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Escaping from Lawyers' Prison of Fear

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ESCAPING FROM LAWYERS' PRISON OF FEAR

John Lande*

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I. INTRODUCTION

Lawyers are full of fears. Of course, fear is a normal—and often functional—emotion in humans and other animals. In addition to the kinds of fears that people generally experience,¹ however, practicing lawyers regularly experience numerous fears endemic to their work. The following is a non-exhaustive catalog of work-related fears that lawyers commonly experience. Obviously, all lawyers do not fear all these things all the time, nor are all these fears unique to lawyers. But even this partial listing of common fears suggests that lawyers generally operate in environments that frequently stimulate many fears including:

- feeling that their offices or cases are out of control;²
- changing familiar procedures;³
- looking foolish by asking certain questions;⁴
- candidly expressing their thoughts and feelings;⁵

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¹ For discussion of people's fears generally, see *infra* Part II.

² Thomas R. Colosi, *The Principles of Negotiation*, DISP. RESOL. J., Feb.-Apr. 2002, at 28-29; Mark P. Robinson, Jr., *Beating Back Your Fears*, TRIAL, Feb. 1998, at 72, 72.

³ Jim Golden et al., *The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases*, 13 HARV. NEGOT. L. REV. 211, 243 n.65 (2008) (quoting lawyer stating, "Key people fear they will go out there and make a mistake or something will go wrong and they will be blamed because they changed the way things had always been done.")

⁴ Robinson, *supra* note 2, at 72.

- giving “bad news” to clients;⁶
- being intimidated by superiors in their firm;⁷
- asking for favors from their counterparts⁸ in a case or being asked for favors by their counterparts;⁹
- seeming “too nice;”¹⁰
- being blamed by oneself or others;¹¹
- speaking in public;¹²
- lacking skill and confidence due to limited trial experience;¹³
- having their clients give false testimony;¹⁴
- failing to locate critical “smoking gun” information hidden by the other side;¹⁵

⁵ Mark I. Satin, *Law and Psychology: A Movement Whose Time Has Come*, 1994 ANN. SURV. AM. L. 581, 591-98 (1994).

⁶ Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 340, 362 (1999) (describing lawyers' fear of giving their clients “bad news” about the case, fearing that this might jeopardize the attorney-client relationship).

⁷ Mark I. Satin, *supra* note 5, at 589 (quoting a lawyer stating, “The associate is afraid to act because of the partner's ‘God complex.’”).

⁸ This article uses the term “counterpart lawyers” (or sometimes just “counterparts”) referring to lawyers representing other parties in a matter. This generally corresponds to the common term, “opposing counsel,” but does not define the roles solely in terms of opposition as counterpart lawyers regularly cooperate with each other. See John Lande, *Getting Good Results for Clients by Building Good Working Relationships with “Opposing Counsel,”* 33 U. LA VERNE L. REV. 107, 107 n.1 (2011).

⁹ Ruth D. Raisfeld, *Attorneys as Negotiators: Practical Steps to Becoming a Better Negotiator*, 33 WESTCHESTER B.J. 15-17 (2006).

¹⁰ Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 146 (2002) (noting that advice to lawyers recommending adversarial behavior stimulates latent fears of being “too nice”).

¹¹ Lee Hugh Goodman, *The Case of the Frightened Adjuster*, FED. LAW., June 1997, at 42-43 (describing fear of insurance defense counsel if something goes wrong in a case and the claims adjuster does not take responsibility); J. Gary Gwilliam, *The Art of Losing*, 34 TRIAL 79 (1998) (explaining that lawyers blame themselves for litigation decisions leading to unfavorable results).

¹² Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 IND. L.J. 589, 597-98 (2009).

¹³ Janine Robben, *Oregon's Vanishing Civil Jury Trial: A Treasured Right, or a Relic?*, OR. ST. B. BULL., Nov. 2009, at 19, 22 (identifying concern that declining trial rates lead to “fewer lawyers and judges who know how to try and judge cases”).

¹⁴ Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 459 (2004) (“The fear of receiving a penalty for defendant testimony later deemed false is relevant not only at trial but at every stage of the criminal prosecution.”).

¹⁵ Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229, 242 (2004) (plaintiffs' attorneys sometimes engaged in “usually quixotic searches for the holy grail of a ‘smoking gun’ document that would instantly win their case”); Michael R. Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLAMETTE L. REV. 429, 442 (1991) (“The goal of a competitive strategy is to use fear or intensity to undermine the other party's confidence in their own bargaining position in order to exploit their weaknesses. Each negotiator carefully controls the dissemination of information about

- taking actions harming their clients' interests, such as disclosing unfavorable information,¹⁶ making trial objections that focus attention on unfairly prejudicial aspects of the case,¹⁷ or failing to argue critical issues on appeal,¹⁸
- being attacked or "outsmarted" by counterparts;¹⁹
- being judged unfairly by actual or potential jurors;²⁰
- being intimidated by judges;²¹
- suffering reprisal in response to judicial disqualification motions or reporting judicial misconduct;²²
- "antagonizing prominent citizens or the local legal community" by representing some clients "too well;"²³
- suffering the "pain, humiliation, and shame of defeat;"²⁴
- losing the "tournament" of associates to become partners in big firms that use an "up or out" system;²⁵

the client's needs out of fear that such information will be used by an opponent to the client's disadvantage. Lack of trust also leads a lawyer to question communication from the opponent for fear that the other is acting competitively.") (footnote omitted). *Id.* Lawyers, haunted by the prospect of failing to uncover critical information, may pursue elaborate quests to find a "smoking gun" that typically does not exist.

¹⁶ Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809, 819 (1998).

¹⁷ Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 *TEX. L. REV.* 629, 650 n.97 (1972) (citing *United States v. Sawyer*, 347 F.2d 372, 374 (4th Cir. 1965)).

¹⁸ Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 *REV. LITIG.* 511, 533 (2010).

¹⁹ James D. Leach et al., *Psychodrama and Trial Lawyering*, *TRIAL* April 1999, at 40; Sarat, *supra* note 16, at 831 (quoting lawyer stating, "You have to get to the point where the defendant's lawyers respect you. To get to that point you have to keep on attacking. You have to make them fear you.")

²⁰ Leach et al., *supra* note 19, at 42 ("Voir dire frightens most lawyers more than any other part of a trial." Lawyers worry that jurors will be prejudiced and judge the lawyers as being inadequate.); Tracy Walters McCormack & Christopher John Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 *GEO. J. LEGAL ETHICS* 155, 168 (2010) ("The fact that lawyers are so willing to believe in the myth of the runaway jury without any empirical evidence to substantiate it is disturbing in and of itself, but may also be a reflection of the deep-seated fear of trying cases.").

²¹ Leach et al., *supra* note 19, at 40; see Etienne, *supra* note 14, at 448 (identifying fear that judges would find lawyers' arguments to be frivolous).

²² Alschuler, *supra* note 17, at 694; David Pimentel *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 *TENN. L. REV.* 909, 926 (2009).

²³ Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 *WIS. WOMEN'S L.J.* 225, 257 (1995).

²⁴ J. Gary Gwilliam, *Trial by Fear*, *TRIAL*, Feb. 2000, at 77; Leach et al., *supra* note 19, at 40 (identifying lawyer's fear "that someday she will be witness to the state's execution of her client"); McCormack & Bodnar, *supra* note 20, at 174 (2010) (lawyers' lack of trial experience can lead them to magnify the risks of trial); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 *CARDOZO L. REV.* 2215, 2237 (2010) (describing loss of competitive pride in losing to an adversary); Sternlight, *supra* note 6, at 328 (1999) (describing fear of reducing lawyers' success rate at trial).

²⁵ MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 94-97* (1991).

- loss of business if they do not act like “hired guns,” even if it requires violating lawyers’ personal ethics;²⁶
- being rejected in an effort to bring new clients to their law firm²⁷ or losing existing clients to other law firms;²⁸
- rejecting what turn out to be lucrative cases, i.e., letting the “big ones” get away;²⁹ and
- adverse professional consequences such as reprimands by superiors, demotion, negative publicity, lack of professional advancement, loss of work, professional discipline, or malpractice liability.³⁰

Indeed, even experienced trial lawyers may have intense fears. Consider, for example, Vann Slatter’s confession: “I have been litigating cases for 18 years and have never gotten over the fear of facing that jury. My heart bangs in my chest, and I want to vomit.”³¹ Similarly, famous trial attorney Gerry Spence writes, “[I]n the courtroom the pain of fear is exacerbated, for we cannot scream. We cannot strike out. We cannot run. We cannot hide. We cannot even admit we are afraid.”³² He describes the following imaginary address to a jury:

Ladies and gentlemen of the jury [I might begin,] I’m often afraid when I start a trial. What am I afraid of? I’m afraid that I may not do my job correctly. Will I ask the right questions? Will I be able to say the right things? Will I forget something? Will I be believed? What will happen to my client if I fail? And I’m afraid.³³

Lawyers have a distinctive set of fears specifically related to negotiation, including:

²⁶ Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 101 (1994) (lawyers may “fear complete cessation of business” if they do not act as “hired guns” as they assume most clients want or expect).

²⁷ Heather Brewer, *Snap Judgments*, BUS. L. TODAY, Jan.-Feb. 2002, at 4, 4-5.

²⁸ John Flood, *Doing Business: The Management of Uncertainty in Lawyers’ Work*, 25 LAW & SOC’Y REV. 41, 64 (1991).

²⁹ Robinson, *supra* note 2, at 72.

³⁰ Scheck, *supra* note 24, at 2236-37.

³¹ Vann H. Slatter, *De-Stress for Success*, 537 PLI/Lit 279, 285 (1995) (on file with author).

