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A Legal Autopsy of the Lawyering in *Schiavo*: A Therapeutic Jurisprudence/Preventive Law Rewind Exercise

Bruce J. Winick

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A Legal Autopsy of the Lawyering in *Schiavo*: A Therapeutic Jurisprudence/Preventive Law Rewind Exercise

BRUCE J. WINICK*

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I. INTRODUCTION

This Article examines the lawyering that occurred during the *Schiavo* case. I examine not the quality of the arguments made or the procedures used, but the extent to which the lawyering was consistent with the respective clients' psychological needs. The *Schiavo* case provides an opportunity to explore the therapeutic jurisprudence/preventive law model of lawyering.¹ This model contemplates lawyers acting with an ethic of care. These lawyers value their clients' emotional needs and interests in addition to their legal interests and seek to prevent legal difficulties through creative lawyering and litigation alternatives. Part II describes this emerging model of lawyering and some of its techniques.

* Copyright 2007 by Bruce J. Winick. Professor of Law and Professor of Psychiatry and Behavioral Sciences, University of Miami. Comments to the author should be addressed to bwinick@law.miami.edu. I would like to thank Kathy Cerminara for her helpful comments on a prior draft, and Mary Clark, Dina Nerdinsky, and Ryan Goldberg for their research assistance.

1. See generally PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000) [hereinafter PRACTICING THERAPEUTIC JURISPRUDENCE]; Symposium, *Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 795-1210 (1999); David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work: The Term May Sound Academic, but It Embodies a Hands-on Approach to Solving Problems Rather Than Simply Winning Cases*, 89 A.B.A. J. 54 (2003); JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003) [hereinafter JUDGING IN A THERAPEUTIC KEY] (applying approach to judging).

In teaching this model,² I use a device drawn from preventive law that is known as the “rewind exercise.”³ It is a sort of legal post-mortem. This Article employs this technique in analyzing the lawyering that occurred during the *Schiavo* case.

In many ways, the *Schiavo* case was an emotional disaster for each party. The litigation became the functional equivalent of siege warfare. Part III presents a brief overview of the *Schiavo* litigation from its early stages until Terri Schiavo’s death. This section also discusses the emotional costs each party endured during this protracted and highly contested litigation. Could the parties have avoided this result? Could the lawyers have counseled their clients in a different, perhaps more productive manner? Were there other available approaches besides high-conflict litigation that could have reduced the level of conflict or even resolved the controversy?

Part IV involves a sort of *Schiavo* “legal autopsy” in which I “rewind” the case back to several crucial points during its early stages to examine what the lawyers could have done differently to improve the outcome and experience for their clients. This section, however, does not provide a complete autopsy of the lawyering in the case. Indeed, I did not interview the lawyers in the case, nor have I interviewed the parties or the judges. Rather, I have scrutinized this case’s extensive record, the media accounts, and the books written by some of the lawyers, by Terri’s husband, and by Terri’s parents, brother, and sister. I have used these sources to reconstruct the tale of what seemed to be happening during this sad story’s crucial stages and to evaluate what the lawyers did – and did not do – to avoid the legal conflict and to minimize its emotional costs.

What techniques or approaches could the lawyers have used? How should the lawyers have advised their clients concerning the litigation’s risks and emotional costs? How could the lawyers have been more effective in dealing with their clients’ emotional characteristics and needs, which contributed so heavily to the conflict’s escalating intensity? What could the lawyers have done to dissipate the denial, anger, and distrust that fueled this intense and prolonged controversy? These are the questions that the rewind exercise addresses – not so much to criticize the lawyers, although much of the analysis involves some level of criticism regarding nearly every lawyer involved in this extensive

2. See Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 432-77 (2005) (describing a course at the University of Miami School of Law that uses this model of lawyering in teaching lawyering skills).

3. *Id.* at 442-51.

case. Perhaps there are things the attorneys attempted of which I am unaware, although the absence of their mention in the extensive accounts the parties, their lawyers, and the media have produced would suggest otherwise. Although I second-guess the lawyers' actions, I do not do so to insult them but rather to illustrate the potential benefits a more humanistic and client-centered lawyering method can provide. On the whole, the therapeutic jurisprudence/preventive law model provides a stark contrast to most of the lawyering that occurred during the *Schiavo* litigation. The case, therefore, presents a fine opportunity to illustrate the differences between this emerging model and what I someday hope will be viewed as antiquated lawyering.

Part V contains a brief conclusion concerning the lawyering techniques that were, and were not, used and why every attorney should bear an ethical duty to demonstrate greater concern for their clients' emotional well-being. In this section, I also briefly comment on the extent to which professional conduct rules and lawyering practices should be changed to ameliorate the problems that the *Schiavo* case so vividly illustrates.

II. THE THERAPEUTIC JURISPRUDENCE/PREVENTIVE LAW MODEL OF LAWYERING

Over the last fifteen years, a number of new conceptions concerning the lawyer's role have emerged. All seem to share a more humanistic orientation that seeks to lessen lawyering's excessively adversarial nature, improve clients' well-being in general, and enhance clients' psychological well-being in particular. Professor Susan Daicoff calls these the "vectors" of the "comprehensive law movement" – therapeutic jurisprudence, preventive law, creative problem solving, holistic law, restorative justice, the increasing array of alternative dispute resolution mechanisms, including collaborative law, and the emergence of problem solving courts.⁴ These models all seek to move beyond an exclusive focus on clients' legal rights or interests, in favor of approaches that value clients' human needs and emotional well-being. These models represent a broadened conception of the lawyer's role; they call for an interdisciplinary, psychologically oriented perspective and enhanced interpersonal skills.

With its psychological orientation and focus on emotional well-

4. SUSAN S. DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES, 169-202 (2004); Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1-2 (2006); Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement,* in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 466.

being, therapeutic jurisprudence is a common thread running through these various movements. Therapeutic jurisprudence brings a more theoretical and interdisciplinary perspective to lawyering than these other models. As a result, one can view therapeutic jurisprudence as an organizing framework for these emerging movements. Therapeutic jurisprudence explicitly values clients' psychological well-being and recognizes that their legal involvement, including their interaction with their lawyer, will produce inevitable psychological consequences for them. Consequently, lawyers functioning within this model are inevitably therapeutic agents in the manner in which they deal with their clients. Once this insight is absorbed, it is transformative for both lawyer and client alike. Lawyers embracing this broadened conception of the professional role strive to avoid or minimize imposing psychologically damaging effects on their clients. They unambiguously value their clients' emotional well-being, and in their problem analysis, problem solving, and litigation efforts seek not only to protect and promote their clients' rights and economic interests, but also to improve, or at least preserve, their clients' emotional lives. These lawyers are psychologically oriented and apply insights and approaches drawn from the behavioral sciences.

Lawyers applying a therapeutic jurisprudence approach practice law with an ethic of care. This ethic of care, however, disavows paternalism.⁵ Therapeutic jurisprudence work has often stressed self-determination's psychological value and has criticized paternalism as anti-therapeutic.⁶ Therapeutic jurisprudence is committed to client-centered counseling.⁷ The lawyer may have her own views about the client's best interest and certainly should discuss these views with the client when appropriate. In so doing, however, she should avoid paternalistic or manipulative attitudes and approaches and should always remember that it is the client who makes the ultimate decision. Although the client is the ultimate decisionmaker regarding the course to follow, the attorney-

5. See generally David B. Wexler & Bruce J. Winick, *Patients, Professionals, and the Path of Therapeutic Jurisprudence: A Response to Petrila*, 10 N.Y.L. SCH. J. HUM. RTS. 907, 907-08 (1993).

6. E.g., Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1765-68 (1992). For applications in the area of mental health law, where the individuals involved may have reduced decisionmaking capacity as a result of mental illness, see generally BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL* (2005), and BRUCE J. WINICK, *THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT* (1997) [hereinafter WINICK, *THE RIGHT TO REFUSE*]. In contexts involving clients who are not mentally ill in a clinical sense, the psychological value of self-determination and the potentially negative effects of paternalism may be even more pronounced.

7. E.g., Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer in Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, reprinted in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 1, at 245, 286-87.

client dialogue shapes that decision, and sometimes it is appropriate for the attorney to question a client's position to ascertain whether a preferable alternative exists in terms of accomplishing the client's underlying interests. The client, thus, sets the course, but does so via counsel's client-centered guidance.

Therapeutic jurisprudence's integration with preventive law has enlarged their collective contribution to improving the lawyering process.⁸ Preventive law originated in the early 1950s through Professor Lewis Brown's work at the University of Southern California Law School and was further developed by Professor Brown and former Dean Edward Dauer of the University of Denver College of Law.⁹ It is an approach designed to minimize the risk of litigation and other legal problems and to bring about greater certainty for clients concerning their legal affairs. Preventive law is a proactive approach to lawyering, emphasizing the lawyer's role as a planner.¹⁰

Preventive law has much in common with preventive medicine. Indeed, the attorney-client relationship has many analogies to the doctor-patient relationship. Preventive medicine is premised on the concept that keeping people healthy is better and more cost effective than providing treatment for them once they become ill. Analogously, preventive law is based on the idea that avoiding legal disputes is inevitably better for the client than costly, time-consuming, and stressful litigation.¹¹ Just as physicians and other healthcare professionals can prevent future illness through periodic check-ups, screenings, inoculations, and nutritional counseling, attorneys can use a variety of techniques to identify and avoid future legal difficulties for their clients.

