

# Peacemaking for Lawyers

## Teaching Notes

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### Introduction

#### Purpose of the course

- To provide a counterbalance to the law-focused, adversarial orientation to human conflict now taught in the law curriculum.
- To provide a foundation knowledge about human conflict.
- To demonstrate the richness of multi-disciplinary analysis.
- To provide analytical tools beyond law for understanding and making sense of human conflict
- To open the possibility of lawyers being peacemakers as a professional career path.

#### Format

This course can be taught as it either two or three unit class meeting one, two, or three times per week. My teaching style is not to rehash assigned material, but to use it as a springboard for discussion. I have found that this class works better with smaller seminar-style classes of fifteen to twenty students. Sitting around a large conference table seems more conducive than a classroom lecture style. The idea is to get students to reflect on the various aspects of human conflict and the law.

#### Typical three hour class session

9:00-10:00	Small group discussion of chapter reflection problems
9:30-10:30	Group discussion
10:30-10:50	Break
10:50-Noon	Exercise or Video or Lecture with PowerPoint

Students have reacted from interest to boredom to the PowerPoint lectures. Therefore, you should look at each of the PowerPoint and decide which if any to use during class. The website provides pdf copies of the Power Point lectures. If you would like the

original ppt files to modify for your use, email me at [doug@nollassociates.com](mailto:doug@nollassociates.com) and I will be happy to send them to you.

## Evaluation and Grading

**Alternative One:** Assigned the development of a conflict map that will be developed to wrap the course. Conflict maps are formal analyses of conflict between two or more people or groups. Students will find the analytical exercise somewhat similar to legal analysis, but using different rules and concepts. Typically, I have the students write three papers, with the first two papers focusing on the early parts of the map. The final paper is a complete conflict map.

**Alternative Two:** Assign three papers, teach dealing with a different conflict. These could be shorter conflict maps emphasizing the material covered to that point in the course.

**Alternative Three:** Provide for a traditional essay exam, except that students must analyze the conflict or case by using conflict mapping techniques.

## Conflict Map

The concept of conflict mapping comes from Paul Wehr's book, *Conflict Regulation*. Conflict mapping is an analytical tool for probing the causes and meaning of human conflict.

Students should be able to prepare a comprehensive conflict map by the end of the course.

Note that the text book does not correlate directly with my conflict map. Students may have to jump ahead by reading or go back for review as their maps are developed. The students will grasp the parallel between conflict mapping and traditional legal analysis. They usually have an "Ah hah!" that opens their consciousness to other ways of looking at human conflict.

## Chapter Notes

### Chapter 1

#### Conflict Metaphor Exercise

I bring in a large roll of white butcher or poster paper (available at Office Max, Office Depot or Staples) and a big box of Crayola crayons. I cut off large sheets (say 25" 25") and hand one to every student. I ask them to draw out their perception or experience with

conflict using crayons. I tell them they are not being graded on artistic ability, but we are interested in their symbolic representation of their experience with conflict.

Students will usually draw negative metaphors for conflict. Have as many as are comfortable describe their conflict metaphor to the class. What is the picture? What does it symbolize? Why did you choose this metaphor?

I draw two metaphors on the white board. One is an iceberg with the tip just above the water. The other is a whitewater river descending out of the mountains. I explain the first as representing conflict in that we only see a tiny portion of what is really going on. I explain the second as a view of conflict that looks wild and chaotic to the unskilled. But to a kayaker or whitewater guide, the rapids are easily negotiable with many still spots.

This leads to a discussion of the overview of the course. I ask the students to save their drawings for the last night of class.

#### Comments and Discussion Points

Law is a means of maintaining a civil and peaceful society. The protective aspect of law defines the rights and obligations of members of the society. The resolution aspect of law is based on a liberal theory of society. First, individualism generally has priority over communitarianism. The justification is that protecting fundamental rights through legal process is better than war. For the legal system to work, there must be minimum legal standards to hold a pluralistic society together. In addition, the system must provide conditions of justice for all, however justice is defined.