³² Gerry L. Spence, *Fear in the Courtroom: The Other Defense of Mike Tyson*, TRIAL, July 1992, at 54, 55.

³³ *Id.* at 56. Spence notes that “my opponents and the judges, too, are afraid—the opponent of me; the judge of his record, of his heavy responsibility to see justice done in his courtroom.” *Id.* He concludes:

What a bitter joke that we are sworn to tell the truth, but that we are counseled to deny our honest feelings, that evidentiary facts must be paraded in front of the jury, but our emotions—including our fear as caring, human participants in the trial—must be so fatally masked.

- insecurity about their negotiation skills or preparation;³⁴
- insecurity about their trial skills, which undermines their confidence in negotiation;³⁵
- asking questions;³⁶
- being questioned aggressively by their counterparts;³⁷
- silence;³⁸
- looking foolish;³⁹
- lacking credibility with their counterparts;⁴⁰
- appearing weak to counterparts, leading them to try to take advantage;⁴¹
- actually being dominated or exploited by their counterparts;⁴²
- offending their counterparts, such as by raising one's voice;⁴³

³⁴ Robert S. Adler et al., *Emotions in Negotiation: How to Manage Fear and Anger*, 14 NEG. J. 161, 174 (1998); Raisfeld, *supra* note 9.

³⁵ Kevin C. McMunigal, *The Cost of Settlement: The Impact of Scarcity of Adjudication on Litigation Lawyers*, 37 UCLA L. REV. 833, 859 (1990) (lawyers with limited trial experience are likely to "evaluate a particular settlement offer by inflating both the advantages of settlement and the risks of trial than if the case were being handled by an experienced trial lawyer"); Robben, *supra* note 13, at 19, 22 (quoting lawyer stating, "If you're going to settle a case, it's a huge advantage to know another perfectly acceptable way to resolve it: you don't have to take a bad settlement because you're afraid to try a case.").

³⁶ Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 70 n.281 (2000) (advising negotiators not to be afraid to ask questions).

³⁷ *Id.* at 71-72.

³⁸ Charles B. Craver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOC. 271, 315 (2003) ("Less competent negotiators fear silence. They are afraid that if they stop talking, they will lose control of the interaction. They remember the awkwardness they have experienced in social settings during prolonged pauses, and they feel compelled to speak.").

³⁹ Joseph M. Epstein, *The Powers of Psychodynamics in Shaping Mediation Outcomes*, COLO. LAW., Jan. 2004, at 45, 46 ("Parties, counsel, and claims adjusters fear failure, embarrassment, ridicule, loss of face, and financial harm. These fears may motivate a negotiator to settle or accept less than the fair value of a case rather than risk going to trial.").

⁴⁰ Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1804 (2000) (lawyers may develop "the fear of developing a reputation as an overreacher should the misrepresentations not be believed").

⁴¹ Adler & Silverstein, *supra* note 36, at 60 (2000) ("in negotiations with more powerful parties[,] . . . a brave face may be called for and . . . showing fear may be fatal"); Mary Jo Eyster, *Clinical Teaching, Ethical Negotiation, and Moral Judgment*, 75 NEB. L. REV. 752, 770 (1996); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 768 (1984) ("Because the parties fear the cost, the length of time to judicial resolution, and the winner-take-all quality of the judicial result, most cases are settled somewhere mid-range between each party's initial demand.").

⁴² Shiel G. Edlin & Janis Y. Dickman, *The S.O.B. Lawyer*, FAM. ADVOC., Winter 1994, at 46, 65; Korobkin, *supra* note 40, at 1816 (lawyers fear that other side would take advantage if they knew the negotiator's actual preferences); Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 272 (2005).

⁴³ See ALAN N. SCHOONMAKER, NEGOTIATE TO WIN: GAINING THE PSYCHOLOGICAL EDGE 116 (1989) (advising negotiators that "[f]ear of offending the other party is another inhibition that you

- retaliation in response to their negotiation tactics;⁴⁴
- disclosing information that might harm their clients' position;⁴⁵
- permitting clients to participate in negotiation in a way that inadvertently harms their own cases;⁴⁶
- receiving sanctions or adverse court rulings due to rejection of suggestions in a judicial settlement conference or other failures to make or accept settlement offers;⁴⁷
- making incorrect valuation of cases;⁴⁸
- making tactical errors by starting with offers that are too high or too low;⁴⁹
- miscommunicating about concessions that the lawyers actually are willing to make;⁵⁰
- recommending that their clients accept an offer that they expect the clients will not like;⁵¹
- not getting a good enough result for clients in negotiation;⁵²
- failing to anticipate possible problems when negotiating a transaction;⁵³
- failing to reach agreement;⁵⁴

must learn to ignore. You are not trying to start a love affair; you are trying to negotiate a good deal, and you need information to get it.”). *See also* Craver, *supra* note 38, at 282, 309.

⁴⁴ *See* Adler & Silverstein, *supra* note 36, at 17 n.54.

⁴⁵ Michael R. Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLAMETTE L. REV. 429, 442 (1991) (“The goal of a competitive strategy is to use fear or intensity to undermine the other party’s confidence in their own bargaining position in order to exploit their weaknesses. Each negotiator carefully controls the dissemination of information about the client’s needs out of fear that such information will be used by an opponent to the client’s disadvantage. Lack of trust also leads a lawyer to question communication from the opponent for fear that the other is acting competitively.”) (footnote omitted); Menkel-Meadow, *supra* note 41, at 782 (“Trial lawyers may fear releasing information in pre-trial negotiations because of the presumed loss of advantage at trial.”).

⁴⁶ Sternlight, *supra* note 6, at 356-57 (1999) (describing lawyers’ fears that their clients may be bullied or tricked or may not be able to handle the emotional stress of negotiation or mediation).

⁴⁷ Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 58, 65-66 (2001) (suggesting that judges’ “‘mere’ suggestions regarding settlement” may coerce litigants who “fear that their failure to accede to judges’ wishes could result in unfavorable rulings or even sanctions”).

⁴⁸ Eyster, *supra* note 41, at 770 (1996) (noting that lawyers may “fear that they may have seriously over- or under-valued the case, or misread the opponent’s real assessment of the case”).

⁴⁹ *Id.* (law students and lawyers may have uncertainty “about the correct figure with which to begin; should they start very high, very low, or with the figure that is close to their actual desires”).

⁵⁰ Korobkin, *supra* note 40, at 1807.

⁵¹ Raisfield, *supra* note 9, at 16.

⁵² Hogan, *supra* note 45, at 447 (“The ‘winners curse’ is a sinking feeling that may occur if the other side appears too eager to negotiate or accept a proposed solution. Winner’s curse is the feeling associated with reaching a solution that is favorable and fair from every perspective but is devalued or viewed with suspicion because it has been reached sooner and with less effort than anticipated.”)

⁵³ James C. Freund, *Calling All Deal Lawyers—Try Your Hand at Resolving Disputes*, BUS. LAW., Nov. 2006, 37, 45-46 (recommending that transactional lawyers engage litigators during negotiation, “not only for the ‘what can go wrong’ caucus, but more generally to help plot strategy to ensure that our side is in a strong position should things turn south”).

- financial harm due to unfavorable negotiation results;⁵⁵
- developing a reputation for being unfair and eliciting negative reactions in subsequent negotiations;⁵⁶ and
- encouraging others to file suit or take advantage in later negotiations due to perceptions of weakness or willingness to settle easily.⁵⁷

Although the experience of fear normally is unpleasant (and, indeed, can entail extreme terror),⁵⁸ it serves an important survival function of preparing humans and other animals to deal with threats.⁵⁹ People who feel no pain—and thus have no fear—are at greater risk of harming themselves because they do not develop normal fears that would prompt them to avoid injury.⁶⁰ Lawyers' fears can lead them to enhance their performance due to increased preparation and effective “thinking on their feet.”

While fear often serves an important adaptive function, it is problematic when it is out of proportion to actual threats, is expressed inappropriately, or is chronically unaddressed effectively. Excessive fear can manifest in debilitating conditions such as phobias, obsessive-compulsive disorders, panic attacks, and post-traumatic stress disorder.⁶¹ Fear is problematic when it leads to sub-optimal and counterproductive performance through paralysis, ritualized behavior, or inappropriate aggression.

⁵⁴ Craver, *supra* note 38, at 309 (“Successful negotiators do not appear to fear the possibility of nonsettlements, which suggests to opponents that they have developed alternatives that will protect their clients if the current negotiations are unproductive. These factors cause less secure adversaries to accord these persons more power and respect than they really deserve.”).

⁵⁵ Epstein, *supra* note 39, at 46.

⁵⁶ John Richardson, *How Negotiators Choose Standards of Fairness: A Look at the Empirical Evidence and Some Steps Toward a Process Model*, 12 HARV. NEGOT. L. REV. 415, 433 (2007) (arguing that “negotiators have to worry about the reactions of others in their social environment” because of potential future negotiations).

⁵⁷ Korobkin, *supra* note 40, at 1813 (lawyers may fear “that paying a substantial settlement would encourage others whom he has injured . . . to sue him”).

⁵⁸ Although people normally want to avoid fear (and the stimuli leading to fear), many people enjoy a controlled dose of fear, as illustrated by the fact that many people pay good money to watch horror movies and go on scary amusement park rides.

⁵⁹ Psychologist Arne Öhman writes:

Basically, fear is a functional emotion with a deep evolutionary origin, reflecting the fact that earth has always been a hazardous environment to inhabit. Staying alive is a prerequisite for the basic goal of biological evolution—sending genes on to subsequent generations. Hence even the most primitive of organisms have developed defense responses to deal with life threats in their environment, whether these are unhealthy chemicals in the surroundings, circumstances suggesting a hunting predator, or aggressive conspecifics. Viewed from the evolutionary perspective, fear is central to mammalian evolution.