The preventive lawyer, working in collaboration with a client,

8. See generally Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997), reprinted in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 5-44.

9. See Louis M. Brown, *The Law Office – A Preventive Law Laboratory*, 104 U. PA. L. REV. 940, 948 (1956); see also LOUIS M. BROWN & EDWARD A. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (1978).

10. See generally BROWN & DAUER, *supra* note 9; ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS (1997).

11. HARDAWAY, *supra* note 10, at xxxvii; Stolle et al., *supra* note 8, at 16; Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L.J. 189 (2002) [hereinafter Winick, *The Expanding Scope*]. Even in a context in which litigation has already commenced or seems likely to do so, lawyers applying the therapeutic jurisprudence/preventive law model strive to avoid litigation through the use of creative approaches to plea bargaining (in the criminal process) or to negotiation and settlement (in the civil context). E.g., Winick, *supra* note 7; Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341 (Marjorie A. Silver ed., 2007) [hereinafter Winick, *Overcoming Psychological Barriers*].

seeks to identify the client's long-term goals and to accomplish them through means that minimize exposure to legal difficulties and related emotional problems. Through creative problem solving, creative drafting, and the use of alternative dispute resolution techniques, the lawyer seeks to accomplish the client's objectives and to avoid legal problems. The preventive lawyer periodically meets with the client, conducting "legal check-ups" to receive updates on the client's business and family affairs, to keep the client out of trouble, to reduce conflict, and to increase the client's opportunities for success in life. Under the preventative framework, the legal relationship's goal is to maintain the client's legal health.

Moreover, just as physicians and other healthcare professionals must cultivate a "bedside manner"¹² to properly play their preventative roles, preventive lawyers must develop a "desk-side manner" to function as effective preventive lawyers. Therapeutic jurisprudence can work in tandem with the preventative model to further a shared set of lawyering goals. It calls for an attorney-client relationship involving increased psychological sensitivity, an awareness of basic psychological principles and techniques, enhanced interpersonal and interviewing skills, and approaches for dealing with the emotional issues that are likely to arise just before or during a legal encounter.

Integrating therapeutic jurisprudence and preventive law has broadened and reconceptualized each approach. Viewed as one, the therapeutic jurisprudence/preventive law model constitutes a new method of lawyering that brings insights from the behavioral sciences into legal practices to improve clients' psychological well-being, to further clients' legal interests, and to minimize legal difficulties. It embraces both a therapeutic and a preventive orientation and sees law as a "helping profession."¹³ The therapeutic jurisprudence/preventive law model involves practical law office procedures, client counseling approaches, and an analytical framework for justifying emotional well-being as an important priority in legal planning and prevention.

This combined model – which is already grounded in a rich body of social science and legal research – brings a much-needed interdisciplinary perspective to the legal representation context.¹⁴ This integrated

12. See Francis Peabody, *The Care of the Patient*, 88 JAMA 887 (1927).

13. Indeed, the subtitle of our 2000 book applying therapeutic jurisprudence to law practice is *Law as a Helping Profession*. PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1.

14. Although therapeutic jurisprudence started in the area of mental health law, see generally DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991), it soon spread to other areas of law, becoming a mental health approach to law generally. See generally *LAW IN A THERAPEUTIC KEY, DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996). The approach not only brings insights from the behavioral

approach humanizes lawyering to a greater extent and provides lawyers with the enhanced interpersonal skills needed to be more effective interviewers, counselors, and problem solvers. Practicing law in this way increases client satisfaction and produces a greater sense of personal and professional satisfaction for the lawyer.

In analyzing the lawyering that occurred during the *Schiavo* case and in thinking about alternative approaches that the *Schiavo* lawyers might have attempted, two concepts drawn from the therapeutic jurisprudence/preventive law model are especially helpful. The first is the “psycho-legal soft spot” – a concept that refers to any aspect of the legal relationship or legal process that is likely to produce a strong negative emotional reaction in the client.¹⁵ Sometimes the legal problem the client faces, or even the process of discussing it in the attorney’s office, produces anger, stress, hard or hurt feelings, anxiety, fear, or depression. These feelings may impede attorney-client dialogue, thus preventing the lawyer from eliciting the entire story, understanding the client’s real needs and interests, devising an appropriate strategy to solve the problem, or counseling the client in ways that the client is able to understand and follow. Sometimes these emotional issues precipitate legal problems or exacerbate them. Sometimes the anxiety the legal encounter induces causes the client to adopt a form of psychological resistance, denial, minimization, rationalization, or another psychological defense mechanism.¹⁶ Sometimes these defense mechanisms produce or escalate legal problems. The therapeutic jurisprudence/preventive lawyer understands how to identify these psycho-legal soft spots and is able to apply various strategies to deal with them.

Another important therapeutic jurisprudence/preventive law technique is the “rewind exercise”¹⁷ – a good technique for teaching clients

sciences into legal studies, but also has itself spawned a body of empirical work testing therapeutic jurisprudence hypotheses. See *id.* at 843-994 (containing chapters reporting on empirical studies); Deborah J. Chase & Peggy F. Hora, *The Implication of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 CT. REV. 12 (2000); Peggy F. Hora & Deborah J. Chase, *Judicial Satisfaction When Judging in a Therapeutic Key*, 7 CONTEMP. ISSUES L. 8 (2004); Charles L. Kennedy, *Judicial Behavior and the Civil Commitment Petitioner*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 1, at 158; Carrie J. Petrucci, *The Judge-Defendant Interaction: Toward a Shared Respect Process*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 1, at 148.

15. See, e.g., Mark W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 69-71; David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 45; Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 327-28.

16. See *supra* note 15.

17. Patry et al., *supra* note 15, at 71; Wexler, *supra* note 15, at 64-65.

about how to avoid future problems and for teaching lawyers about how to see legal problems from a preventive perspective. The idea is a simple one: once a legal problem has become manifest, the task at hand is to solve it. This calls for the usual lawyering skills – e.g., negotiation or re-negotiation, settlement, and sometimes litigation. At this stage, the preventive lawyer is interested both in ending the controversy and in preventing its reoccurrence. In helping the client avoid a future reoccurrence of the problem, it is helpful for the lawyer to assist the client in understanding why the problem originally occurred. It is also a helpful technique for analyzing the possible alternative approaches the lawyer could have used to avoid the legal problem or the litigation that ensued, or to minimize any related negative emotional consequences for the client. The rewind approach can be expressed along these lines: “Let us ‘rewind’ the situation back in time to the period prior to the occurrence of the critical acts or omissions to determine more preferable approaches to solving the legal problem then at hand.” What could the client have done at this point to avoid the problem? What can he or she do now to avoid its reoccurrence? What could the lawyer have done or suggested that might have prevented the problem or litigation?

Thinking about the problem in this way is analogous to performing an autopsy after a patient has died. Once the doctors identify the cause of death, they may learn something about how to avoid similar problems for their other patients or how to avoid any mistakes that may have contributed to the patient’s death. Rewinding the legal problem can provide both lawyer and client with important insights regarding how to avoid or minimize future problems and their accompanying anti-therapeutic consequences. After discussing the *Schiavo* litigation’s history, this Article performs a rewind exercise that focuses on several critical points during the conflict’s early stages.

III. THE *SCHIAVO* LITIGATION

A. *The Factual Background of the Litigation*

As a result of a potassium imbalance, twenty-seven-year-old Terri Schiavo suffered a cardiac arrest during the early morning hours of February 25, 1990.¹⁸ Her husband, Michael, called 911;¹⁹ but, by the time the paramedics arrived and restored Terri’s heartbeat, her brain had been deprived of oxygen for several minutes.²⁰ Terri suffered devastating brain damage and slipped into a coma.

18. *In re* Guardianship of Schiavo, 780 So. 2d 176, 177 (Fla. 2d Dist. Ct. App. 2001).

19. *Id.*

20. *Id.*

Terri was taken to the Humana Northside Hospital in St. Petersburg, Florida, where doctors inserted a percutaneous endoscopic gastroscopy ("PEG"), a feeding tube.²¹ In tragic irony, Terri was named after St. Theresa of Avila, "a sixteenth-century Carmelite nun who at the age of twenty-four took ill and fell into a coma but then revived, living a productive and spiritual life for another forty-three years."²² Terri eventually emerged from her coma, but unlike her namesake, she never regained consciousness. Instead, she settled into a persistent vegetative state ("PVS").²³

After two months, the hospital discharged Terri, and she was relocated to a rehabilitation facility.²⁴ Because of Terri's incapacity, a Florida court appointed Michael as Terri's guardian.²⁵ Despite physical, occupational, and speech therapy, her condition did not improve.²⁶ During this time, Terri's parents, the Schindlers, and Michael shared their grief and their efforts to help Terri recover.²⁷ Michael even lived in the same house with the Schindlers until 1992.²⁸ By the next year, the Schindlers were encouraging Michael to date other women, and he did.²⁹ He even introduced one of his dates to the Schindlers.³⁰

The relationship between Michael and the Schindlers, however, began to change³¹ after he prevailed in a medical malpractice lawsuit instituted on Terri's behalf.³² "In the late 1980s, Terri and Michael tried

21. JON B. EISENBERG, USING TERRI: THE RELIGIOUS RIGHT'S CONSPIRACY TO TAKE AWAY OUR RIGHTS 11, 13 (2005); see also *In re Guardianship of Schiavo*, 780 So. 2d at 177.

