple would watch old movies from their bedroom window.

Once the function of the trees was better understood, the arborists were then able to work together to fashion a remedy that would allow the trees to provide the assets enjoyed by the tree owners while eliminating the danger they posed to the neighbors, and reducing the debris load for both sides. By having a directed and respectful dialogue, not only was litigation avoided; the neighbors were then able to communicate with each other successfully about other issues that arose, such as one neighbor's remodel and fence issues.

H. Alternative Dispute Resolution

As seen by the illustration in the preceding section, various methods for alternative dispute resolution can play a large part in avoiding litigation and are limited only by the creativity of the parties and counsel. Mediation is one method. Direct negotiation, with or without attorneys and/or arborists present, is another. Binding arbitration or judicial reference are yet other mechanisms. These mechanisms all have one thing in common—they keep these disputes out of court. With limited judicial resources and burgeoning criminal calendars, neighbor disputes are very low on the list of the kinds of disputes judges would like to see in their courtrooms and juries, even less. When and if these matters make it to trial, often the response by the trier of fact will be to say "a pox on both your houses."

III. THE SOCIALLY RESPONSIBLE PRACTICE OF LAW: A HEALING PROFESSION

Early in this article, we touched on the subject of the law as a "healing profession." The concept of the law as a healing profession is not new, but is largely forgotten. Chief Justice Warren Burger famously observed,

> The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?[15]

Just what is it that we should be striving to heal? As an ideal, the law is meant to heal the rifts in the social fabric

created when people are in conflict with one another. This can happen not just by helping people resolve their problems, but by helping them heal relationships. This is done first by developing an understanding of the sources of conflict and the psychology underlying disputes. Healing starts by demonstrating empathy for what it is they are going through, thereby modeling the empathy they can find for the party with whom they are in dispute. Throw in a healthy dose of gratitude and appreciation for the blessings in their lives and top it off with a sprinkling of perspective, and you have the recipe for a collaborative approach to problem-solving.

Ah, but you say, "Even if my clients were willing to take a collaborative approach, that does not mean their neighbor or the opposing counsel will." True. And you can only be responsible for your side's actions and behavior. However, by taking that responsibility, it is amazing how often such a simple act inspires a similar response from the other side. When two people are in dispute, it only takes one to disengage.

There is a growing movement in the legal profession that is beginning to view the practice of law in this very different light. In family law, we have the collaborative law movement premised on attorneys working with other attorneys who vow not to litigate should they be unable to resolve the matter through negotiations. Integrative law focuses on teaching lawyers neuro-literacy[16] to understand the scientific psychological and organic underpinnings of perception and conflict in order to help their clients to resolve their problems in non-adversarial ways.[17] There are now entire workshops devoted to the importance of forgiveness in conflict resolution.[18] There is restorative justice, transformational law, holistic law, non-violent communication, and various interdisciplinary forms of dispute resolution.[19] These new approaches to problem-solving all have one thing in common: they all view the metaphor of the courtroom as a battlefield upon which "scorched earth" tactics are waged as a relic which should be discarded into the historical dustbins next to jousting and gladiators.

Lawyers should reclaim the title "counselor" and all that the word implies. We should be counseling our clients, helping them to understand the source of the conflict, and their role in it. We should be giving them the tools to communicate in a way that the other party can hear and understand. Can you imagine a school counselor advising a student to resolve a playground dispute by bullying the other child into submission? Or how about a marriage counselor teaching a client to solve disagreements with a spouse by holding back information and then "taking him down" in a public forum? What if career counselors taught job candidates to obtain a position by sabotaging the other candidates? And yet, for far too many attorneys, advocacy has become this theater of the absurd, where we bite, scratch, trip, booby trap, and claw our way to "victory." Instead of taking a client-centric approach—e.g., how do we best help our client to resolve their problems—we make it all about our performance. "I won my case." "I settled that suit." "I beat that SOB lawyer." This is hardly the behavior needed to repair the rift in the social fabric. Unfortunately, our legal system, adversarial in nature, does not really provide us with many alternative tools. It is said, "If the only tool you have is a hammer, everything starts to look like nails." Litigation is certainly an effective hammer, but like a hammer, it tends to just smash things to pieces. In neighbor disputes, even if one were to win a lawsuit, the financial and emotional costs will likely be disproportionate to the perceived success of the outcome.