The great strength of the legal system is that one party can compel another party to participate. Many argue today that this unfettered right has run amok, especially with medical providers and small businesses. Nevertheless, access to the legal system is a fundamental and essential part of our liberal society.

I ask students a simple question. “What are the justifications for an adversary system of resolving disputes?” Notice that I do not use that phrase “adversarial system of justice.” Justice is subjective and difficult, if not impossible, to measure. Concepts of Justice are covered extensively in Chapter 10.

I list student answers on the whiteboard.

Generally, I look for:

- Determine the truth
- Safeguard individual rights
- Provide a check against government abuse

Next, I ask, “What are the assumptions underlying the adversary system of resolving disputes? “

Don't be surprised at the blank stares. Law professors generally do not challenge students to think about the adversary system within a broader context of human conflict. Of course, I think this is a big mistake.

I think the basic assumptions are:

- The parties are represented by equally competent counsel.
- The process is governed by rules known to all.
- The rules are fairly and uniformly applied to each side.
- An impartial referee/judge presides over the proceedings.
- An impartial trier of fact weighs evidence and decides which story is most convincing.

There may be more assumptions, but these seem basic to me. If you are at all cynical, you will realize the impotence of these assumptions. While theoretically pleasing, they are pragmatically non-existent. You may or may not wish to share your cynicism with your students. I do, based on my lengthy trial career. I have personal stories that rebuff every assumption.

Then ask, "Why do these assumptions exist? What is the purpose of each assumption?"

I point out that zealous advocacy only works when bounded by rules and the will to enforce the rules. E.g., the limits of zealous advocacy are the four walls of the courtroom. Outside the physical courtroom, the assumptions fail and the justification for zealous advocacy fails. I show that the "win at any cost" mentality of many lawyers is not ethically or morally justified by adversary ideology.

The last question asks: "What are the remedies a court can give a party in the dispute?"

Let them struggle a bit, then give them this simple answer:

- A judgment for money;
- A coercive order;
- A declaration of rights.

That's it!

All criminal remedies fit into the coercive order; e.g., an order of incarceration or death.

Then I ask, “How the effective are these remedies that solving most human conflicts?” Students began to see the limitations of the law and probably silently question why they are in law school in the first place.

### The Myth of Redemptive Violence

Walter Wink proposes a useful model of modern society. The idea is that only violence can restore and protect safety and order. Wink demonstrates how the myth has dominated human society for 4,000 years.

While there are many explanations for the decline of civility in the law, I think Wink’s myth helps us understand the larger societal pressures and responses to human conflict. The law and lawyers reflect the environment they operate in. Consequently, understanding lawyers as “armed redeemers” helps us comprehend the love-hate relationship society has with the legal profession.

The point I make in this chapter is that lawyers can be peacemakers. Their current role has been defined by a myriad of sources and histories, but nothing really describes what it means to practice law as a peacemaker.

### Chapter 2

I ask, “What does the word ‘Peacemaker’ evoke for you?” I want to generate discussion about the meaning of peace, whether there are different value assumptions between peacemaking, litigation, and mediation, whether peace and peacemaking are even terms that should be used in law and in law school.

The Ten Principles of Peacemaking can provide grist for discussion. Some questions to consider:

- Are there advantages to settling cases rather than trying them? Disadvantages?
- What should we as a society be striving for in settlement?
- Does settlement resolve conflict?
- What are the roles of lawyers in our society? Is the concept of a lawyer as peacemaker consistent with our current view of lawyer roles? Why? Why not?

If you want to work in some early ethics discussion, consider the ABA Model Rules that require lawyers to advise clients of all possibilities for conflict resolution.

Students will ask if clients will seek out lawyers who advise peacemaking. “Don’t people want the meanest, junkyard dog lawyer they can find?”