22. EISENBERG, *supra* note 21, at 11.

23. *Id.* at 13; *In re Guardianship of Schiavo*, 780 So. 2d. at 177. A thorough autopsy performed after her death by the Pasco and Pinellas County Medical Examiner was consistent with her having been in a PVS, and the Examiner concluded that her brain had "massive cerebral atrophy" and weighed half of its expected weight, that she was blind, and that her condition never would have improved. JON R. THOGMARTIN, DIST. SIX MED. EXAM'R OFFICE, REPORT OF AUTOPSY FOR THERESA SCHIAVO 35 (2005), available at http://www6.miami.edu/ethics/schiavo/pdf_files/061505-autopsy.pdf; see Abby Goodnough, *Schiavo Autopsy Says Brain, Withered, Was Untreatable*, N.Y. TIMES, June 16, 2005, at A1, available at 2005 WLNR 9531280 ("An exhaustive autopsy found that Terri Schiavo's brain had withered to half the normal size since her collapse in 1990 and that no treatment could have remotely improved her condition . . .").

24. EISENBERG, *supra* note 21, at 13.

25. *Id.* at 14.

26. *Id.*

27. *Id.* at 13.

28. *Id.* at 14.

29. *Id.*

30. *Id.*

31. "Since the resolution of the malpractice lawsuit, both Michael and the Schindlers have become suspicious that the other party is assessing Theresa's wishes based upon their own monetary self-interest." *In re Guardianship of Schiavo*, 780 So. 2d 176, 178 (Fla. 2d Dist. Ct. App. 2001) (finding that if Terri were to die immediately, Michael would inherit the money under Florida's intestacy laws, but if Michael eventually divorced Terri, "the fund remaining at the end of her life would presumably go to her parents").

32. Michael sued Terri's doctor for failure to diagnose and treat her bulimia. Terri saw the

to conceive a child.”³³ During the year before her cardiac arrest, they received fertility treatment from an obstetrician who did nothing to address Terri’s dramatic weight loss and who failed to provide Terri a blood test, which could have detected a potassium imbalance.³⁴ The malpractice lawsuit resulted in a jury verdict for Michael, awarding him \$300,000 for his loss of consortium, and awarding approximately \$725,000 for Terri.³⁵ According to Michael, Terri’s father, Bob Schindler, immediately demanded a share of the \$300,000.³⁶ Michael also said that Terri’s mother, Mary Schindler, told him, “[w]e deserve some of this money.”³⁷ Michael refused to share his award with the Schindlers.

Soon after Michael received these legal damage awards, he ended Terri’s rehabilitative therapy.³⁸ In response to suggestions offered by two doctors, Michael ordered the nursing home to withhold antibiotics if Terri suffered a future urinary tract infection, a recurrent condition.³⁹ One of the rehabilitation facility’s administrators told Michael they could not deny Terri this treatment and advised the Schindlers about Michael’s directive.⁴⁰ He then withdrew the order.⁴¹ After this, the rift between Michael and the Schindlers became “bitter and irreparable.”⁴² They eventually stopped speaking to one another following an argument about the legal damages award.⁴³

defendant, her gynecologist, three times over a seven-month period for menstrual irregularity. Michael alleged that Terri’s cardiac arrest was the result of her condition going undiagnosed and untreated. Michael was awarded over two million dollars. After attorney’s fees and costs, this amounted to around \$725,000 for Terri’s care and \$300,000 for loss of consortium. See EISENBERG, *supra* note 21, at 14-15. The jury found that Terri was seventy percent responsible for her damages, and the doctors were thirty percent responsible, thereby reducing the amount of damages awarded pursuant to Florida’s comparative negligence law. MICHAEL SCHIAVO WITH MICHAEL HIRSCH, *TERRI: THE TRUTH* 71 (2006).

33. EISENBERG, *supra* note 21, at 14-15.

34. *Id.*

35. *Id.*

36. Diana Lynne, *Matters of Life and Death: Michael Schiavo Pleads Case on CNN*, WORLDNETDAILY, Oct. 28, 2003, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35304.

37. EISENBERG, *supra* note 21, at 15 (internal quotations omitted).

38. Lynne, *supra* note 36.

39. *Id.* The two doctors were Drs. Mulroy and Harrison. SCHIAVO WITH HIRSH, *supra* note 32, at 87-88. In his book, Michael acknowledged his attempt to discontinue treatment, but did not state when during 1993 the attempt occurred. *Id.* at 99-100. In her book, Mary identifies July 1993 as the relevant time period. MARY SCHINDLER ET AL., *A LIFE THAT MATTERS: THE LEGACY OF TERRI SCHIAVO – A LESSON FOR US ALL* 57 (2006).

40. Lynne, *supra* note 36.

41. EISENBERG, *supra* note 21, at 15

42. *Id.*

43. *Id.*

B. *The History of the Litigation*

The Schindlers made the initial legal move. In July 1993, the Schindlers formally challenged Michael's guardianship status, asking the guardianship judge to appoint a guardian *ad litem* to determine whether Michael had abused Terri.⁴⁴ The guardian *ad litem* subsequently determined that no abuse had occurred and that Michael "had acted appropriately and attentively."⁴⁵ Michael remained Terri's guardian and began to exclude the Schindlers from participating in Terri's care.

The litigation over whether to remove Terri's feeding tube began in May 1998 when Michael filed a petition in the Pinellas County Circuit Court, Probate Division, to authorize removal of the PEG tube.⁴⁶ "The case did not go to trial until January 24, 2000."⁴⁷ Michael presented three witnesses: himself, his brother, Scott Schiavo, and his sister-in-law, Joan Schiavo, with whom Terri had been close during the mid-1980s.⁴⁸ These witnesses testified that Terri had made statements demonstrating that she would have wanted the feeding tube removed.⁴⁹ The Schindlers presented testimony from Mary Schindler and an old friend of Terri's, both of whom testified that Terri expressed wishes to the contrary.⁵⁰ During cross-examination, however, it became apparent that these supposedly relevant conversations took place when Terri was a child.⁵¹ Bob Schindler, Terri's father, acknowledged in his deposition the extremes to which the Schindlers might go to keep Terri alive.⁵² The presiding judge, George W. Greer, determined that Terri was in a PVS with no hope of regaining consciousness.⁵³ Judge Greer further determined that the Schiavos' testimony constituted clear and convincing evidence of Terri's wishes to discontinue life support.⁵⁴ He, therefore, granted Michael's petition to withdraw Terri's feeding tube.⁵⁵

44. *Id.* at 15; *In re Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at *2 (Fla. 6th Cir. Ct. Feb. 11, 2000).

45. EISENBERG, *supra* note 21, at 15; Lynne, *supra* note 36. Michael described this event in his book. SCHIAVO WITH HIRSH, *supra* note 32, at 110. He stated that because the Schindlers at this time had filed a lawsuit seeking to replace him as Terri's guardian, his lawyers had advised him not to press the treatment discontinuation order with the nursing home. *Id.* at 95.

46. *In re Guardianship of Schiavo*, 2000 WL 34546715, at *2-35; see also *In re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. 2d Dist. Ct. App. 2001); EISENBERG, *supra* note 21, at 16.

47. EISENBERG, *supra* note 21, at 16.

48. *Id.*

49. *Id.* at 16-17.

50. *Id.* at 17.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 18.

55. *Id.*

The Schindlers appealed Judge Greer's ruling, and the removal order was stayed.⁵⁶ In 2001, Florida's Second District Court of Appeal ("the Second District") upheld Judge Greer's decision, finding the evidence that Terri was in a PVS "overwhelming."⁵⁷ Moreover, the Second District determined there was clear and convincing evidence that Terri would have wanted the feeding tube removed.⁵⁸ The Florida Supreme Court and U.S. Supreme Court refused to hear the case.⁵⁹ On April 24, 2001, Terri's PEG tube was clamped, cutting off her supply of artificial nutrition.⁶⁰

The Schindlers immediately struck back, seeking relief from Judge Greer's order based on new evidence: a purported assertion by Michael's former girlfriend that Michael had told her that he and Terri had never discussed end-of-life wishes.⁶¹ When Judge Greer denied this motion,⁶² the Schindlers filed a new lawsuit in the Pinellas County Circuit Court, Civil Division, making similar claims as they had in the Probate Division.⁶³ A new judge, Frank Quesada, granted an emergency injunction requiring that the PEG tube be unclamped and that artificial nutrition be restored.⁶⁴ Michael appealed.⁶⁵ The Second District held that the Schindlers were entitled to challenge Judge Greer's judgment based on newly discovered evidence, but that their motion before Judge Greer had been procedurally untimely and their evidentiary showing before Judge Quesada had been insufficient to support his injunction.⁶⁶ The decision required Judge Quesada to transfer the Schindlers' separate civil lawsuit to Judge Greer.⁶⁷

Once again before Judge Greer, the Schindlers refiled their motion for relief from the judgment and filed motions demanding: (1) Judge Greer's disqualification; (2) removal of Michael as Terri's guardian; and (3) an additional medical examination of Terri by doctors the Schindlers had selected.⁶⁸ At the trial before Judge Greer, the Schindlers' counsel had conceded that Terri was in a PVS, but asserted that some of her cognitive functioning, including speech, could be restored via new forms

56. *Id.*

57. *In re Guardianship of Schiavo*, 780 So. 2d 176, 179-80 (Fla. 2d Dist. Ct. App. 2001).

58. *Id.*

59. EISENBERG, *supra* note 21, at 19.

60. *Id.*

61. *Id.* at 19-20; *In re Guardianship of Schiavo*, 800 So. 2d 640, 643 (Fla. 2d Dist. Ct. App. 2001).