Arne Öhman, *Fear and Anxiety: Overlaps and Dissociations*, in HANDBOOK OF EMOTIONS 710 (Michael Lewis et al. eds., 3d ed. 2008).

⁶⁰ RUSH W. DOZIER, JR., FEAR ITSELF: THE ORIGIN AND NATURE OF THE POWERFUL EMOTION THAT SHAPES OUR LIVES AND OUR WORLD 79-80 (1998).

⁶¹ *Id.* at 177, 186-93.

The title of this article, *Escaping Lawyers' Prison of Fear*, obviously is hyperbole.⁶² Lawyers are not literally detained in custody by one of their emotions and they cannot evade fear as simply as exiting a building. But some lawyers' fears unnecessarily prevent them from performing well, producing good results for clients, earning more income, and experiencing greater satisfaction in their work. Lawyers who can manage their fears effectively are likely to do better than those who do not manage their fears as well.

This article examines the nature and causes of fear generally (Part II), in military personnel (Part III), and in lawyers (Part IV). It includes analysis of fear in the military because of similarities between military and legal roles, as described in Part III. Part IV discusses fear in law students, citing evidence that the law school experience often is highly stressful and stimulates fear-related responses. Patterns of fear initiated in law school can persist and grow as students move into legal practice. Part V suggests ways that lawyers can take advantage of the benefits of their fears and reduce problems caused by them. Part VI concludes with suggestions that lawyers, legal educators, and bar association officials promote constructive methods of dealing with fears, including use of planned early negotiation processes when appropriate to better serve their clients.

II. PSYCHOLOGY OF FEAR GENERALLY

Fear is a complex, multi-dimensional phenomenon.⁶³ Fear consists of three related components: subjective experience, psychophysiological changes, and behavioral responses such as efforts to avoid or escape scary situations.⁶⁴ Although these components are related, there is not a perfect relationship between them. For example, one may subjectively experience fear but not display typical physical or behavioral responses to fear.⁶⁵ Moreover, some people have anxiety, i.e., persistent feelings of apprehension, sometimes without being able to identify the specific sources of the fear.⁶⁶ People's expectations

⁶² JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* 4-17 (2011).

⁶³ The discussion in this article of the psychology of fear necessarily is limited to a general summary and is not a detailed, technical analysis of the subject.

⁶⁴ S. J. RACHMAN, *FEAR AND COURAGE* 3 (2d ed. 1990). It is helpful to distinguish fearlessness and courage. People can be considered fearless when they encounter scary situations but do not subjectively experience fear or have physical fear responses. People are courageous, on the other hand, when they feel fear but proceed to encounter the situation despite the fear. *Id.* at 12, 293-317.

⁶⁵ *Id.* at 3, 8.

⁶⁶ *Id.* at 3. Scientists have sought to distinguish fear and anxiety. Both phenomena may involve strong negative feelings and physical manifestations. "Fear denotes dread of impending disaster and an intense urge to defend oneself, primarily by getting out of the situation," whereas anxiety is the "apprehensive anticipation of future danger or misfortune accompanied by a feeling of dysphoria or somatic symptoms of tension." Öhman, *supra* note 59, at 710. This definition of anxiety is used by the American Psychiatric Association. *THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, § 300.02 (4th ed. 1994). Fear is often considered as a response to

about whether they will encounter aversive situations affect their actual experiences, so that people with such expectations generally are more fearful than those without those expectations.⁶⁷ In other words, fearing fear can, in itself, increase the level of fear.⁶⁸ Conversely, people who feel that they have more control over their situation are likely to feel less fear than those who feel that they have less control.⁶⁹

Researchers identify four types of situations stimulating fear in humans: (1) “death, injuries, illness, blood, and surgical procedures,” (2) animals, (3) “agoraphobic” situations such as public places, crowds, closed places, and places without escape routes, and (4) “interpersonal events or situations [including] criticism and social interaction, rejection, conflicts, . . . evaluation, [and] interpersonal aggression and display of sexual and aggressive scenes.”⁷⁰

Lawyers’ fears are primarily in the fourth class of fears. The first three of these classes of fear-inducing stimuli generally involve a primitive fear system, with analogs in most other animals.⁷¹ This is the “fight-or-flight” system that operates quickly, without “direct conscious and rational control.”⁷² Even when people are not on the lookout for danger, our bodies are prepared to respond even before we become conscious of danger.⁷³ Excessive anxiety is a “disease of fear” that occurs when people have intense perceptions of fear from their primitive fear systems that are not readily susceptible to conscious controls.⁷⁴

A second fear system operates consciously by analyzing information from the environment so that we can decide what to do about our initial responses, including “standing down” if we determine that the stimulus is not really a threat.⁷⁵ This rational system permits consideration of a wider range of responses such as bluffing, investigation, or negotiation instead of merely fighting or fleeing.⁷⁶

an identifiable stimulus whereas anxiety often arises without the presence of a specific threatening stimulus. Öhman, *supra* note 59, at 710. Reviewing cognitive and psychobiological research, Öhman concludes:

[B]oth fear and anxiety have a joint origin in an unconscious mobilization to an as yet poorly defined threat. With more time to appraise the situation, the emotion can be resolved into fear when reflexive (or highly preferred) coping options are available, or can turn into anxiety when they are not.

Id. at 724. For the purpose of this article, references to fear include anxiety unless otherwise indicated.

⁶⁷ RACHMAN, *supra* note 64, at 5.

⁶⁸ President Franklin Delano Roosevelt expressed this idea in his famous statement, “[T]he only thing we have to fear is fear itself.” Franklin D. Roosevelt, Former President of the United States, Inaugural Address (March 4, 1933).

⁶⁹ RACHMAN, *supra* note 64, at 13-15.

⁷⁰ Öhman, *supra* note 59, at 711.

⁷¹ DOZIER, *supra* note 60, at 10.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 177, 186.

⁷⁵ *Id.* at 10-11.

⁷⁶ *Id.* at 11.

Human consciousness can generate fear and also responses to fear. People develop fears through personal experience (called “conditioning”) and “social learning” (i.e., by observing others or by being told about fear-inducing stimuli).⁷⁷ Indeed, social panics, or contagions of fear, can be spread by mass communication.⁷⁸ As writer Rush Dozier puts it, “Our huge range of fears flows from the incredibly complex model of the world that we carry in our heads.”⁷⁹ It is precisely because of people’s sophisticated cognitive abilities that we can fear complex interpersonal interactions involving such things as criticism, rejection, conflict, and other threats to self-confidence. On the other hand, our brains also enable us to study threats in great detail, exchange information with others about them, and use imagination and creativity to develop strategies to prevent or neutralize them in the future.⁸⁰

Repeated exposure to fear-inducing stimuli can lower the threshold of fear or increase it. In some situations, people may become “sensitized” to particular fears, increasing the experience of fear, after being primed to expect something fearful.⁸¹ As an example of sensitization, horror movies create a crescendo of fear by presenting a series of cues creating expectations that something horrible is about to happen. On the other hand, after an extended series of exposures, people may become “desensitized” or “habituated” to stimuli

⁷⁷ Joseph E. LeDoux & Elizabeth Phelps, *Emotional Networks in the Brain*, in HANDBOOK OF EMOTIONS 167-68 (Michael Lewis et al. eds., 3d ed. 2008). See also RACHMAN, *supra* note 64, at 4 (describing three “pathways” to fear including direct exposure, observation, and communication).

⁷⁸ DOZIER, *supra* note 60, at 218. The reactions to the attacks on September 11, 2001 illustrate social contagion. The dramatic and extensive media coverage of the attacks and the aftermath frightened virtually everyone in the U.S., even though only a small fraction of the population was directly affected by the attacks. A researcher found that in the following twelve months, people flew less than in prior years, presumably in response to these events. See DANIEL GARDNER, *THE SCIENCE OF FEAR: WHY WE FEAR THE THINGS WE SHOULDN’T—AND PUT OURSELVES IN GREATER DANGER* 1-4 (2008).

⁷⁹ DOZIER, *supra* note 60, at 13. Dozier writes, “Animal fears never extend much beyond their immediate environment,” but humans worry about abstract and intangible phenomena such as global warming and nuclear winter. *Id.* at 85.

⁸⁰ *Id.* at 12. Of course, people cannot simply will their way out of all fear. The idea of consciously willing fear away is reminiscent of the song, “I Whistle a Happy Tune”:

Whenever I feel afraid
 I hold my head erect
 And whistle a happy tune
 So no one will suspect
 I'm afraid.
 . . .
 The result of this deception
 Is very strange to tell
 For when I fool the people
 I fear I fool myself as well!

STLyrics, *I Whistle a Happy Tune*, available at <http://www.stlyrics.com/lyrics/thekingandi/iwhistleahappytune.htm> (song from “The King and I”).

⁸¹ DOZIER, *supra* note 60, at 21-23.

that previously caused fear but no longer do so.⁸² For example, one study found a reduction over time in medical students' distress in dissecting cadavers in medical school courses.⁸³

There are three general approaches to treating fear and anxiety disorders. Cognitive therapy tries to help people rationally understand their fears. Biological therapy involves drugs and sometimes surgery. Behavioral therapy tries to rid fears through desensitization from controlled, repeated exposures to the feared stimuli.⁸⁴ Fears can be "extinguished" by experiencing the fear-inducing stimulus often enough that fear no longer emerges or by using cognitive strategies to regulate emotions without actually being exposed to the stimulus.⁸⁵ For example, people who are afraid of speaking in public may learn to get over the fear by repeated instances of speaking in front of others, starting with relatively innocuous efforts and building up to more challenging situations.