My response is that most clients come to lawyers out of fear. They can be and often are emotional and, as a result, want to strike back hard and fast. The lawyer who agrees to this desire without reflection will have a very disappointed client. Reasons to explore:

- The judicial system does not guarantee “justice” in substantive outcomes.
- Trial is very expensive.
- There are always two or more stories to be told.
- The crowded court dockets usually mean long delays.
- The available remedies will not address client needs, interests, or desires.
- “Winning” almost never leads to a sense of justice, closure, satisfaction, vengeance, or healing.

Related to all of this is the economics of practice. How does one make money by being a peacemaker? Isn't the lawyer's economic interest harmed by early resolution of conflict?

My response is that most lawyers do not represent people or entities with enough wealth to afford litigation. Most every lawyer in private practice can talk about tens of thousands of dollars written off as uncollectible fees in litigation. I personally wrote off millions of dollars in fees. This is the rule, not the exception, in private practice.

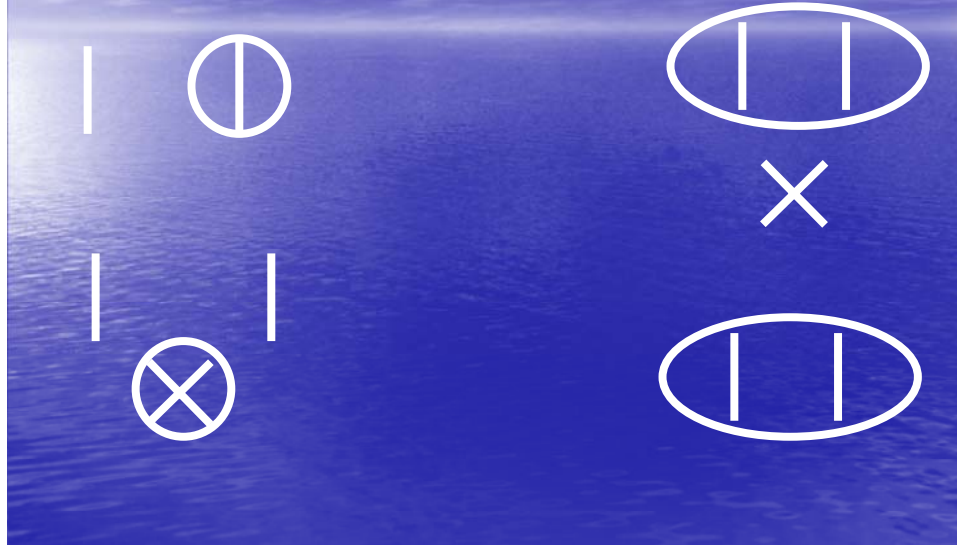
In addition, the outlook for a professional practice should be long term. Working on long term reputation and long term wisdom will pay greater dividends than short term exploitation of cases. This is a hard sell, but students should hear it over and over.

The video “The Last Dance,” produced by the Harvard Negotiation Project, is an example of a no-caucus, transformative, interest-based mediation. It is useful for creating a picture of process early in the class. I have some problems with it, but for teaching purposes, it's fine.

### Chapter 3

The key to this chapter is my colleague Ron Claassen's model. His Four Choices for Dealing With Conflict is very elegant. This model is so simple, yet so effective at showing people their choices in resolving conflict. As a matter of professional practice, I use this model in my mediation monologue. The model is based on party choice. The four parts each demonstrate a fundamental way to resolve conflict.

## Conflict Resolution Claassen's 4-Way Model



The upper left choice is Coercion where one party has the power to decide the conflict over another. The lower left choice is Outside Authority where the parties give the power to decide a conflict an outsider. This is typically the litigation/arbitration choice. The upper right choice is Peacemaking/Mediation where the parties agree to keep the power to decide the conflict to them. They bring in an outsider, the peacemaker, to assist them. The lower right choice is Negotiation where the parties work out the conflict by themselves.

I tell students that the typical legal conflict starts with Negotiation, then moves to Coercion when one party becomes frustrated, then moves to Outside Authority (litigation), then moves to Peacemaking/Mediation. I advocate moving from Negotiation to Peacemaking to Outside Authority.