62. *In re Guardianship of Schiavo*, 800 So. 2d at 642-43.

63. *In re Guardianship of Schiavo*, 792 So. 2d 551, 555 (Fla. 2d Dist. Ct. App. 2001).

64. *Id.* at 556.

65. *Id.*

66. *Id.* at 561-63.

67. *Id.* at 563.

68. *In re Guardianship of Schiavo*, 800 So. 2d 640, 642-43 (Fla. 2d Dist. Ct. App. 2001).

of treatment, including vasodilation and hyberbaric therapies.⁶⁹ Judge Greer denied each of the abovementioned motions and again ordered Terri's feeding tube removed.⁷⁰ Once again the case went back to the Second District, resulting in another stay preventing removal of the feeding tube.⁷¹ The Second District upheld Judge Greer's rejection of new testimony, concluding that the new evidence was insufficient to alter Judge Greer's original ruling.⁷² However, the court provided a new evidentiary hearing where the Schindlers were allowed to present testimony from two of their physicians.⁷³ Michael was to present rebuttal testimony by two of his physicians, and the trial court was to appoint a fifth, independent physician to examine Terri and testify about her condition.⁷⁴

This evidentiary hearing took place in October 2002.⁷⁵ Perhaps unsurprisingly, the Schindlers' two physicians testified that Terri was not in a PVS, while Michael's physicians testified to the contrary.⁷⁶ The court-appointed physician cast the tie-breaking vote, determining that Terri was indeed in a PVS and would never improve.⁷⁷ The trial court viewed four hours of videotapes made in the summer of 2002, which depicted Terri's medical examinations and the Schindlers visits to her bedside.⁷⁸ These videotapes became central to the Second District's decision when the case returned on appeal.⁷⁹

"Three weeks after the hearing, the Schindlers renewed their nine-year-old suggestion" that Michael abused Terri.⁸⁰ "They filed a motion before Judge Greer asking for [more] time to collect evidence of abuse, again seeking Michael's removal as Terri's guardian."⁸¹ Judge Greer again concluded that Terri was in a PVS and that the Schindlers had failed to present evidence of any medical treatment that could improve Terri's cognitive functions.⁸² On November 22, 2002, Judge Greer ordered the removal of Terri's feeding tube.⁸³

69. SCHINDLER ET AL., *supra* note 39, at 68-69.

70. *Id.* at 184-85.

71. *Id.*

72. *Id.* at 186-87.

73. *Id.* at 184-85.

74. *Id.* at 185.

75. EISENBERG, *supra* note 21, at 21.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 22.

81. *Id.*

82. *Id.*

83. *Id.*; *In re Guardianship of Schiavo*, No. 90-2908-GB-003, 2002 WL 31817960, at *2-5 (Fla. 6th Cir. Ct. Nov. 22, 2002).

The Schindlers appealed yet again.⁸⁴ By this time, they had support from several right-to-life interest groups.⁸⁵ The removal order was stayed for another seven months until June 6, 2003, when the Second District issued its fourth written opinion in the case.⁸⁶ The court affirmed Judge Greer's removal order, reviewing the evidence *de novo* even though the appropriate standard was abuse of discretion.⁸⁷ The Florida Supreme Court refused to intervene.⁸⁸ Judge Greer rescheduled the removal of Terri's feeding tube.⁸⁹

Next, the Schindlers went to federal court in August 2003, requesting an immediate stay of the scheduled tube removal.⁹⁰ Then-Governor of Florida Jeb Bush's lawyers filed a brief in support of the Schindlers' position.⁹¹ The federal court dismissed the action for lack of subject matter jurisdiction.⁹² Then, the Schindlers went back to the Second District, "asking the court to block Judge Greer's removal order."⁹³ "The court refused to do so."⁹⁴ On October 15, 2003, Terri's feeding tube was once again removed.⁹⁵

By this time, the media circus surrounding the *Schiavo* case was in full swing. Governor Bush promised the Schindlers he would try to prevent Terri's death.⁹⁶ The circus eventually produced "Terri's Law," which authorized Governor Bush to keep Terri Schiavo's feeding tube attached.⁹⁷ The Republican-controlled Florida Legislature passed the bill in approximately one day.⁹⁸ Neither a committee debate nor a legal staff analysis occurred.⁹⁹ None of the representatives had ever seen the bill before that point, and some did not even read it before voting.¹⁰⁰ The law gave Governor Bush the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003, four conditions were met: (1) the patient had no written advanced directive; (2) the court had found the patient to be in a

84. EISENBERG, *supra* note 21, at 22.

85. *Id.*

86. *In re Guardianship of Schiavo*, 851 So. 2d at 182-87.

87. *Id.* at 186 ("We have concluded that, if we were called upon to review the guardianship court's decision *de novo*, we would still affirm it.").

88. *Schindler v. Schiavo*, 855 So. 2d 621 (Fla. 2003).

89. EISENBERG, *supra* note 21, at 24.

90. *Id.* at 25.

91. *Id.*

92. *Id.*

93. EISENBERG, *supra* note 21, at 25.

94. *Id.*

95. *Id.*

96. *Id.* at 115.

97. *Id.*

98. *Id.*

99. *Id.* at 116.

100. *Id.*

PVS; (3) the patient had had nutrition and hydration withheld; and, (4) a member of that patient's family had challenged the withholding of nutrition and hydration.¹⁰¹ "There was only one such person in Florida – Terri Schiavo."¹⁰²

In response, Michael Schiavo brought an action against Governor Bush in the Pinellas County Circuit Court, Civil Division, seeking a declaration that "Terri's Law" was unconstitutional.¹⁰³ Judge W. Douglas Baird presided over the case.¹⁰⁴ Bush's lawyers filed several motions to dismiss on grounds of improper venue, to disqualify Judge Baird based upon bias allegations, to subject seven witnesses – including Michael – to depositions, to compel a full jury retrial of all issues, and to permit the Schindlers' intervention in the lawsuit.¹⁰⁵ When Governor Bush's lawyers lost these motions, they appealed.¹⁰⁶ Judge Baird declined to decide the constitutionality of "Terri's Law" until the Second District decided the venue issue.¹⁰⁷ On April 23, 2004, the Second District determined that Michael's case was brought in the proper venue.¹⁰⁸ On May 6, 2004, Judge Baird held "Terri's Law" unconstitutional.¹⁰⁹ He found that the law violated separation of powers principles in two ways: (1) it allowed the executive branch to encroach on the powers of the judicial branch; and (2) it impermissibly delegated legislative power to the Governor.¹¹⁰

Governor Bush's appeal went directly to the Florida Supreme Court after the Second District had certified it.¹¹¹ On September 23, 2004, the Florida Supreme Court ruled that "Terri's Law" was indeed unconstitutional.¹¹² The court issued a unanimous opinion, holding that the law encroached on judicial power by authorizing the executive to overturn a Florida state court judgment.¹¹³ Second, the law improperly delegated legislative power to Governor Bush by providing him absolute, unfettered discretion to interfere with the judicial determination to remove Terri's feeding tube in a manner that failed to provide any standards of

101. *Id.*

102. *Id.* at 118.

103. *Bush v. Schiavo*, 885 So. 2d 321, 328 (Fla. 2004); *Id.* at 119-20.

104. EISENBERG, *supra* note 21, at 120; Joshua E. Perry, *Biblical Biopolitics: Judicial Process, Religious Rhetoric, Terri Schiavo and Beyond*, 16 HEALTH MATRIX 553, 601-02 (2006) (identifying the relevant Florida circuit court judge as Judge Baird).

105. EISENBERG, *supra* note 21, at 123.

106. *Id.*

107. *Id.*

108. *Bush v. Schiavo*, 871 So. 2d 1012, 1013 (Fla. 2d Dist. Ct. App. 2004).

109. *Bush v. Schiavo*, 885 So. 2d 321, 328 (Fla. 2004).

110. *Id.* at 328-31.

111. *Id.* at 324 n.1.

112. *Id.* at 337.

113. *Id.* at 332.

conduct, thereby rendering Governor Bush's decision virtually non-reviewable.¹¹⁴ The court further found that "Terri's Law" even failed to require that Governor Bush consider the patient's wishes, which is the bioethical and legal foundation of substituted judgment decisionmaking.¹¹⁵ Moreover, the court declined to reexamine Judge Greer's factual determinations regarding Terri's medical condition and wishes.¹¹⁶ Five months later, on January 24, 2005, the U.S. Supreme Court denied Governor Bush's request that the Court review *Bush v. Schiavo*.¹¹⁷

After the U.S. Supreme Court's ruling, the Schindlers' lawyers filed written arguments before Judge Greer for a new trial in light of the Pope's allocution on withholding artificial nutrition and proposing that Florida Department of Children and Families ("DCF") lawyers be permitted to participate in the guardianship proceeding.¹¹⁸ On February 25, 2005, Judge Greer issued an order denying further stays of the order to remove the feeding tube.¹¹⁹ The tube was scheduled for removal on March 18, 2005.¹²⁰ The Schindlers' lawyers responded by petitioning Judge Greer to issue an order requiring "experimental treatment" to determine whether Terri was in a PVS "and whether she might be trained to swallow through 'electrical charge' therapy."¹²¹ Next, they filed "[a] motion asking the judge to order a completely new "medical/psychiatric/rehabilitative evaluation" of Terri to determine whether she had been misdiagnosed as being in a PVS or might have moved into a minimally conscious state."¹²² Further, the Schindlers' attorneys filed many additional motions asking to: (1) let a priest give Terri the last rites of the Catholic Church after the feeding tube was removed; (2) let the Schindlers visit her while she was dying; (3) prevent Terri's cremation; (4) begin proceedings for Terri to divorce Michael because he had "engaged in open adultery"; (5) allow limited media access to Terri and visitation with her family; (6) allow the Schindlers to photograph and videotape Terri and keep the photos and tapes; (7) order depositions of Michael and his girlfriend; (8) allow the Schindlers to attempt to provide Terri oral nutrition and hydration; (9) move Terri to the Schindlers' home to die; (10) clamp instead of remove the feeding tube; and finally, (11) appoint a "neutral medical witness" to observe the procedure by

114. *Id.* at 336.