In general, people are more likely to manage fears constructively if they create opportunities to exercise significant control over their situations and maintain realistic optimism.⁸⁶ Part V describes strategies that lawyers can use to manage patterns of fear that lawyers regularly experience.

III. PSYCHOLOGY OF MILITARY PERSONNEL'S FEARS

A. Analogies Between Military Personnel and Lawyers

Before considering lawyers' particular fears, it may be useful to consider fears of military personnel. All analogies are imperfect and there are important differences between the military and legal worlds, but comparisons based on the similarities of these two worlds can be instructive. We can start by acknowledging some differences between the two contexts. One major difference is that, unlike lawyers, military personnel may be deployed into armed combat in which they are expected to kill others and are at risk of being killed themselves. In military combat, there is no neutral arbiter enforcing rules during the conflict, unlike judges in court. Moreover, the military is essentially a single hierarchical organization with strict lines of authority, quite different from the legal profession.

⁸² *Id.* at 23-25.

⁸³ Dene Hancock et al., *Impact of Cadaver Dissection on Medical Students*, 33 N.Z. J. PSYCH. 17, 22-23 (2004).

⁸⁴ RACHMAN, *supra* note 64, at 6, 209-40. Behavioral treatments include several different approaches including (1) desensitization through gradual exposure to the feared stimulus, (2) "flooding," which involves rapid, ungraded exposures, and (3) modeling of unafraid behavior to prompt people to imitate that behavior. There are a wide range of cognitive therapies including Freudian psychoanalysis. *Id.* See generally Judy Wong et al., *Social Anxiety Disorder*, in HANDBOOK OF EVIDENCE-BASED PRACTICE IN CLINICAL PSYCHOLOGY (Peter Sturmey & Michel Hersen eds., 2012).

⁸⁵ LeDoux & Phelps, *supra* note 77, at 168-69.

⁸⁶ DOZIER, *supra* note 60, at 209-10.

Consider also the similarities. Both military and legal personnel act as agents in adversarial systems. Both groups enter conflicts involving potentially high stakes and great uncertainty for their principals and themselves. Both roles are designed for adversarial competition in which the goal is to defeat adversaries, who use their own strategies in an attempt to win the competition.⁸⁷ Military personnel are bound to follow orders of political and military authorities, and lawyers must act to achieve their clients' goals. In that sense, both military personnel and lawyers are viewed as champions for their principals. Both groups may become involved in conflicts that are very complex, involving a range of high-level strategic plans as well as "on the ground" tactical battles. Both types of personnel receive elaborate training to take strong offensive and defensive actions to advance their goals. In both contexts, even when one side is generally stronger than its adversary, weaker parties often can inflict substantial harm on the stronger party. Both groups' tactics in handling conflict are legally regulated and individuals may receive serious sanctions for violating the rules.⁸⁸

In addition to their prototypical roles in all-out war or scorched-earth litigation, both groups are sometimes required to engage in non-adversarial (or less adversarial) actions. Although people commonly think of the military in terms of its war-fighting role, military personnel often perform other activities. Even in conflict zones, military action requires responses "ranging from 'traditional' outright warfare (where there is a complete negation of negotiation) to a seemingly antithetical skill in the form of negotiation (where armed conflict is avoided)."⁸⁹ For example, according to military expert Deborah Goodwin, "Even in more obviously aggressive military operations, such as the operation mounted in Afghanistan in 2002 and Iraq in 2003, some military units continue to work as discrete liaison teams, and negotiate with locals on a daily basis to help to re-build a shattered infrastructure."⁹⁰ Moreover, military personnel regularly

⁸⁷ Although lawyers representing clients in disputes sometimes cooperate, their role as advocates in an adversary system requires them to give the highest priority to achieving their clients' goals and taking action against others who would interfere with those goals. Even when lawyers represent clients in transactional negotiations, their goal normally is to get the best possible results for their clients and not let their clients be disadvantaged in relation to their negotiation partners. When lawyers are retained for advice and planning, they seek to protect clients from harm with possible future contestants. Thus, to generalize, in every legal representation, lawyers give priority to their clients' interests above all others'. See MODEL RULES OF PROF'L CONDUCT R. 1.7-1.11 (prohibiting conflicts of interest).

⁸⁸ For an excellent analysis of similarities between military action and negotiation, see Michael Wheeler, *The Fog of Negotiation: What Negotiators Can Learn from Military Doctrine*, 29 NEGOTIATION J. 23 (2013). Like lawyers and warfighters, negotiators may seek partisan advantage over their counterparts, who have wills of their own. *Id.* at 26-27 (Of course, most lawyers negotiate with their counterparts at times, though not all negotiators are lawyers.). Warfighters, negotiators, and lawyers should analyze the strengths and weaknesses of their positions and must deal with uncertainty, ambiguity, and friction through learning and adaptation. *Id.* at 27-32. Well-designed training can improve the effectiveness of all three groups. *Id.* at 34-35.

⁸⁹ DEBORAH GOODWIN, *THE MILITARY AND NEGOTIATION: THE ROLE OF THE SOLDIER-DIPLOMAT* xv (2005).

⁹⁰ *Id.* at xvi.

engage in military operations other than war (known as “MOOTW”s), which include conflict prevention, peace-making, peacekeeping, peace enforcement, peace-building, and humanitarian operations.⁹¹ In MOOTWs, military personnel need to “know how to fight, how to establish local security, how to deal with local adversaries, and how to cooperate with local partners and civilian international relief organizations.”⁹² As MOOTWs have become a regular part of military action as part of a “peacekeeping culture” within the military, individual personnel may identify more as warriors or peacekeepers.⁹³ These military phenomena have obvious analogs in legal work, which typically involves a great deal of negotiation, even in the context of litigation.⁹⁴

For both military personnel and lawyers, it is normal to experience high levels of fear when anticipating and engaging in conflict. Even in MOOTWs, military personnel experience fear. These missions involve difficult roles that may include some threat or use of force⁹⁵ and “are characterized by vagueness, ambiguity, boredom, and sudden or latent risk.”⁹⁶ Indeed, psychologists have

⁹¹ Wilfried von Bredow, *Conceptual Insecurity: New Wars, MOOTW, CRO, Terrorism, and the Military*, in SOCIAL SCIENCES AND THE MILITARY: AN INTERDISCIPLINARY OVERVIEW 174 (Giuseppe Caforio ed., 2007). MOOTWs are also sometimes referred to as peace support operations or crisis response operations (“CRO”). Although many of these activities sound similar, there are useful distinctions. Conflict prevention includes things like preventive deployment, early warning, embargoes, and evacuation. Peace-making includes diplomatic activities and mediation. Peacekeeping includes observation and interposition of force. Peace enforcement includes protection of humanitarian operations and establishing and protecting no-fly and other safe areas. Peace-building includes military aid to civilian authorities and assistance to refugees. Humanitarian operations include disaster relief and protection of human rights. *Id.* at 173-74.

⁹² Gerhard Kümmel, *A Soldier Is a Soldier Is a Soldier!? The Military and Its Soldiers in an Era of Globalization*, in HANDBOOK OF THE SOCIOLOGY OF THE MILITARY 432 (Giuseppe Caforio ed., 2003).

⁹³ Marina Nuciari, *Models and Explanations for Military Organization: An Updated Reconsideration*, in HANDBOOK OF THE SOCIOLOGY OF THE MILITARY 73 (Giuseppe Caforio ed., 2003).

⁹⁴ See John Lande, *Teaching Students to Negotiate like a Lawyer*, 39 WASH. U. J.L. & POL’Y 109, 121-23 (2012).

⁹⁵ See *supra* note 91.

⁹⁶ Nuciari, *supra* note 93, at 66. The goals and perspectives of military personnel can be confusing in MOOTWs because of the sharp contrast with traditional war-fighting. For example, military intervention may be part of a multinational re-education and reconciliation process rather than an operation to defeat or destroy an enemy. Armed forces sometimes act as police forces to capture war criminals for trial rather than to vanquish them on the battlefield. “The motivation [of the soldier] . . . is no longer or not solely his or her allegiance to the nation-state, but a kind of cosmopolitan perception of the necessity to defend human rights, prevent genocide and other atrocities, and to keep or enforce peace.” von Bredow, *supra* note 91, at 175. Some officers who have been involved in MOOTWs have felt unprepared for their missions due to insufficient training in understanding how to interact effectively with a wide range of people including civilians, local authorities, conflicting factions, international officials, as well as members of their own forces. They sometimes also feel unprepared to deal with the range of rules they need to follow, including international law, multinational procedures, and military regulations. Giuseppe Caforio, *Trends and Evolution in the Military Profession*, in SOCIAL SCIENCES AND THE MILITARY: AN INTERDISCIPLINARY OVERVIEW 231-32 (Giuseppe Caforio ed., 2007).

coined the term "UN Soldier's Stress Syndrome" referring to soldiers' challenges when working in MOOTWs. These include (1) inability to express aggressive impulses or respond to threats, (2) fear of loss of control in the face of provocation, and (3) fear of making errors that would cause serious political problems.⁹⁷ As noted above, even when lawyers negotiate, they are subject to many fears.⁹⁸

Lawyers have recognized the similarity between legal work and military activity, particularly focusing on hostile conflict. For example, writing about legal combat in trial, veteran trial lawyer G. Gary Gwilliams states, "[W]e are supposed to be warriors with our battle armor intact."⁹⁹ Professor Elizabeth Thornburg compiled a long list of military metaphors that lawyers use when describing their work:

Litigation is commonly referred to as a war, or more often as a battle. The other battle metaphors flow from this premise. For example, some refer to the roles that trial lawyers play in this war. They can be heroes, hired guns, gladiators, warriors, champions, generals, lone gunfighters, or the man on the firing line. Like soldiers, lawyers can be seasoned or battle-tested. They are assisted by squadrons of young lawyers who function as shock troops. People who help the lawyer are allies, while other parties are barbarians and enemies, opponents, the other "side." People injured by the litigation process are casualties.