### Chapter 4

This chapter summarizes the various views on mediation orientation. Putting up Riskin's Grid is usually of good idea. Len it is reconsidering his model, but the time being, the original grid remains useful.

In this class, I start by showing Star Trek: The Next Generation "Loud As A Whisper." I play this video (available on Amazon.com) with chapters three and four. Students are blown away by Star Trek in a law school class. The video is the basis for discussion based on the following questions:

Why does mediation work?

What are the good/bad attributes of a mediator?

How should a mediator be selected?

It's typeset, that was the mediator selected question

Where would this mediator fit on Riskin's Grid?

Does this mediator's orientation change through the story? If so how?

What strategic choice does this mediator face as the story unfolded?

## Chapter 5

This chapter and chapter seven deal with material potentially sensitive to students. I'm careful not to be judgmental and am clear about my own opinions. I expect disagreement, using it to point out the problems we have an understanding human nature.

I divide the class into groups of 3 or 4 and assign them a "View of Human Nature" from the book. I ask them to develop answers to the following questions that they can share with the entire class"

- What is the particular view or philosophy? What evidence does the proponent offer for his or her view?
- What is the diagnosis? E.g., what are the qualities or attributes that make up human nature in this view?
- What is the prescription? E.g., how must humans live to have a virtuous, good life?
- Is this view complete? What is missing, if anything?
- What does the view appeal to?
- Do you have any critiques or comments?

My comments follow this outline:

- I. What is ideology?
  - a. System of beliefs
  - b. Guides life, norms, behaviors
  - c. Promotes group cohesion
  - d. Identifies membership in a group
  - e. Excludes non-believers
- II. What is a theory of human nature?
  - a. Background theory of the nature of the universe
  - b. Theory of the nature of humans
  - c. A diagnosis of what is wrong with humanity
  - d. A prescription for fixing what is wrong with human nature
- III. Classifications of theories

- a. By Discipline
    - i. Religious
    - ii. Philosophic
    - iii. Scientific
  - b. By Nature
    - i. Transcendent
    - ii. Existential
- IV. Basic Theories
- a. Humans as essentially good
  - b. Humans as essentially evil
  - c. Humans as free beings
  - d. Humans as social animals
- V. Relationship to Peacemaking and Conflict Theory
- a. Theories of human nature provide frames, lenses, and perspectives. How do we interpret social events?
  - b. Norms and rules
  - c. Assessment, evaluation and judgment about behaviors and conduct
  - d. Response to conflict:
    - i. Response to offenders
    - ii. Response to injustice
    - iii. Propensity to blame and attribute causation

## Chapter 6

I have updated this material that will appear as a chapter in a multi-volume set entitled “Psychology And War” to be published by Praeger in 2005. I’ve included a draft with the materials.

Don’t be overwhelmed by the technicality and don’t let students be overwhelmed by it. Like any field of knowledge, neuroscience has layers of complexity. We don’t need the gritty details, just the big picture and its implications.

### Key points

Humans are 98 percent emotional; 2 percent rational

Rationality cannot control emotion

Emotion can overwhelm rationality

The dominance of emotion over rationality is biologically based.

All humans share the same brain systems and brain responses.

Upbringing, culture, experience, all modulate human triggers (what causes us to fear), behaviors (how we respond), and perceptions (how we explain what is going on).