115. *Id.* at 335.

116. *See id.* at 330-31.

117. 543 U.S. 1121 (2005).

118. EISENBERG, *supra* note 21, at 131.

119. *Id.* at 132.

120. *Id.* at 131-32.

121. *Id.* at 132 (internal quotations omitted).

122. *Id.* at 133 (internal quotations omitted).

which the feeding tube was removed or clamped.¹²³ The motions and petitions were largely unsuccessful, with Judge Greer rejecting most of them by early March.¹²⁴

Next, Governor Bush used the DCF to file a motion to “intervene” in the *Schiavo* guardianship proceedings, that is, to enter the guardianship case formally as a new party litigant.¹²⁵ According to the motion, on two previous days that week the DCF received approximately thirty anonymous, detailed allegations of abuse, neglect, or exploitation of Terri.¹²⁶ The motion provided few details, revealing only that the allegations involved things like “failure to file [a] proper guardianship plan or report,” “confinement issues at the ward’s residence,” “improper performance of experimental procedures, and two claims the Schindlers had already made – that Terri had been deprived of independent legal counsel and potentially beneficial new experimental treatments.”¹²⁷ The motion admitted that the DCF had investigated previous abuse allegations and determined that they were “unfounded.”¹²⁸ Judge Greer denied the DCF’s motion on March 23, 2005, on the ground that the legislation prescribing the DCF’s powers and duties did not authorize the agency to become a party to a guardianship proceeding.¹²⁹ Next, Judge Greer noted that the order to discontinue Terri’s artificial nutrition did not interfere with the DCF’s statutorily mandated duty to investigate.¹³⁰ The DCF appealed, and the Second District and the Florida Supreme Court refused to issue another stay.¹³¹

The Second District issued its last opinion in the *Schiavo* case on March 16, 2005.¹³² The court fully absolved Judge Greer’s position, denying any further stay.¹³³ The Schindlers again sought relief from the U.S. Supreme Court, and the Court refused to intervene or issue an immediate stay.¹³⁴ On March 18, 2005, the Schindlers’ attorneys filed a new lawsuit in the U.S. District Court for the Middle District of Florida, Tampa Division, styled as *Theresa Marie Schiavo v. The Honorable*

123. *Id.*

124. *Id.*

125. Dep’t of Children & Family Servs. v. Schiavo (*In re* Guardianship of Schiavo), 932 So. 2d 264, 265 (Fla. 2d Dist. Ct. App. 2005).

126. *Id.*

127. EISENBERG, *supra* note 21, at 136 (internal quotations omitted).

128. *Id.* (internal quotations omitted).

129. *Id.*; see Carl Jones, *Appellate Review*, MIAMI DAILY BUS. REV., Sept. 26, 2005, at 18.

130. EISENBERG, *supra* note 21, at 136.

131. *Id.* at 137.

132. *Id.* at 138; *In re* Guardianship of Schiavo, 916 So. 2d 814 (Fla. 2d Dist. Ct. App. 2005).

133. *In re* Guardianship of Schiavo, 916 So. 2d at 819.

134. EISENBERG, *supra* note 21, at 139.

George Greer.¹³⁵ Suing on Terri's behalf, the Schindlers reused the same arguments they had used in state court and asked the court to issue a habeas corpus order requiring Terri's release from state "custody" and an injunction prohibiting Judge Greer and Michael Schiavo from "taking any action to cause Mrs. Schiavo to die while this action is pending."¹³⁶ Caselaw and principles of federalism were against the Schindlers' requests, and the federal district court judge instantly denied the Schindlers' petition.¹³⁷

The saga was not yet over, however. In these final days, the Florida legislature attempted to pass "Terri's Law II," a new attempt to intervene legislatively.¹³⁸ However, these attempts proved unsuccessful, and time was running out.¹³⁹ Terri's feeding tube was removed as scheduled on March 18, 2005.¹⁴⁰ Next, Congress passed An Act for the Relief of the Parents of Theresa Marie Schiavo on March 21, 2005, authorizing federal-court jurisdiction to reconsider the withdrawal of life support.¹⁴¹

On the same day, the Schindlers filed a new lawsuit in the U.S. District Court for the Middle District of Florida requesting a retrial pursuant to the congressional grant of federal court jurisdiction.¹⁴² The Schindlers sought a new trial and a stay of the removal of Terri's feeding tube.¹⁴³ The Schindlers lost in the federal district court and appealed to the U.S. Court of Appeals for the Eleventh Circuit.¹⁴⁴ The Eleventh Circuit upheld the federal district court's opinion.¹⁴⁵ The Schindlers sought *certiorari* from the U.S. Supreme Court.¹⁴⁶ On March 24, 2005, the Supreme Court denied review.¹⁴⁷

A few days earlier, the Schindlers' lawyers had filed additional pleadings in the U.S. District Court for the Middle District of Florida, adding four new legal theories.¹⁴⁸ The Schindlers argued that Terri's

135. *Id.*; Schiavo *ex rel.* Schiavo v. Greer, No. 8:05-CV-522-T-30TGW, 2005 WL 754121 (M.D. Fla. Mar. 18, 2005).

136. EISENBERG, *supra* note 21, at 139-40 (internal quotations omitted).

137. *Id.* at 140-41.

138. *Id.* at 142.

139. *Id.* at 148-49.

140. See, e.g., *Schiavo's Feeding Tube Removed*, CNN.COM, Mar. 18, 2005, <http://www.cnn.com/2005/LAW/03/18/schiavo.brain-damaged>.

141. Pub. L. No. 109-3, 119 Stat. 15 (2005); EISENBERG, *supra* note 21, at 169.

142. EISENBERG, *supra* note 21, at 171.

143. *Id.*

144. *Id.* at 173-74.

145. See Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1226-29 (11th Cir. 2005), *reh'g en banc denied*, 403 F.3d 1261 (11th Cir. 2005).

146. See Schiavo *ex rel.* Schindler v. Schiavo, 544 U.S. 945 (2005).

147. *Id.*

148. EISENBERG, *supra* note 21, at 180; Schiavo *ex rel.* Schindler v. Schiavo, 358 F. Supp. 2d 1161, 1167 (M.D. Fla. 2005).

constitutional rights had been violated because the U.S. Supreme Court's *Cruzan* decision¹⁴⁹ required clear and convincing proof regarding Terri's wishes before Judge Greer could order Terri's feeding tube removed.¹⁵⁰ This contention was erroneous, however; *Cruzan* merely upheld the ability of the states to require proof by clear and convincing evidence.¹⁵¹ Nothing in the Court's opinion mandated a clear and convincing evidence standard as a matter of due process; it merely held that due process is satisfied, *inter alia*, when a state requires this standard of proof.¹⁵² At this point, the Schindlers' attorneys used emotional tactics, calling Terri's impending death a "murder" at a hearing before the federal district judge.¹⁵³ The court denied the Schindlers' latest arguments and denied their request for an injunction to reinsert the feeding tube.¹⁵⁴ The Schindlers' lawyers then appealed to the Eleventh Circuit, and once again, they lost.¹⁵⁵ The Schindlers then announced they would no longer pursue additional federal appeals.¹⁵⁶

Instead, the Schindlers returned to Florida state court, filing another motion for the DCF to intervene before Judge Greer in the guardianship proceedings.¹⁵⁷ The Schindlers claimed that there was reasonable doubt as to whether Terri was in a PVS.¹⁵⁸ On March 23, 2005, Governor Bush attempted to use the DCF and the Florida Department of Law Enforcement to remove Terri from the hospice to a hospital.¹⁵⁹ Michael Schiavo's attorneys obtained an emergency hearing with Judge Greer, who issued a restraining order preventing Governor Bush from effectuating his plan.¹⁶⁰ Next, Judge Greer denied the DCF's latest intervention motion and declined to revisit his original judgment concerning Terri's condition.¹⁶¹ Meanwhile, Governor Bush again tried to abduct Terri during an appeal of Judge Greer's restraining order to the Second District, which automatically suspended Judge Greer's order.¹⁶² Judge Greer vacated the automatic suspension to issue an order to put the suspended order back into effect, and local law enforcement officials pre-

149. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

150. *Schiavo*, 358 F. Supp. 2d at 1166-67.

151. *Cruzan*, 497 U.S. at 284; see also EISENBERG, *supra* note 21, at 180.

152. EISENBERG, *supra* note 21, at 180; see also *Schiavo*, 358 F. Supp. 2d at 1166-67 (discussing *Cruzan*, 497 U.S. at 284).

153. EISENBERG, *supra* note 21, at 180 (internal quotations omitted).

154. *Schiavo*, 358 F. Supp. 2d at 1168.

155. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005).

156. EISENBERG, *supra* note 21, at 181.

157. *Id.* at 182.