Other metaphors describe litigation activities in warlike terms. Parties arm themselves, draw battle lines, offer or refuse quarter, plan preemptive strikes, joust, cross swords, undertake frontal assaults, win by attrition, seek total annihilation of their enemies, marshal forces, attack, and sandbag their opponents. They deliver blows, attack flanks, kill, fire opening salvos, skirmish, and cry craven. There are various kinds of battles: discovery battles; uphill battles; courtroom battles; first battles; heated battles; custody battles; credibility battles; battles of experts; and all-out battles.

Still other war metaphors depict the equipment and location of war and apply those words to litigation. Trials can take place in trenches, staging areas, and battlefields. The litigants use arsenals, weapons, war chests, launch vehicles, legal swords, artillery, hand grenades, ammunition, bombs, and explosives. They aim at targets. Even non-litigators strive to make their documents ironclad or bombproof.

War metaphors also illustrate strategies of litigation. As in war, litigation has winners and losers, victors and vanquished. The lawyers make strategic choices. Litigants may use Rambo tactics, Pearl Harbor tactics, scorched earth tactics, kamikaze tactics, pit bull tactics, and

⁹⁷ GOODWIN, *supra* note 89, at 118.

⁹⁸ See *supra* notes 34-57 and accompanying text.

⁹⁹ Gwilliam, *supra* note 24, at 77.

Hiroshima tactics. They may fight hard or fight fair, make an attack plan, adopt a take-no-prisoners approach, and take calculated risks.¹⁰⁰

Thornburg notes that metaphors comparing litigation to war “choose only glory, strategy, and generalship and ignore fear, violence, and destruction.”¹⁰¹

B. Dealing with Fear in the Military

While we generally celebrate the courage of military heroes, military personnel regularly experience fear, which is not discussed as frequently. Even so, there is some acknowledgment of this virtually-universal experience in war. For example, World War II General George Patton is quoted as saying, “[E]very man is scared in his first action. If he says he’s not, he’s a goddamn liar.”¹⁰² Most warriors experience fear, not just those going into battle for the first time. General Douglas MacArthur is quoted as saying, “[i]f bravery is a quality which knows no fear, then I have never seen a brave man.”¹⁰³

For military personnel, like other people, fear can serve a beneficial function, though it can also lead to problems. Precisely because military personnel face severe threats, fear can help them exercise caution and be ready to respond effectively to those threats.¹⁰⁴ Of course, fear can also prompt military personnel to freeze, perform ineffectively, or flee, thus increasing the risk to themselves, their comrades, and their mission.¹⁰⁵ Signs of fear include recurrent

¹⁰⁰ Thornburg, *supra* note 23, at 232-36 (footnotes omitted).

¹⁰¹ *Id.* at 247. Indeed, as Nancy Welsh commented to me, these military metaphors focus on lawyers’ roles in adversarial litigation but not lawyers’ other roles such as counselors, planners, drafters, or negotiators.

¹⁰² MICHAEL J. ASKEN & DAVE GROSSMAN WITH LOREN W. CHRISTENSEN, *WARRIOR MINDSET: MENTAL TOUGHNESS SKILLS FOR A NATION’S DEFENDERS* 78 (2010).

¹⁰³ *Id.* at 77. Historian Joanna Bourke cites a study finding that most soldiers in World War II experienced symptoms of fear:

During the Second World War, a series of interviews of men in two combat infantry divisions found that only seven per cent claimed that they never felt afraid. Three quarters of men complained of trembling hands, eighty-five per cent were troubled by sweating palms, and eighty-nine per cent tossed sleeplessly in their beds at night.

Joanna Bourke, *The Emotions in War: Fear and the British and American Military: 1914-1945*, 74 *HIST. RES.* 314, 315 (2001) (footnote omitted).

¹⁰⁴ ASKEN ET AL., *supra* note 102, at 78.

¹⁰⁵ *Id.* at 85. Bourke describes soldiers’ fears in World Wars I and II, writing that fear could be: a dangerous emotion. Fear was responsible for inhibiting aggression, disrupting the disciplined “social unit”, and over-riding more positive emotions such as loyalty to comrades. Under the spell of fear, soldiers shot their rifles wildly or found that their hands shook so much that they could not load them. It caused psychiatric casualties. Indeed, it was argued that outbreaks of fear did the greatest damage to military morale. It was even more dangerous than mortal physical wounds which at least might arouse the survivors to renewed acts of aggression against the enemy. In contrast, people who witnessed their

tardiness, moving to the rear of the lines, spending excessive time checking their gear, and exhibiting chronic fatigue, depression, illness, or unusual behaviors.¹⁰⁶

Military and police experts Michael Asken, Loren Christensen, and Dave Grossman distinguish six types of fear and recommend different approaches for dealing with each one.¹⁰⁷ These include: (1) realistic fear, (2) fear of the unknown, (3) anxiety, (4) illogical fear, (5) fear of failure, and (6) fun fear.¹⁰⁸ Asken argues that to deal with fear effectively, military personnel should understand and manage it and not try to “prevent or eradicate” it.¹⁰⁹

To deal with realistic fears, Asken recommends increased training, simulations dealing with frightening situations, setting appropriate goals, and mental rehearsals (called “tactical imagery”).¹¹⁰ Fear of the unknown is one type of realistic fear, as not knowing what to expect is normal in an uncertain situation, though sometimes the level of fear exceeds what is realistic to expect. To deal with fear of the unknown, Asken and his colleagues recommend anticipating possible scenarios and responses, and gaining experience in real life and through simulations.¹¹¹ Asken recommends training, modeling, or gradually increasing exposure to the frightening situation as well as stress management techniques such as progressive muscle relaxation, tactical breathing, and biofeedback.¹¹² Illogical fears are “out of proportion to objective realities” and can be managed through conscious efforts to stop negative thoughts.¹¹³ Fear of failing may involve a variety of factors including distaste for the particular activity, perceptions of extreme consequences of failure, fear of embarrassment, and great desire for relief from anxiety. Much fear of failure may be related to

comrades give way to terror were often rendered “ineffective” themselves.

Fear was always described as a “virus”, insidious and infectious.

Bourke, *supra* note 103, at 315 (footnotes omitted).

¹⁰⁶ ASKEN ET AL., *supra* note 102, at 78.

¹⁰⁷ *Id.* at 82, 85-86. See also BRUCE K. SIDDLE, SHARPENING THE WARRIOR’S EDGE (1995) (recommending techniques for dealing with threats to survival and other stressful situations).

¹⁰⁸ ASKEN ET AL., *supra* note 102, at 80.

¹⁰⁹ *Id.* Military personnel may experience less fear if they have some control over their situations. In World War II, bomber pilots felt they had less control over their routes and maneuvers than fighter pilots and experienced more fear despite the fact that fighter pilots were known to have twice as much risk of being killed. Bourke, *supra* note 103, at 322. Indeed, historian Alex Watson noted that in World War I, “[b]y concentrating on short-term risk and overestimating personal control, soldiers were able to convince themselves that they would survive.” Alex Watson, *Self-deception and Survival: Mental Coping Strategies on the Western Front, 1914-18*, 41 J. CONTEMP. HIST. 247, 249 (2006). See *id.* 263-66.

¹¹⁰ ASKEN ET AL., *supra* note 102, at 80, 150-83. In World War II, the military trained some soldiers by exposing them to recordings of the sounds and smells of battle including recordings of screams and the odor of decomposing bodies. Bourke, *supra* note 103, at 325.

¹¹¹ ASKEN ET AL., *supra* note 102, at 80-81. Research has found that individuals’ self-confidence in their military skills is related to reductions of fear in combat. See RACHMAN, *supra* note 64, at 47-49 (citing studies finding that military personnel have reduced fear after training in realistic conditions).

¹¹² ASKEN ET AL., *supra* note 102, at 81-82. See also David A. Kipper, *Behavior Therapy for Fears Brought on by War Experiences*, 45 J. CONSULTING & CLINICAL PSYCH. 216 (1977) (describing use of desensitization techniques to deal with war-related fears).

¹¹³ ASKEN ET AL., *supra* note 102, at 82, 184-201.

individuals' experiences growing up. Dealing with fear of failure requires acceptance of the inevitability of making mistakes and their value in a learning process. It is important to maintain self-confidence despite a limited number of inadequate performances. Techniques for dealing with fear of failure include psychological counseling and developing a positive outlook through practicing positive "self-talk."¹¹⁴ Regarding what he calls "fun fear," Asken writes that it is more accurate to refer to fun from arousal than from fear. This is not necessarily problematic as long as people exercise control in avoiding foolish risks.¹¹⁵

As indicated in this summary of recommended procedures for reducing and managing fears, experts recommend gaining real and simulated experience to manage several of these types of risk. Research suggests that simulations can be very effective in providing realistic experiences that are useful in training.¹¹⁶

IV. PSYCHOLOGY OF LAWYERS' FEARS

There appears to be little empirical research specifically about lawyers' fears. Thus this Part makes inferences based on what we know about fears that people generally and military personnel experience as well as lawyers' experience in law school and in practice. In particular, this Part focuses on students' and lawyers' experience of being stressed and related phenomena, since these experiences often lead to fears. This Part discusses law students' fears because the patterns related to lawyers' stress and fears often begin in law school. Like fear, stress can be helpful in prompting people to pay attention to threats and take appropriate actions. Too much (and even too little stress), however, can be problematic.¹¹⁷

Lawyers' fears generally involve interpersonal situations in which they are subject to evaluation of their performance and competence, resulting in fear of criticism, rejection, and defeat.¹¹⁸ Through personal experience and social conditioning, lawyers may become keenly sensitive to social threats somewhat analogous to the way that wild animals are sensitive to physical threats from

¹¹⁴ *Id.* at 82-83.