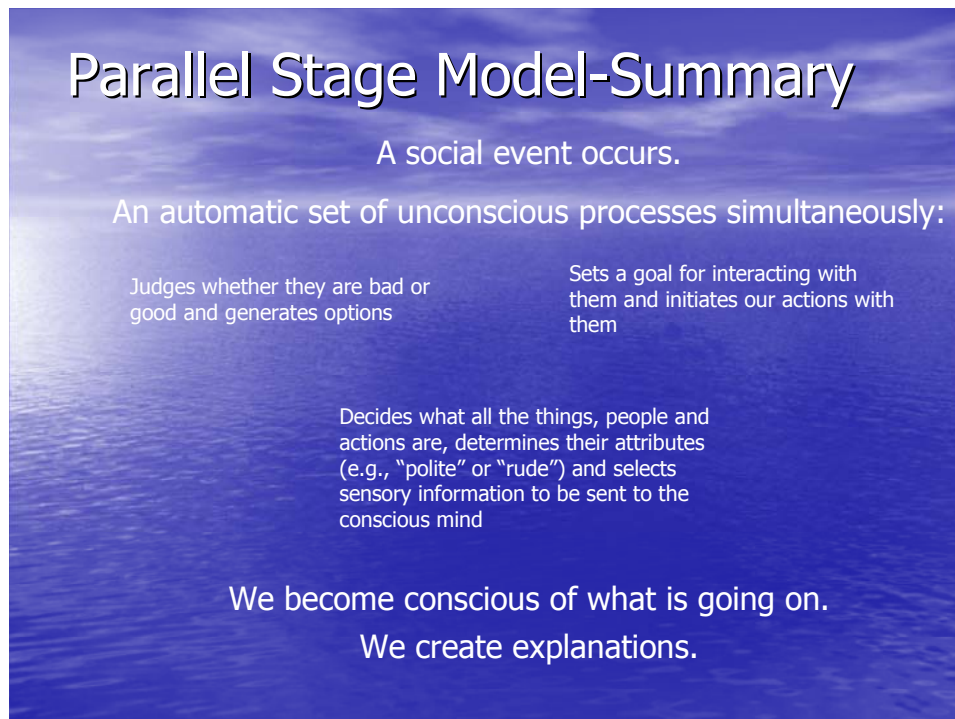
The fear response system

Keyword: amygdala

We have two amygdala in our brains. They are almond-sized processes, one on each hemisphere. The amygdala is phylogenetically very old. That means that vertebrate animals have had some form of amygdala going back millions of years.

The amygdala functions as an early warning system. They evaluate relatively raw sensory information and judge that information as good or bad. The judgmental process is continuous and, most importantly, is outside our conscience awareness or control.

A highly simplified diagram illustrates what happens:



## Chapter 7

This material is self-explanatory. Identity is a major conflict-driver. Many conflicts persist because the parties have so closely identified with the conflict that to end it would mean the symbolic end of their personal identity.

## Chapter 8

This chapter approaches religion on several levels. First, as the introduction demonstrates, the law is often inadequate when dealing with religious issues. The judge in this Hmong case, the Honorable Larence O'Neill, now a Federal Magistrate Judge in

the Eastern District of California) recalls that he had not been on the bench six months when he received this assignment. He was faced with an impossible position and ultimately deferred to the Hmong family's desires. Second, I find the new research in neurotheology to be illuminating. The research says that our brains have the same religious experiences. The difference in religion may not be in the physical experience, but in the interpretation of that experience. When we think of religion as a set of absolute values, I find hope that ultimately there will be one set of values. I have read Deepak Chopra's book, "How to Know God" and think that his seven levels of knowing God are very useful in understanding the role of conflict and religion. I am still assimilating his material and will up these notes later.

I also saw the documentary "What the (Bleep) Do We know?" I intend to start showing this film somewhere midpoint in the class. Although I am careful and sensitive to the rational-secular environment of law school, peacemaking is for me a spiritual experience. I have simply witnessed too many "miraculous" transformations of intractable conflict to not believe some Higher Power is at work in the room. Surprisingly, many students hold a deep-seated spirituality and seem to resonate with this.

Tony, a catalyze the major world religions for use in comparison using the cognitive operators of the brain. I point out that each religion addresses two issues: present the G. or how the universe was created and salvation, the religious meaning of human life.