158. *Id.*

159. *Id.* at 184.

160. *Id.*

161. *Id.* at 185; see *Fla. Dep't of Children & Families v. Schiavo*, 900 So. 2d 553 (Fla. 2005).

162. EISENBERG, *supra* note 21, at 185-86.

vented the Florida Department of Law Enforcement from seizing Terri.¹⁶³

On March 25, 2005, the Schindlers filed a motion before Judge Greer requesting an immediate order for reinsertion of Terri's feeding tube, based primarily on an affidavit by one of the Schindlers' attorneys, Barbara Weller, who claimed that when she visited Terri a week earlier, Terri had vocalized "Ahhhhhhh" and "Waaaaaaa," which Weller interpreted as "I want to live."¹⁶⁴ The Schindlers motion relied on the work of Lawrence J. Caldwell, an inventor who assertedly conceptualized a device capable of detecting brain waves that capture pre-vocalized thoughts and a means of using computer software to verbally interpret such thoughts – simply put, "a machine that might read Terri's mind."¹⁶⁵ Further, the Schindlers included an affidavit from a doctor who said she had viewed video clips and reports on the Internet and concluded that Terri was not in PVS.¹⁶⁶ In different affidavit, a different doctor argued that the circumstances of Terri's initial anoxic episode were consistent with a strangulation – in other words, Michael had attempted to murder his wife.¹⁶⁷ Judge Greer denied this final motion.¹⁶⁸ Shortly thereafter, "the Florida Supreme Court denied a final request by the Schindlers to order Terri's immediate transportation to the hospital for reattachment of her feeding tube."¹⁶⁹

The Schindlers were still not done. On March 29, 2005, they filed another petition for a rehearing by the Eleventh Circuit.¹⁷⁰ They again misperceived *Cruzan* and argued that the *Cruzan* decision required clear and convincing evidence – the standard that Judge Greer applied in state court – and that *Cruzan* protected a right-to-life that required procedural due process.¹⁷¹ The three-judge Eleventh Circuit panel denied the Schindlers' request for a rehearing.¹⁷² Later that day, the full Eleventh Circuit, sitting en banc, denied rehearing 9 to 2.¹⁷³ The Schindlers then sought review by the U.S. Supreme Court and an order compelling the reinsertion of Terri's feeding tube.¹⁷⁴ The Supreme Court denied the

163. *Id.* at 186.

164. *Id.* at 155, 187 (internal quotations omitted).

165. *Id.* at 187.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 188.

170. *Id.* at 190.

171. *See id.*

172. *Id.* at 191; *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1282 (11th Cir. 2005).

173. EISENBERG, *supra* note 21, at 192; *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270 (11th Cir. 2005).

174. EISENBERG, *supra* note 21, at 193.

application.¹⁷⁵ The barrage of legal maneuvers finally ceased. On March 31, 2005, Terri Schiavo died in her husband's arms.¹⁷⁶

C. *The Emotional Impact of the Litigation on the Parties*

Being involved in protracted and highly contested litigation of this sort causes predictable negative emotional consequences for the parties. In general, litigation is often an altogether disagreeable form of dispute resolution. Few cases illustrate this point more clearly than *Schiavo*.

Before turning to the specifics of this case, let us consider the negative consequences of litigation in general. Aside from often being hugely expensive¹⁷⁷ and often fraught with delay, litigation is always risky, and its outcome is always uncertain.¹⁷⁸ During any lawsuit's frequently long pendency, both parties may suffer as a result of this persistent cloud of uncertainty.¹⁷⁹ A lawsuit may injure both parties' community reputations, costing them friends and sometimes jeopardizing relationships with the litigants' spouses and families.¹⁸⁰ The wounds that the conflict has precipitated will remain open during the sometimes lengthy pendency of the lawsuit, making it more difficult for healing to occur and for the parties to move on with their lives.¹⁸¹ Being involved in a lawsuit is often ethically challenging, bringing forth guile and concealment on the part of the parties, if not outright dishonesty.¹⁸² It frequently escalates the conflict and produces compromises in the parties' moral values.¹⁸³ It also frequently saps the parties' energy, distracting them from their business affairs and personal lives.

Being involved in a lawsuit also frequently imposes serious emotional costs on both parties.¹⁸⁴ Protracted and high-conflict litigation of the kind involved in the *Schiavo* case is always vexatious and stressful. Indeed, a lawsuit ranks among the most stressful experiences an individual may endure, comparable to the death of a loved one, the breakup of a relationship, or the loss of a job.¹⁸⁵ A lawsuit exacerbates the anger or

175. *Id.* at 193; see *Schiavo ex rel. Schindler v. Schiavo*, 544 U.S. 945 (2005).

176. EISENBERG, *supra* note 21, at 193.

177. See, e.g., David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 109-22 (1983).

178. Winick, *Overcoming Psychological Barriers*, *supra* note 11, at 343.

179. *Id.*; see, e.g., David B. Wexler, Symposium, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 266 (1999).

180. Winick, *Overcoming Psychological Barriers*, *supra* note 11, at 343.

181. *Id.*

182. *Id.*

183. *Id.*

184. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 8-11 (1986).

185. See, e.g., Barbara S. Dohrenwend et al., *Exemplification of a Method for Scaling Life Events: The PERI Life Events Scale*, 19 J. HEALTH & SOC. BEHAV. 205, 211-15 (1978).

distrust a party may already have concerning his or her adversary. The intense anger that a lawsuit may produce prevents wounds from healing and may forever sever the underlying relationship between the parties.¹⁸⁶

A lawsuit can also produce intense fear and anxiety, particularly when the party is required to testify at a deposition or at a public trial, typically in the presence of their adversaries.¹⁸⁷ Litigation may also produce strong feelings of sadness and depression, sometimes provoking a clinical depression that may require mental health treatment.¹⁸⁸ In addition, the psychological difficulties may produce an assortment of physiological problems that may seriously impair the individual's health or shorten his or her life.¹⁸⁹ Anger, in particular, can produce illness, high blood pressure, headache, back or neck pain, and increased risk of heart attack or stroke.¹⁹⁰

These negative consequences generally occur during protracted and high-conflict litigation. The *Schiavo* case illustrates almost all of them. In many respects, the case was a train wreck for both Michael Schiavo and the Schindlers. Their recently published accounts of the litigation demonstrate how emotionally difficult and harmful the case was for all of them.¹⁹¹

Certainly, the litigation completely fractured the relationship between the Schindlers and their son-in-law, a relationship that at one point was close, loving, and supportive. As the Schindlers' book describes the relationship before the dispute drove them apart, "[f]or the first two years, we acted in concert, everybody working for Terri, everybody thinking first about her well-being."¹⁹² During this period, Michael Schiavo lived with his in-laws in a home they rented together, and he called them "Mom" and "Dad."¹⁹³ In an effort to obtain "money that would allow her to be taken care of properly for the rest of her life," Michael Schiavo and Mary Schindler together consulted with personal injury lawyers to explore the possibility of a lawsuit against Terri's doctors, who had failed to spot her bulimia and to take steps that might have averted the potassium imbalance that presumably led to her cardiac

186. Winick, *Overcoming Psychological Barriers*, *supra* note 11, at 343.

187. *Id.*; see, e.g., *Morales v. Artuz*, 281 F.3d 55 (2d Cir. 2002) (witness needed to wear disguise based on fear of defendant).

188. Winick, *Overcoming Psychological Barriers*, *supra* note 11, at 343.

189. *Id.* at 349.

190. *Id.* (citing medical literature).

191. See generally SCHIAVO WITH HIRSH, *supra* note 32; SCHINDLER ET AL., *supra* note 39.

192. SCHINDLER ET AL., *supra* note 39, at 42.

193. SCHIAVO WITH HIRSH, *supra* note 32, at 57; Larry Copeland & Jill Lawrence, *Feud May Be as Much over Money as Principle*, USA TODAY, Mar. 24, 2005, available at http://www.usatoday.com/news/nation/2005-03-24-schiavo-money-cover_x.htm.

arrest.¹⁹⁴

During the 1992 trial of the medical malpractice claim against Terri's doctors, Mary Schindler offered profuse praise of Michael: "He's there every day. . . . [Terri] does not want for anything. He is loving, caring. I don't know of any young boy that would be as attentive. He is – he's just unbelievable, and I know without him there is no way I would have survived this."¹⁹⁵ Michael's brother, Scott, described him as "a wonderful son-in-law."¹⁹⁶ Michael and his mother-in-law were particularly close and spent much time together visiting Terri, working with her, and planning and taking various efforts to attempt to rehabilitate her.¹⁹⁷

Although their generally good relationship seemingly continued until the verdict in the medical malpractice action, it began to fall apart soon thereafter when Michael and the Schindlers fought about the Schindlers' claim to a share of the damages award,¹⁹⁸ and their relationship was completely severed by the intense litigation that ensued.¹⁹⁹ According to the Schindlers,

[the medical malpractice trial's] outcome signaled a 180-degree turn in our relationship with Terri's husband. From being the closest of allies, united in our love for Terri and our desire to give her every chance at the best life possible, we became sudden enemies, bitter opponents in "The Schiavo Case" that divided the country as it divided Michael and us.²⁰⁰

The parties stopped speaking to one another soon after Michael received the medical malpractice award.²⁰¹ In a 2000 deposition, Michael stated that the Schindlers "put me through pretty much hell the last few years" as a result of "[t]he litigation they put me through" and "their attitude towards me because of the litigations."²⁰² The Schindlers felt betrayed by Michael's actions following the medical malpractice verdict, which they saw as inconsistent with his trial testimony that he would love and

194. SCHIAVO WITH HIRSH, *supra* note 32, at 53.

195. *Id.* at 64-65 (internal quotations omitted).