¹¹⁵ *Id.* at 84.

¹¹⁶ *Id.* at 91-93.

¹¹⁷ See B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 635-41(1991) (describing the "Yerkes-Dodson" principle that moderate levels of stress increase performance and the negative consequences of excessive stress). Trial lawyer Glenn Bradford describes lawyers' procrastination patterns reflecting their fear:

Although a fear of losing may well serve as a strong motivator for many active trial lawyers, a fear of losing can become crippling for others It has been suggested that a fear of losing often prevents a lawyer from conducting a full-blooded representation for a deserving client. The lawyer recommends a less than optimum settlement. Another continuance request is filed. A case is delegated to a junior attorney to try for experience.

Glenn E. Bradford, *Losing*, 58 J. MO. B. 208, 209 (2002). This is analogous to some soldiers' patterns of fear behavior. See *supra* notes 105-06 and accompanying text.

¹¹⁸ See text accompanying *supra* note 70.

potential predators. Even though social situations generally do not threaten lawyers' physical safety, they may respond immediately with fight-or-flight reactions to social threats. Thus lawyers may respond to threats by immediately giving up or escalating a conflict. Using highly developed cognitive systems, lawyers can manage threats through anticipation, preparation, and training to develop a repertoire of possible responses.¹¹⁹

Sophisticated communication mechanisms in legal education and the legal system can both promote and dampen fears. These mechanisms include, among others, publications, online databases, law school courses, and continuing education programs disseminating information about legal rules, cases, decisions, and procedures. This massive communication network conveys, in exquisite detail, an almost infinite range of problems arising in legal practice along with potential adverse consequences, which can be quite severe. Thus these systems alert current and future lawyers about legal risks, including "traps for the unwary," so that they do not get trapped and produce bad results for their clients. Lawyers who expect to encounter many threats seem especially likely to be afraid. On the other hand, lawyers who feel that they have more control over the risks are likely to feel less fear than those who feel that they have less control.¹²⁰ While some lawyers are truly fearless (i.e., they do not experience fear), probably the vast majority of lawyers regularly experience fear in their work and display varying degrees of courage in confronting those fears.¹²¹

Repeated exposure to legal risks can lower lawyers' threshold of fear or increase it. After repeated stressful experiences that lawyers perceive as not being successful, they may become "gun-shy" of particular situations and afraid to act assertively.¹²² On the other hand, if lawyers have repeated experiences successfully managing certain stressful situations, they are likely to become more confident in dealing with those situations in the future.¹²³ Indeed, lawyers' fears can be reduced or extinguished if they can successfully confront frightening situations.¹²⁴ Of course, that may be hard to do because many situations that scare lawyers are quite challenging and unpredictable.

Professor Susan Daicoff analyzed empirical research on lawyers' psychological patterns, some of which may relate to their experiences of fear.¹²⁵

¹¹⁹ See text accompanying *supra* notes 75, 76, 80.

¹²⁰ See text accompanying *supra* notes 69, 86.

¹²¹ See *supra* note 64.

¹²² See text accompanying *supra* note 81.

¹²³ See text accompanying *supra* notes 82-85, 112. .

¹²⁴ See *Id.*

¹²⁵ See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997). See also AMIRAM ELWORK, STRESS MANAGEMENT FOR LAWYERS: HOW TO INCREASE PERSONAL AND PROFESSIONAL SATISFACTION IN THE LAW 13-24 (3d ed. 2007) (summarizing research documenting lawyers' stress). Readers should note that such research typically identifies significant but not universal patterns that some groups (such as lawyers) are more likely than other groups (such as the general population) to have certain characteristics. Readers should not infer, however, that all members of each group have the particular characteristic ascribed to their group. See Daicoff, *supra* at 1416-17

Research suggests that many lawyers' problems arise during law school. Prior to law school, law students generally had "relatively normal" mental health reflected by rates of "psychiatric distress, such as anxiety, depression, hostility, and irritability" comparable to the general population.¹²⁶ Although studies have found that law students generally are socially confident (or at least project confidence outwardly), some research suggests that this image may be a social mask hiding feelings of inadequacy, uncertainty, and nervousness in some students.¹²⁷ Several studies have found that law students "consistently report more anxiety than the general population."¹²⁸ Although some students obviously thrive in law school, for others, law school is an experience of "fear and loathing."¹²⁹

An especially well-designed study found that, as a group, law students experience serious distress in law school that continues afterward. Professor G. Andrew H. Benjamin and his colleagues surveyed students shortly before they entered law school and found that the proportion who were depressed was comparable to the normal population.¹³⁰

During law school, however, symptom levels are elevated significantly when compared with the normal population. These symptoms include obsessive-compulsive behavior, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism (social alienation and isolation). Elevations of symptom levels significantly increase for law students during the first to third years of law school. Depending on the symptom, 20-40% of any given class reports significant symptom elevations. Finally, further longitudinal analysis showed that the symptom elevations do not significantly decrease between the spring of the third year and the next two years of law practice as alumni.¹³¹

(discussing role of individual differences in psychological characteristics and reactions within the population of law students and lawyers). In addition, readers should be cautious about making inferences from any single study because the findings may not be validly generalizable to the population of modern lawyers.

¹²⁶ Daicoff, *supra* note 125, at 1355.

¹²⁷ *Id.* at 1372-75.

¹²⁸ *Id.* at 1375.

¹²⁹ See Glesner, *supra* note 117. Referring to the fight-or-flight pattern of fear, she writes, "Students fight education and educators in ways ranging from hostility and ridicule to passive aggression, and they see themselves as 'beating the system' or 'refusing to play the game.' Students flee as well, dropping out entirely or continuing their enrollment while 'playing dead' in school." *Id.* at 627. She notes that "war stories are passed from one generation of students to the next, and indeed a cottage industry has grown around products designed to relieve student fear." *Id.* at 631.

¹³⁰ See G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students*, 1986 AM. B. FOUND. RES. J. 225, 246.

¹³¹ *Id.* at 246. The findings of declining psychological well-being of students during law school are consistent with those in other studies. See Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 889 (2007).

Moreover, a related study found that although medical students generally experienced more distress than the normal population, law students generally experienced even more distress than the medical students.¹³²

It is not clear what causes law students' distress. Theorists have suggested various features of legal education may be causal factors including "overvaluing theoretical scholarship and undervaluing the teaching function, employing generally unsound teaching and testing methods, and emphasizing abstract theory rather than providing practical training."¹³³ In particular, some things causing distress may include an intimidating Socratic teaching method, novelty of the subject matter, ambiguity of the law, heavy work load, competition, lack of grades in most courses until the end of the semester, feelings of isolation, de-emphasizing personal relationships, ignoring emotional reactions, and reluctance to get help.¹³⁴ Some have compared the first year of law school to "military indoctrination" in which instructors intimidate students, who are "stripped naked, so to speak, so that [they] may be remade" as lawyers and, as a result, become passive and fearful.¹³⁵ Some scholars argue that legal education

¹³² Benjamin et al., *supra* note 130, at 247. See also Sheldon & Krieger, *supra* note 131, at 883 ("[T]he emotional distress of law students appears to significantly exceed that of medical students and at times to approach that of psychiatric populations.").

¹³³ Sheldon & Krieger, *supra* note 131, at 883 (citations omitted).

¹³⁴ Daicoff, *supra* note 125, at 1414-15. Dean Daisy Hurst Floyd describes how the competitive law school environment inevitably leads to stress and perceptions of failure, which, in turn, can lead to fear.

Classrooms can be actively hostile, regardless of the professor's teaching style or the professor's accessibility; much of the classroom atmosphere is dictated by the general peer competition. Students feel pressure to "win" at law school, which becomes the end game. Winning is defined by the identified prizes of law school: high grades; high class rank; law review or other journal membership; the right kinds of jobs in the summer and after graduation. Unfortunately, legal education defines the prizes as goals that cannot be achieved by most of our students. If winning is defined by being in the top 10 percent of the class, then 90 percent of our students are set up for failure from the beginning. Most students enter because they want to graduate, pass the bar, and become lawyers. Almost all of them will do so. Yet many will see themselves as failures by the time they accomplish the goal because of the artificial definition of success implicit in the law school environment.

...

Law school is isolating for many students and an environment intolerant of fears, anxieties, vulnerabilities, and mistakes. Therefore, students who struggle with the complexity of law school, who are anxious about the responsibilities that come with being a lawyer, and who make mistakes or fear making them interpret these reactions as signs of inability or incompetence.

Daisy Hurst Floyd, *We Can Do More*, 60 J. LEGAL EDUC. 129, 130-31 (2010).