## Chapter 9

I am indebted to Larry Dunn, Ph.D., my colleague at Fresno Pacific University's Center for Peacemaking and Conflict Studies, for his excellent course on Culture and Conflict. I took the course and learned a great deal. Thos most important lesson is that a peacemaker must be as free as possible of all assumptions about the parties and their cultural backgrounds. Following the lead of John Paul Lederach, I believe the parties are the best resource for process design in peacemaking when they appear to be of different cultures.

The chapter summarizes some of the major themes in conflict and culture studies.

## Chapter 10

This is one of my favorite teaching sessions. Amazingly, most allow students cannot give a cogent definition of justice.

I think justice can be defined from a variety of perspectives:

- Classical theories of justice: positive law, utilitarianism, and natural rights;
- Distributive justice: equity, equality, and need;
- Procedural justice: hear the other side;

- Retributive and Restorative Justice

The students understand the interplay between classical justice theories by the following diagrams:

## What is Justice?

Theory	Measure	Obligation
Positive Law	Conformity to law	Obedience
Social Good	Most good for most people	Promote good of society
Natural Rights	Preservation of individual rights	Recognize human rights

# Justice and Balance of Power

Theory	Branch of Government
Positive Law	Executive
Social Good	Legislative
Natural Rights	Judicial

The question is often asked whether peacemaking or mediation can provide justice. You might tease out the assumptions of the question:

What is justice to a party?

Can justice be measured objectively?

If peacemaking cannot provide justice, can the adversary system do any better?

This usually leads to a discussion of the criminal justice system. I ask what justifications support retributive justice. In other words, why do we punish? The Power Point on Justice contains a fairly extensive list of justifications. I ask if punishment actually achieved these goals. If so, why are the prisoner populations increasing?

I use this Zen moment to introduce Restorative Justice. The Power Point presentation is useful here to introduce the concepts to the students.

## Chapter 11

The literature generally divides conflict behaviors into four, five, or six categories. I use five: Forcing, Accommodating, Avoiding, Compromising, and Collaborating.

I give the students a simplified conflict behavior inventory so we have some sense of where they fall into these behavior classes. The inventory is attached as a pdf file.

Using the inventory:

Score each statement based on your understanding of how you respond to the situation. Students should choose to either social/private or professional environments to measure.

In Part Two, add the scores and place the numbers in the appropriate categories.

In Part Three, rank the behaviors highest to lowest so that the numerical score will be in the left column and the corresponding behavior will be in the right column. Do this for both Calm and Storm.

### Interpretation

The highest score for Calm and Storm indicates the conflict behavior most likely to arise first. The differential between scores indicates the strength and persistence of the behavior.

Example:

12	Forcing
11	Accommodating

The person will start with Forcing and if it is unsuccessful will fail to quickly move to Accommodating.

12	Forcing
8	Accommodating

The person will start with Forcing and remain in that behavior for some time before trying Accommodating. The four point difference between the two styles indicates that the Forcing behavior will show some persistence.

9	Forcing
9	Accommodating

The person has no preference between Forcing and Accommodating and will settle between these behaviors.

I have administered this inventory to hundreds of students, lawyers, and judges and find it surprisingly accurate. Judges, by the way, are uniformly Avoiders. Maybe that's why they sit on the bench "above it all."

Van Vliert's analysis and grid helps students understand the relationship between conflict behaviors. I usually don't spend much time on it as they seem to understand the material.

## Escalation Theory

This is self-explanatory. This theory is based on an article by Spillman & Spillman. I think the theory describes well the stages of conflict escalation in terms of human development.

Key points:

- Each stage is inversely related to a stage in human development. The higher the escalation stage, the more emotionally regressed the parties.
- Parties start at different stages and move through the stages at different speeds. Holding a party at Stage I while de-escalating another party can be very challenging. The party at Stage I may become impatient, feel disrespected, and start escalating. “That guy is just jerking us around!”
- Lawyers usually get involved at Stage III.
- Few cases get into Stage IV so make sure students do not over-exaggerate the escalation.
- Peace only occurs by walking the parties back through the stages one step at a time. One of the biggest reasons for impasse is that mediators engage parties in negotiation (which means the parties should be in Stage I) when the parties are in Stage II or higher. I emphasize the importance of de-escalation before negotiation.
- Lawyers can also be escalated in their professional relationship with each other. This adds another layer of complexity to the conflict.