196. *Husband, Parents in Bitter Feud*, FOXNEWS.COM, Mar. 28, 2005, <http://www.foxnews.com/story/0,2933,151661,00.html>.

197. SCHINDLER ET AL., *supra* note 39, at 42, 44-45.

198. Melanie Ave & David Karp, *After Jury Award, Battle Lines Drawn*, ST. PETERSBURG TIMES, Mar. 23, 2005, available at http://www.sptimes.com/2005/03/23/Tampabay/After_jury_award__bat.shtml.

199. *In re Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at *2-7 (Fla. 6th Cir. Ct. Feb. 11, 2000) (order granting Michael Schiavo authority to discontinue Terri Schiavo's artificial life support).

200. SCHINDLER ET AL., *supra* note 39, at 49.

201. Ave & Karp, *supra* note 198.

202. SCHINDLER ET AL., *supra* note 39, at 78.

care for their daughter forever.²⁰³ “What was to ensue,” Mary Schindler stated,

broke my heart. The time I spent working with Michael to help Terri to improve would soon seem a facade. What Michael wanted was to favorably influence the malpractice jury that he was a dedicated husband. When I realized this, I cried so much I can still taste the tears.²⁰⁴

Mary Schindler reported that Bob Schindler felt like Michael “had sucker-punched him in the stomach.”²⁰⁵

Each side became suspicious of the other’s motives, attributing their actions to monetary self-interest.²⁰⁶ Distrust and suspicion soon provoked anger and hostility. As Michael Schiavo stated in his book, “[t]hey hate me and I hate them.”²⁰⁷ As Bob Schindler put it: “He’s having my daughter put to death to get her money. That burns me up.”²⁰⁸

These feelings continued and even intensified during the fourteen years of litigation that followed. Every time the litigation seemed final, it took a new turn, provoking further stress, uncertainty, and despair. For example, the Schindlers complained in their book that they “felt abandoned, trapped in a court system where a judge can overturn the findings of his own investigator without explaining why, and without giving the other side a chance to appeal.”²⁰⁹ “My legs were weak, and a couple of times I thought I was going to faint,” Mary Schindler stated, recalling her response to a court ruling.²¹⁰ After another ruling, Mary Schindler stated, “[i]t felt as though the judges had taken out my battered heart and squeezed the life out of it.”²¹¹ Commenting on the frustrations of the trial before Judge Greer, Terri’s sister, Suzanne, described it as “a week of hell,” at the end of which “I felt like we were [all] run over by a truck.”²¹² Michael Schiavo reacted with strong mixed feelings to Judge Greer’s decision to allow removal of Terri’s feeding tube: “I was excited beyond belief for a few seconds, and then suddenly felt the cold chill of a dagger in my heart.”²¹³ Learning that the decision would be stayed and that an appeal would likely follow, he reacted with exas-

203. Ave & Karp, *supra* note 198.

204. *Id.* at 49.

205. *Id.* at 65.

206. *In re* Guardianship of Schiavo, 780 So. 2d 176, 178 (Fla. 2d Dist. Ct. App. 2001).

207. SCHIAVO WITH HIRSH, *supra* note 32, at 194 (emphasis omitted).

208. Ave & Karp, *supra* note 198 (internal quotations omitted).

209. SCHINDLER ET AL., *supra* note 39, at 60.

210. *Id.* at 87.

211. *Id.* at 97.

212. *Id.* at 83 (internal quotations omitted).

213. SCHIAVO WITH HIRSH, *supra* note 32, at 167.

peration: "I thought, [t]his is going to take forever. Who knew?"²¹⁴ Upon learning of Judge Greer's decision, Mary Schindler stated:

We had lost. *No!* my heart screamed. I couldn't believe it. . . . At first, I was numb. Then, quickly, I started to cry and couldn't stop. I cried and cried as if the dam I had built inside me had broken and nothing could build it back again. I thought I would cry forever.²¹⁵

Before the decision, Terri's brother Bobby stated, "my anxiety was so profound I felt I was going to faint. When it did come, it was an absolute shock."²¹⁶

Both Michael and the Schindlers were subjected to intense stress at varying points during the litigation. "The pressure was unbelievable," Mary Schindler reported.²¹⁷ "The stress got so bad that it even affected our family dynamic," according to Bobby.²¹⁸ Mary described it as "psychological torture."²¹⁹ Michael Schiavo described the intense litigation that occurred during the conflict's final phases as a "category five" hurricane lasting five years.²²⁰ The pressures also adversely affected Michael's personal relationships. He reported quarreling with his fiancée, Jodi, who told him "enough is enough" and that it was "time to quit," and left with their two children when he declined to do so.²²¹ In describing the intensity of the litigation and the media and public attention, Michael's lawyer, Debbie Bushnell, stated, "we were [all] emotionally drained and in shock from the process."²²²

The litigation-induced high stress the parties endured probably adversely affected their physical as well as emotional health. In his book, Michael mentioned that he suffered from ulcerative colitis, which he speculated intensified because of the stress he was experiencing.²²³ In describing his reaction to viewing Governor Bush report on television that a neurologist concluded Terri had been misdiagnosed as having been in a PVS, Michael stated, "I could feel myself immediately getting

214. *Id.* at 168 (emphasis in original).

215. SCHINDLER ET AL., *supra* note 39, at 86 (emphasis in original).

216. *Id.* at 86 (internal quotations omitted).

217. *Id.* at 171 (internal quotations omitted). Mary Schindler expressed that she "can't possibly convey the anxiety we continued to feel" during the "terrible time" prior to the January 2000 trial before Judge Greer. *Id.* at 65.

218. *Id.* at 171 (internal quotations omitted).

219. *Id.* at 172.

220. SCHIAVO WITH HIRSH, *supra* note 32, at 176.

221. *See id.* at 288-89 (internal quotations and emphasis omitted). Under pressure from Jodi, Michael phoned his attorney, George Felos, and told him of the decision to give up the fight. *Id.* Felos convinced Michael that he should not do so, and Michael relented. *Id.* Although Jodi left Michael in response, she stayed away for only one night. *Id.*

222. SCHIAVO WITH HIRSH, *supra* note 32, at 294; *see also id.* (Michael mentioning the "emotional toll" that the litigation had produced for Jodi and himself).

223. *Id.* at 130.

agitated. I jumped up, my eyes got big and my jaws clenched. . . . My temperature must have spiked ten degrees. It was like I could feel myself boil”²²⁴ The case made the Schindlers “sick with worry.”²²⁵ When the lawsuit seeking removal of Terri’s feeding tube was filed, Mary Schindler reported that she “couldn’t sleep for a week.”²²⁶ Bob Schindler, who had a long history of hypertension, experienced spikes in his blood pressure as a result of this long battle.²²⁷

Terri’s autopsy established that she lacked consciousness since her February 25, 1990 cardiac arrest.²²⁸ As a result, Terri suffered no emotional impact as a consequence of the litigation between her husband and parents. Yet, it seems appropriate to take into account the impact that the protracted litigation probably had on her reputation and the way she will be remembered. Michael noted that the press coverage at the initial trial before Judge Greer “would have appalled Terri, who was at heart a very private person.”²²⁹ This was just the beginning of the intense media circus the case became. Few cases received the extraordinary media attention that this human drama commanded. Photos and videotapes of Terri in her PVS, many of them quite unflattering, received extensive media and online exposure, as did the details of her medical condition. Unfortunately, this is the way most people will remember poor Terri. These humiliating and demeaning images, indelibly engrained in the public consciousness, would undoubtedly have been a source of great embarrassment to Terri had she been aware of them, as they must have been to her husband and family.

Moreover, the entire episode probably took an enormous toll on the parties’ reputations. Michael and the Schindlers became just as much a spectacle as Terri. Their motives were questioned, and they became the subject of public scrutiny and ridicule.²³⁰ They publicly vilified one another in the media, and they became the subject of public gossip and condemnation.²³¹ Their personal tragedy was turned into a public event. The litigation and their mutual animosity took over their lives and will

224. *Id.* at 306-307.

225. SCHINDLER ET AL., *supra* note 39, at 67; *see also id.* at 65 (“Eating made me sick. . . . I can’t possibly convey the anxiety we continued to feel or the pain of arising each morning thinking, [t]hey’re trying to kill our Terri.”).

226. *Id.* at 65.

227. *Id.*; *id.* at 170 (Bob Schindler’s blood pressure was “off-the-wall” (internal quotations omitted)); *id.* at 185-86 (noting that at one point, Bob Schindler had to be rushed to a hospital emergency room after he fainted from the stress).

228. *See supra* note 23.

229. SCHIAVO WITH HIRSH, *supra* note 32, at 135.

230. *See, e.g.,* Ave & Karp, *supra* note 198; CNN *Saturday Morning News* (CNN television broadcast Mar. 19, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/0503/19/smn.02.html>; Copeland & Lawrence, *supra* note 193.