¹³⁵ Stephen C. Halpern, *On the Politics and Pathology of Legal Education (or, Whatever Happened to the Blindfolded Lady with the Scales?)*, 32 J. LEGAL EDUC. 383, 389 (1982). Similarly, Professor David ButleRichie writes:

The law school experience is, in many ways, similar to other formative (or re-formative, as the case may be) enterprises such as military "boot-camp." Initiates learn to think according to new rules and regulations; they are taught a

trains students to ignore their own values, which undermines their self-confidence.¹³⁶ For example, Dean Edward Rubin argues that lawyers experience “ethical stress” where “lawyers [and law students] are required to be insincere, to speak words they themselves do not necessarily believe.”¹³⁷ He argues:

Very little of this stress [in legal education] is productive and just as little of it is necessary. Modern learning theory not only provides no support for the Socratic Method as it is practiced in law schools, but also fails to support the idea, championed by the real Socrates, that education must be painful. When subjected to stress, people tend to become defensive, constricted, and instrumental.¹³⁸

While such curricular and pedagogical factors certainly are plausible causes of some students’ distress, other factors (that may or may not be related to features of legal education) may be responsible for students’ distress, such as changes in personal relationships or influences from their employment.

After graduation from law school, lawyers frequently experience “psychological problems, substance abuse, depression, anxiety, and job dissatisfaction.”¹³⁹ In one study, researcher Connie Beck and her colleagues find that “throughout their career span, a large percentage of practicing lawyers are experiencing a variety of significant psychological distress symptoms well beyond that expected in a normal population.”¹⁴⁰ Beck estimates that “[a]pproximately 70% of the lawyers in the sample are likely to develop alcohol problems over their lifetime.”¹⁴¹ Some of the causes of these problems may be related to aspects of legal practice including frequent deadline pressures, heavy workload, interpersonal and political conflicts in law offices, competition with other lawyers and law offices, financial pressures, ambivalence about their obligation of loyalty to clients regardless of the effect on others, and the competitive nature of adversary representation.¹⁴² In particular, the adversarial legal system predictably leads some lawyers “to suspect everyone of ulterior motives, and encourages secretiveness, manipulateness, and selfishness.”¹⁴³

new language; their creativity and intellectual vigor are channeled into a highly formalized and rigidly controlled continuum of thought and they are instilled with a sense of esprit de corps and professional responsibility. . . . Learning how to “think like a lawyer” in this first year of law school involves immersing students in a world that is alien and, in many ways, frightening.

David T. ButleRitchie, *Situating “Thinking like a Lawyer” Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29, 33 (2002-2003) (footnotes omitted).

¹³⁶ See Sheldon & Krieger, *supra* note 131, at 883.

¹³⁷ Edward Rubin, *Curricular Stress*, 60 J. Legal Educ. 110, 119 (2010).

¹³⁸ *Id.* at 121.

¹³⁹ Daicoff, *supra* note 125, at 1414.

¹⁴⁰ Connie J.A. Beck, Bruce D. Sales & G. Andrew H. Benjamin, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 57 (1995-1996).

¹⁴¹ *Id.* at 51.

¹⁴² Daicoff, *supra* note 125, at 1417.

¹⁴³ *Id.* at 1418.

Individual characteristics of some lawyers may contribute to their stress including “aggressiveness, competitiveness, need for achievement and dominance, low self-esteem, fear expressed through awkwardness, paranoia, and insecurity, ways of coping with anxiety, inflexibility and intolerance for change expressed through authoritarianism.”¹⁴⁴ High needs for achievement, success, and dominance can become maladaptive in practice, leading to “workaholism and perfectionism, which are at first rewarded by professional and financial success [but] when used in the extreme, however, exact a greater toll on the individual than the benefits they provide, resulting in stress, interpersonal difficulties, and substance abuse.”¹⁴⁵

The analogies between legal and military work may help explain lawyers’ patterns of stress and fear. As legal warriors,¹⁴⁶ lawyers engage in high-stakes conflict in which they fight complex battles under conditions of great uncertainty and risk. Lawyers may crave exhilarating “highs” of victory but also fear the agonizing pain of defeat. Lawyers must champion their clients’ interests even when the lawyers disagree with the clients’ decisions about how to handle a matter. Most lawyers cannot act only as gladiators in adversarial adjudication but must also represent clients in negotiation, which requires a more nuanced form of advocacy, including conflict prevention as well as negotiation with clients, allies, and opponents. For lawyers with a gladiator mindset, this nuanced advocacy can be disorienting and stressful as they may feel inhibited from responding in an adversarial manner because it may be counterproductive. Lawyers with more of a peacemaker mindset may also experience stress, fearing that they may not adequately protect their clients in the face of hostile action by adversaries. In such uncomfortable situations, lawyers can easily freeze, perform ineffectively, and exhibit counterproductive patterns including procrastination, tardiness, fatigue, depression, and alcohol and other drug abuse.

Based on this analysis of lawyers’ fears, the next Part suggests some approaches for dealing with them constructively.

V. DEALING WITH LAWYERS’ FEARS

To develop effective strategies for dealing with lawyers’ fears, it may be helpful to distinguish different patterns of fears using the Asken typology developed for the military context, which includes (1) realistic fear, (2) fear of the unknown, (3) anxiety, (4) illogical fear, (5) fear of failure, and (6) fun fear.¹⁴⁷ Obviously, there are no solutions that will successfully resolve all lawyers’ problematic fears. Reforming legal education and legal practice to increase lawyers’ competence and confidence is a large, complex challenge. The analysis in the preceding parts of this article suggests that the following approaches may

¹⁴⁴ *Id.* at 1417.

¹⁴⁵ *Id.* at 1418.

¹⁴⁶ See *supra* text accompanying note 100.

¹⁴⁷ See *supra* text accompanying note 108.

help some lawyers successfully manage their fears, similar to military personnel. This Part briefly sketches some suggestions but does not provide a comprehensive analysis or proposed reform program, which is beyond the scope of this article.

A. Dealing with Realistic Fears

To deal with realistic fears, including many fears of the unknown, Asken recommends training that includes simulations of frightening situations in which soldiers set appropriate goals and engage in mental rehearsals of how they would handle these situations. Of course, law students receive extensive education in law school and, after graduation, lawyers get continuing education, sometimes mandated by their bar associations. Some of these educational experiences include training in certain legal skills including legal analysis, research, argument, and writing, though much of it focuses on teaching the content of legal doctrine. This instruction is necessary but not sufficient to prepare students to handle many problems they regularly face soon after graduation.

In recent years, there has been a crescendo of criticism of legal education for failing to provide more training in a wider range of legal skills to prepare students to be “practice-ready” lawyers.¹⁴⁸ In virtually all law schools, students can graduate without ever having a clinical legal experience in which they get even a minimal amount of experience with close supervision.¹⁴⁹ Law schools must require students to take at least one skills course, though there is no required minimum amount of skills instruction¹⁵⁰ and students can satisfy this requirement by taking a course in legal research or writing.¹⁵¹ Although law school faculty increasingly recognize the importance of providing more skills training, there are major forces of inertia making it difficult to significantly increase the amount of skills training in law school.¹⁵² Even without increasing the number of skills courses, law schools can provide more opportunities for

¹⁴⁸ See, e.g., Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J.L. & SOC. JUST. 247 (2012); Judith S. Kaye, 2011 James P. White Lecture on Legal Education a Chief Judge's After-Life: Reflections on Educating Lawyers Today, 45 IND. L. REV. 291, 297-99 (2012); Suzanne J. Schmitz & Alice M. Noble-Allgire, *Reinvigorating the 1L Curriculum: Sequenced “Writing Across the Curriculum” Assignments as the Foundation for Producing Practice-Ready Law Graduates*, 36 S. ILL. U. L.J. 287 (2012).

¹⁴⁹ SEC. LEG. EDUC. & ADMISSION TO BAR, A.B.A., A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 33 (Catherine L. Carpenter ed., 2012) (in 2010, only three percent of law schools require students to take a clinical course to graduate).

¹⁵⁰ See generally SEC. LEG. EDUC. & ADMISSION TO BAR, A.B.A., Standards for Approval of Law Schools Standard 302(a)(4) (requiring law school curricula to provide every student with “substantial instruction” in “professional skills generally regarded as necessary for effective and responsible participation in the legal profession”).

¹⁵¹ See SEC. LEG. EDUC. & ADMISSION TO BAR, A.B.A., *supra* note 149, at 42.

¹⁵² See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 269-75 (2010).

“mental rehearsals” in doctrinal courses. For example, instead of asking students to analyze problems primarily from the perspective of an appellate litigator, faculty can frame issues for some cases where students rehearse the roles of legal advisor or negotiator, which they are more likely to perform in practice and for which students have relatively few opportunities to practice in law school.¹⁵³ In addition to efforts to increase and improve students’ training to deal with challenging legal tasks, law schools can also analyze students’ overall experience to consider if the schools might change particular aspects of the program to reduce students’ stress without significant reduction in their learning. This might entail changes in curriculum, pedagogy, and/or student services.

Although lawyers presumably have more opportunities to practice legal tasks after they graduate from law school, they still may not have enough opportunities to gain sufficient skill and confidence to avoid realistic fears. Some large law firms have essentially created their own apprenticeship programs in which they carefully train associates in their first years in the firm. However, many firms do not provide such mentorships, and the number and quality of such opportunities are likely to shrink as clients are less willing to foot the bill for this training.¹⁵⁴ In any case, lawyers perform many different tasks and it is hard to get a lot of opportunities to practice many of them. This is a particular concern related to the low trial rate, as many lawyers have little or no experience trying cases. This can lead to realistic fears not only about performance at trial but also in negotiation, where lawyers’ assessments of likely court outcomes can make a critical difference.¹⁵⁵

Many legal tasks are challenging and require difficult judgment calls given the unique combination of factors in any given matter. Thus, even when lawyers have some experience with a certain task, they may have realistic fears about their ability to perform well in particular matters. Although some continuing legal education programs involve simulations, many involve presentation of material that may or may not engage lawyers in significant mental rehearsals that would increase competency and reduce fear. Lawyers can address this by regularly engaging colleagues to serve as mentors to help them figure out how to deal with challenging problems. Lawyers can do this on an ad hoc basis or participate in consultation groups that meet regularly to grapple with challenging problems.¹⁵⁶ This is a normal practice for mental health professionals but is unusual for lawyers. Even so, lawyers can take the initiative to organize or participate in such activities.