Outside of litigation, the law can play as large a role or as small of a role as the parties assign it. Getting beneath the parties' positions, legal or otherwise, to the underlying needs and interests is really where the interesting fruitful work is to be found. The more we practice creative problem-solving in the context of a more socially responsible practice of law, the better we will be as a profession…and in turn, a society.

Endnotes

1 *See e.g., Understanding Tree Law: A Handbook For Practitioners*, Barri Kaplan Bonapart, (2014) Thomson Reuters/Aspatore.

2 Aikido is a modern martial art founded in the last century by Morihei Ueshiba O-Sensei. It is non-violent and strives to achieve harmony with nature, others, and oneself. There is a growing movement of professional mediators and conflict managers who are incorporating principles of Aikido into conflict resolution techniques. *See, e.g., AIKI WAZA MICHI SHIRUBE (Aikido Practice as a Signpost to The Way), Selected essays on aikido and nonviolent interaction*, Second, Enlarged Edition, Donald N. Levine, The University of Chicago, (September 2013), at Chapter Eleven, "Aikido and the Art of Mediation".

3 Author Miguel Ruiz put it succinctly in his book *The Four Agreements:* "Whatever happens around you, don't take it personally… Nothing other people do is because of you. It is because of themselves." *The Four Agreements:*

A Practical Guide to Personal Wisdom (A Toltec Wisdom Book), 1997, Amber-Allen Publishing.

4 For industry definitions of and requirements for the various kinds of arborists, see the ASCA website, *available at* www.asca-consultants.org/industry/definitions.cfm.

5 ASCA Homepage, www.asca-consultants.org.

6 or a description of the eligibility requirements, see the ASCA website available at www.asca-consultants.org/?page=EligibilityDuesNewMe.

7 For a list of requirements to become an RCA, see the ASCA website available at www.asca-consultants.org/?page=EligibilityFeesRCAs.

8 For a description of professional foresters and the requirements for becoming an RFP, see the Board of Forestry and Fire Protection website at www.bof.fire.ca.gov/professional_foresters_registration/about_seebox/the_registered_professional_forester__printable_pamphlet_.pdf.

9 See Society of American Foresters website available at www.eforester.org.

10 See SAF website for eligibility requirements available at www.eforester.org/Main/Professional-Dev/Certified-Forester/Eligibility-Requirements/Main/Certification/Eligibility-Requirements.aspx.

11 See SAF website for eligibility requirements available at www.eforester.org/Main/Certification_Education/Certified_Forester/Requirements/Main/Certification/Requirements.aspx?hkey=7eae8378-e92b-438e-aba9-93e713cb38cc.

12 See, e.g., the Arbor Day Foundation website, available at www.arborday.org/trees/righttreeandplace/.

13 Arbor Day Foundation, *available at* www.arborday.org.

14 Alexis de Tocqueville: *Democracy in America (Chapter 8).*

15 Annual address to the American Bar Association, (Feb. 12, 1984).

16 For an in-depth discussion on neuro-literacy and its importance in conflict resolution see the website for the Integrative Law Institute available at www. https://integrativelawinstitute.org/2013/08/02/what-is-neuro-literacy-and-why-should-you-care/

17 Various definitions of "integrative law" can be found. One article published by the American Bar Association in 2013 described it this way: "Unlike traditional law practice, which is often competitive and aggressive, integrative lawyers are trying to simultaneously make a difference in the world, earn a good living and lead satisfying personal lives. According to Pauline Tesler, director of the Integrative Law Institute, integrative law is the "umbrella term for a variety of vectors that have become more widely known" in the past few years. The movement encompasses some forms of mediation, restorative justice, collaborative practice, and even elements of positive psychology and social neuroscience. Integrative lawyers focus on out-of-court solutions and the well-being of all players in the legal system—lawyers and clients included. Over the past several years, the movement has gained momentum. And Tesler, who has trained more than 6,000 people in integrative law principles over the past 20 years, is convinced it is the next 'huge wave coming to the legal profession.'" www.abajournal.com/magazine/article/integrative_law_puts_passion_into_the_profession/. See also Pauline Tesler's website at www.integrativelawinstitute.org.

18 See, for example, Eileen Barker's work in transformational forgiveness designed to resolve conflict and make peace both with others and oneself at www.thepathofforgiveness.com.

19 See, for example, the work performed by the Center for Nonviolent Communication founded by Marshall Rosenberg available at www.cnvc.org. For a list of other alternative forms of legal practice see www.cuttingedgelaw.com