## Chapter 12

I don't have a lot to say about this chapter. It is foundational and included for completeness. If you want to spend some time on power, this is a good place to do it. I originally thought that conflict resolution was all about power. The more I practice, study, and teach peacemaking, the more convinced I am that power is greatly over-rated. Here's why:

- Power requires capacity to compel and coerce. Most people do not have the capacity they think they do.
- Power requires will to exercise. Most people do not have sufficient will to exercise power.

- Power requires that the object have no other options. Obviously, people can reframe their perceptions to create new options and render others into powerlessness.
- Power requires supervision. If the object is not supervised, how does one know whether power has been effective? Most people do not have the ability or discipline to supervise the exercise of power.
- Power requires the will to punish or withhold benefits. Most people do not have the strength or resolve to do this.

## Chapter 13

The Prisoner's Dilemma demonstrates a classic problem: how does one cooperate when the danger of exploitation is great?

I divide the class into two groups. Group one, composed of two players, plays an iterated Prisoner's Dilemma twenty times. They note each play and keep points. Group two is divided into groups of three-two contestants and a mediator. I ask the mediator to facilitate cooperation between the contestants. They play twenty times and keep score..

The results are posted on the whiteboard. Usually, the non-mediated groups obtain suboptimal results compared to the mediated group. This is a striking demonstration of the power of an intermediary, even without power to enforce a commitment or promise.

I demonstrate information conditions using the card table on page 354. Much of human decision-making can be analyzed in terms of the information states of the parties.

The social dilemmas in this chapter are also useful discussion topics. Typically they develop during discussion of the reflective questions.

## Chapter 14

The major point is to emphasize CRIP as a simple, fast method of conflict analysis.

- Content        But does this conflict seem to be about objectively?
- Relationship    Who are we in this relationship? This raises issues of equity, equality and need.
- Identity        Who am I in this relationship? Raises issues about face and self-esteem.
- Process        How will we process this conflict? Raises issues about conflict behavior and processes. This is a good time to review Claassen's Four option model.

Typically, lawyers focus on content to the exclusion of relationship, identity, and process. Relationship, identity, and process goals drive conflicts, but are difficult to articulate. I tell students that when a plaintiff is making a high dollar demand in a case that is not worth it, the conflict is probably being driven by relationship, identity, or process goals.

One of the central tasks of peacemaking is to help parties identify their goals, reframe them, and clarify them. Clear goals can be achieved and modified.

## Chapter 15

The “Value Valuation” exercise is useful to show students how black letter ethical rules gain meaning with the shading and textures of experience. I go through the ABA-AAA-SPIDR rules to show how they, like most ethical guidelines, are too broad to provide meaning and guidance. I have updated this material with the California rules, adopted in 2003, which are more specific.

## Chapter 16

I start this class with the question:

“What are some reasons apology is not considered by lawyers as a response to conflict?”

The points I want students to think about how lawyers and the law excuse people from taking full responsibility for their errors. One of the reasons, I think, our society is so litigious is that we have lost the courage to be accountable to others. Instead, we turn to lawyers and say “Make them accountable.” If defending, “Make them pay so I won’t have to be accountable.”

I ask students if this is a good attribute or behavior for our society. Should we advance individualism at the expense of personal accountability. I introduce the concept of core sequence in apology. What makes an apology sincere? Why are insincere apologies offensive?

## Chapter 17

In the last class session, I ask students to take out their conflict metaphors from the first session, turn them over, and draw out a conflict metaphor as they see it today. The degree to which students have deepened their perspectives about human conflict never fails to move me.

I use a leadership metaphor to describe the role of the peacemaker. In this metaphor, the peacemaker provides a large number of psychological services to the parties in conflict. It is a good recapitulation of the course material.