¹⁵³ See *id.* at 278-83; see also Legal Education, Problem-Solving, and ADR Task Force, A.B.A. (2010), available at <http://leaps.uoregon.edu/content/teaching-techniques> (suggesting teaching techniques).

¹⁵⁴ Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499, 499-503 (2011).

¹⁵⁵ See John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 229-33 (2006).

¹⁵⁶ See LANDE, *supra* note 62, at 134.

B. Dealing with Anxiety

Law students and lawyers may have a hard time overcoming anxiety because it is a general feeling of apprehension that is not directly related to a specific threat. Indeed, some people experience an escalating cycle of anxiety, becoming increasingly anxious as they focus on their anxiety. Similarly, some lawyers have illogical fears, which are out of proportion to the actual situations. If people can identify the source of their anxiety and the actual nature of the situations they fear, they may be able to take actions to address those fears. Some experts have recommended using mindfulness techniques, such as meditation, to help lawyers become more aware of themselves and this may be an effective way to counteract anxiety.¹⁵⁷ This is consistent with Asken's recommendations to use stress management techniques such as muscle relaxation, tactical breathing, and biofeedback.¹⁵⁸ As lawyers become more aware of the sources of their anxiety, they may be able to deal with their fears through gradually increased exposure to the frightening situations as well as by getting training that focuses specifically on dealing with particular challenges.¹⁵⁹

Some lawyers may have deep-seated anxiety that may not be addressed successfully through the preceding techniques. Those lawyers may need professional mental health services instead or in addition to these techniques. If they use alcohol or other drugs to try to dissolve their anxiety, they may need services focusing specifically on those behaviors. Considering the stressful environments that students and lawyers work in, it is appropriate that many bar associations arrange for counseling services to help constructively manage their foreseeable stresses and anxieties¹⁶⁰ and it is appropriate for law schools to do so as well.

C. Dealing with Fear of Failure

Fear of failure is particularly relevant to law students and lawyers because they regularly deal with situations involving major risks that are hard to assess. Fear of failure may be related to a variety of factors including particular situations that individuals find challenging, perceived serious consequences of failure, fear of embarrassment, and craving for relief from anxiety. Law students not only fear getting poor grades and failing to get desirable employment (or any

¹⁵⁷ See, e.g., Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

¹⁵⁸ See ASKEN ET AL., *supra* note 102, at 94-124. For a wide range of advice for lawyers to manage their stress, see generally ELWORK, *supra* note 125 (describing strategies to improve lawyers' work environments, health, thinking, and emotions and stay true to their values).

¹⁵⁹ See *supra* notes 82-86, 110-14 and accompanying text.

¹⁶⁰ Fred C. Zacharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237, 237 n.2 (2004) (describing numerous bar assistance programs to help lawyers with substance abuse problems).

employment), but many also fear the daily experience of attending classes where they may feel humiliated by their professors' questioning. Similarly, lawyers understandably fear losing cases in litigation, negotiating agreements that disappoint their clients (or not being able to negotiate an agreement at all), and also potential embarrassment in interactions with judges, counterpart lawyers, senior partners, and even their clients.

Most law students do not succeed in all aspects of law school and most lawyers regularly encounter defeats and disappointments as a normal part of their work. Indeed, the "boot camp" theory of legal education is designed to prepare students to deal with just such challenges in practice.¹⁶¹ To be effective on an ongoing basis, lawyers must learn to accept some failure as an inevitable part of their work and avoid becoming demoralized or paralyzed by it. While some students and lawyers can internalize this perspective on their own, others may need help, especially if this is part of a larger pattern of anxiety. Students and lawyers can be taught techniques of "positive self-talk" to anticipate and deal with difficult events and disappointments.¹⁶² In some cases, they may need psychological counseling services to get past major fears of failure.

D. Dealing with "Fun Fear"

Asken identifies a final pattern, "fun fear," which is really fun from arousal. In the legal context, students and lawyers can enjoy the stimulation of "crossing swords" in encounters with professors, judges, and counterpart lawyers. Rather than feeling anxiety, these students and lawyers feel confident and excited by the challenges. This can be quite productive if it leads to improved performance while complying with the applicable rules and norms. Of course, this is problematic if students' or lawyers' enjoyment of the challenge leads them to violate the norms or rules. If individuals regularly do transgress the norms or rules, responsible individuals and institutions should inform the person of the transgressions and, if appropriate, impose formal or informal sanctions.

E. Dealing with Stressful Nature of Legal Work

So far, the prescriptions in this article assume that lawyers' work environment is a given and not open to change. Thus, the suggestions focus on what lawyers can do to gain increased control of themselves individually, through such things as training, mentoring, mindfulness, positive attitudes, and psychological counseling.

An additional approach, which complements the preceding techniques, is to change the nature of their legal interactions to make them less threatening. Lawyers can take initiative to increase their control and reduce their risks in the

¹⁶¹ See *supra* note 135.

¹⁶² See ASKEN ET AL., *supra* note 102, at 184-201.

matters they handle. Lawyers can routinely conduct systematic assessments of their cases at the outset.¹⁶³ While this would not prevent all surprises or risks, it should reduce uncertainty and provide greater control. As part of this process, lawyers can develop good relationships with their clients so that they develop a shared understanding of realistic goals and strategy to achieve them.¹⁶⁴ Lawyers can also try to develop constructive working relationships with their counterpart attorneys. Since their counterparts normally represent the greatest threat, having good professional relationships can significantly reduce the threat.¹⁶⁵ Recognizing that most litigated cases eventually settle, counterpart lawyers can jointly manage their cases so that they each protect their clients' interests in obtaining the information they need to make good decisions in negotiation. Counterpart lawyers can plan the negotiation process to increase the likelihood of producing satisfying process and results for all parties.¹⁶⁶ I call this approach lawyering with planned early negotiation.¹⁶⁷

Of course, changes in legal procedures such as these cannot avoid all risks and these procedures are not appropriate in all cases.¹⁶⁸ But the status quo also bears risks that are typically much greater than these procedures. Moreover, lawyers need not elect the status quo or an alternative procedure for all cases. Indeed, lawyers and their clients need not make an irrevocable election of procedure in any given case. Instead, they may try one approach and switch to another if appropriate.¹⁶⁹ Thus, lawyers can increase control over their work by choosing (with their clients) which approach to use and by using planned early negotiation whenever appropriate. In combination with strategies to change lawyers' own competence and confidence, this approach should generally reduce lawyers' fears and produce better results for clients.

The suggestions in this article are based on theoretical analyses of fear that are extrapolated into the legal context. While this hopefully provides some useful guidance, it is only a first step. Lawyers would benefit from more detailed studies of lawyers' effective (and ineffective) strategies for dealing with fears in specific contexts. These might include inquiries into problems in working with clients and counterpart lawyers, pretrial litigation, trial, dispute negotiation, transactional negotiation, as well as particular subject areas such as divorce, criminal law, tort litigation, securities regulation, etc. To some extent, the subject-area analyses would necessarily relate to handling of particularly challenging doctrinal issues, though they would presumably need to go beyond

¹⁶³ See International Institute for Conflict Prevention and Resolution, Early Case Assessment Toolkit (2009), <http://www.cpradr.org/Resources/ADRTools/EarlyCaseAssessmentGuidelines.aspx>; LANDE, *supra* note 62, at 10-11.

¹⁶⁴ See LANDE, *supra* note 62, at 19-33.

¹⁶⁵ See generally Lande, *supra* note 8.

¹⁶⁶ See LANDE, *supra* note 62, at 73-94.

¹⁶⁷ See generally LANDE, *supra* note 62 (describing "planned early negotiation" procedures).

¹⁶⁸ See *id.* at 11.

¹⁶⁹ See *id.* at 14-15 (describing "escape hatches" from negotiation).

purely doctrinal issues to examine how they lead to distinctive patterns of fear in practice.

VI. CONCLUSION

Much like warriors, litigators operate in a treacherous environment where they fight adversaries determined to take offensive actions against them.¹⁷⁰ Litigation is a complex battlefield, full of booby-traps for the unwary. Lawyers must be on guard not only for the other side's attacks but also adverse court rulings and even difficulties in agreeing with clients about how to proceed. While lawyers sometimes fight for all-out victories in court, they more often resolve legal battles through negotiation to avoid the risks of public defeat in court. But negotiation is full of risks of its own, so lawyers cannot afford to let down their guard until the "battle" is finally over.

It would be amazing if most lawyers did not feel fear in such situations (or analogous situations when handling legal transactions). Indeed, lawyers are full of fears, as noted at the outset.¹⁷¹ Lawyers' fears can lead them to give outstanding performances because they prepare to avoid feared consequences. Lawyers' fears can also lead them to perform poorly and avoid taking appropriate actions, harming themselves and their clients as a result. Thus lawyers, legal educators, and bar association officials should not seek to eliminate all the things that lawyers fear but rather to promote constructive methods of dealing with fears. They should also encourage lawyers to use planned early negotiation processes whenever appropriate. While such strategies may benefit lawyers by reducing their stress and improving their quality of life, the ultimate goal should be to help them better serve their clients.

¹⁷⁰ See *supra* notes 87-100 and accompanying text.

¹⁷¹ See *supra* notes 2-57 and accompanying text.