231. *See id.*

forever haunt their memories and the way they are remembered by others. As the Schindlers put it, “our lives – psychological, professional, philosophical, emotional – would be transformed forever.”²³² In view of the high personal, emotional, and reputational costs that this most public of controversies imposed, it is likely that if somehow given the opportunity to turn back the clock, they would have chosen to resolve their conflict privately and would have moved on.²³³

IV. REWINDING THE LAWYERING

Let us look back at the key events at the early stages of the conflict between Michael Schiavo and the Schindlers to examine more closely what the lawyers might have done differently to prevent the disaster that the prolonged course of litigation represented for all parties. It is useful to examine in more detail the various points at which the seeds of conflict were sown and the points at which the lawyers became involved or should have become involved. By rewinding the conflict back to various points in its chronology, we can examine what the lawyers did and did not do and what a lawyer applying the therapeutic jurisprudence/preventive law model might have attempted at each of these points. I begin with a modified timeline of the key events occurring during the conflict’s early stages, in which I identify various rewind points. I then present a more detailed chronological description, and finally I analyze what the lawyers could have done at each rewind point to better foster and protect their clients’ wellbeing.

Rewind Chronology

- February 25, 1990
Terri’s cardiac arrest;
- 1992
REWIND POINT: Michael Schiavo initiates a medical malpractice suit against Terri’s physicians. Testimony is planned regarding loss of consortium issue;
- November 1992
Trial and jury verdict;
- December 1992
REWIND POINT: Mary Schindler’s visit to attorney Glen Woodworth;
- November 1992 – February 1993
REWIND POINT: The Schindlers’ uncorrected misconception post-verdict; Michael Schiavo’s change of heart.

232. SCHINDLER ET AL., *supra* note 39, at 66; *see also id.* at 94 (“[A]ll we could talk about was the case. . . . It obsessed our lives.” (quoting Bobby Schindler) (internal quotations omitted)).

233. *See generally* Mary Coombs, Schiavo: *The Road Not Taken*, 61 U. MIAMI L. REV. 539 (2007).

- February 1993
\$300,000 payment to Michael Schiavo and \$725,000 payment to Terri's trust;
- February 14, 1993
Valentine's Day fight;
- July or August 1993
REWIND POINT: Michael Schiavo seeks to withhold antibiotics;
- July 16, 1993
The Schindlers' letter to Michael Schiavo;
- July 29, 1993
REWIND POINT: The Schindlers' petition to remove Michael Schiavo as Terri's guardian;
- August 1993
REWIND POINT: Oral and written settlement initiatives by Michael Schiavo's lawyer, Stephen J. Nilssen;
- March 1, 1994
First guardian *ad litem*, John H. Pecarek, submits report absolving Michael Schiavo regarding the petition's allegations;
- June 1997
Michael Schiavo retains attorney George Felos;
- May 1998
REWIND POINT: Felos files a petition to authorize removal of Terri's feeding tube; court appoints second guardian *ad litem*; the Schindlers hire Pamela Campbell;
- December 20, 1998
Second guardian *ad litem*, Richard Pearse, submits report;
- January 2000
Trial before Judge Greer;
- February 11, 2000
Judge Greer authorizes feeding tube removal.²³⁴

A. *The Seeds of the Conflict*

We now know that when Terri Schiavo suffered a cardiac arrest on February 25, 1990, it deprived her brain of oxygen, which led to a PVS.²³⁵ At this early stage, neither Michael Schiavo nor the Schindlers were able to accept this conclusion. About two weeks after her collapse, Dr. Garcia DeSousa, Terri's neurologist at Humana Northside Hospital,

234. See Kathy Cerminara & Kenneth Goodman, *Schiavo Case Resources, Key Events in the Case of Theresa Marie Schiavo* (2006), <http://www.miami.edu/ethics/schiavo/timeline.htm> (timeline of important events in the case).

235. *Id.*

told Mary Schindler that her daughter was in a PVS.²³⁶ Mary Schindler rejected this diagnosis, probably based in part on her hope that her daughter would recover and partly based on the family's observations of her smiles and apparent ability to visually follow their movements.²³⁷ Quite understandably, the Schindlers were in denial about the seriousness of their daughter's condition. And, as Mary Schindler later acknowledged in discussing this conversation, "[n]ews like that is impossible to digest. Bob and I took it in without processing it and without considering its implications."²³⁸ Dr. DeSousa's diagnosis "felt simply like one more piece of bad news."²³⁹ "[I]t was inconceivable to us that she wouldn't get any better."²⁴⁰ "We dismissed the diagnosis and, with Michael, planned for the first steps in Terri's rehabilitation."²⁴¹

At this stage, Michael shared in the Schindlers' denial regarding the seriousness of Terri's condition. He did not understand what the doctors were telling him and assumed simply that she was ill and that the doctors would soon make her well.²⁴² Even though she was unresponsive, he would interpret anything she would do "in the most positive light."²⁴³ "Nobody was going to tell me any different," he said.²⁴⁴ Although she was in a PVS, Michael "didn't believe it."²⁴⁵ In May and June 1990, without opposition, Michael applied for and was appointed to be Terri's guardian.²⁴⁶ Michael visited Terri frequently in the hope that she would improve, and he took every conceivable step to facilitate her rehabilitation.²⁴⁷ Her condition, however, remained the same.

At Daniel Grieco's suggestion – an attorney who previously had been Michael Schiavo's employer – Michael began to consider the possibility of bringing a medical malpractice action against the two physicians whom Terri had consulted when she was having trouble becoming

236. SCHINDLER ET AL., *supra* note 39, at 40. When Mary asked him what this meant, he replied: "Persistent vegetative state. It's a condition where the patient is, and will remain, unconscious and unaware. . . . As long as we keep feeding her, she won't die from it, but this is how it's going to be. She's never going to get any better." *Id.* (internal quotations omitted).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 41.

241. *Id.*

242. SCHIAVO WITH HIRSH, *supra* note 32, at 22-28.

243. *Id.* at 28.

244. *Id.*

245. *Id.* at 30.

246. *Id.* at 31.

247. *Id.* at chs. 2-3 (including taking her to San Francisco for experimental treatment involving electronic stimulation through a surgical implant).

pregnant.²⁴⁸ Was it medical malpractice for them not to have recognized Terri's eating disorder and resulting low potassium levels, which might have caused her cardiac arrest? Grieco referred Michael to Glen Woodworth, a medical malpractice lawyer, and Woodworth began to research the issues and evaluate the evidence.²⁴⁹ Michael and the Schindlers had many discussions concerning the potential lawsuit. On February 4, 1992, Woodworth invited Michael and Mary Schindler to a meeting in his office to tell them that the prospects for a lawsuit did not appear promising.²⁵⁰ Michael was "crushed" because he thought (1) the doctors were at fault for Terri's condition, and (2) that a lawsuit against those doctors might provide "money that would allow [Terri] to be taken care of properly for the rest of her life."²⁵¹ He urged Woodworth to reconsider and pursue the medical malpractice lawsuit even if it was a long shot.²⁵² After further investigation, Woodworth and personal injury attorney Gary Fox agreed to pursue the case.²⁵³

During the lawsuit's planning stages, the Schindlers got the impression that any money received would go to Terri's rehabilitation. At an early stage, there was speculation that the malpractice claim might be worth upwards of fifteen million dollars.²⁵⁴ At this point, Michael and his in-laws discussed using the amount recovered to buy a house where they all could live together with Terri.²⁵⁵ Although the Schindlers understood Michael to have been making a commitment to use the funds towards Terri's rehabilitation,²⁵⁶ Michael denied that he made such a commitment, instead suggesting that they had merely fantasized about building a house with a special wing for Terri and her nurses.²⁵⁷ The Schindlers asserted that Michael promised them a share of the legal proceeds, in part to repay them for helping Terri and him to move to Florida from New Jersey, allowing them to live rent-free in their condominium,

248. *Id.* at 33.

249. *Id.*

250. *Id.* at 53.

251. *Id.*

252. *Id.* at 54.

253. *Id.*

254. *Id.* at 102.

255. *Id.*

256. SCHINDLER ET AL., *supra* note 39, at 51 (asserting that there was an agreement to share the jury award); Ave & Karp, *supra* note 198 (when the settlement money came, the Schindlers said they believed Michael would use it to buy a house, where they could communally care for Terri).

257. SCHIAVO WITH HIRSH, *supra* note 32, at 102; Deposition of Michael Schiavo at 68-70, *In re* Guardianship of Schiavo, No. 90-2908GD-003 (Fla. 6th Cir. Ct. Nov. 19, 1993) [hereinafter Schiavo 1993 Deposition], available at <http://judgegeorgegreer.com/pain.html> (follow "Click Here for [F]ull [D]eposition [T]ranscript" hyperlink) (conceding that there were "discussions" between himself and the Schindlers about using the medical malpractice proceeds to purchase a house where they would all live together).

and providing them additional financial help.²⁵⁸ According to Mary Schindler, Michael used to say, “[d]on’t worry, Mom. If I ever get any money from the lawsuit, I’ll help you and Dad.”²⁵⁹

The lawsuit against Terri’s former doctors sought damages for her injuries and for Michael’s loss of consortium.²⁶⁰ In support of Michael’s loss of consortium claim, the medical malpractice lawyers presented Michael’s moving testimony regarding how he loved his wife and how he visited her regularly and was actively and closely involved in every aspect of her care and rehabilitation.²⁶¹ Additionally, they presented Mary Schindler’s testimony concerning Michael’s dedication to Terri and what a wonderful husband and son-in-law he was.²⁶² At the medical malpractice trial, Michael Schiavo testified that he became a nurse because he wanted to learn more about how to care for Terri.²⁶³ He testified that he wanted to bring her home and take care of her there.²⁶⁴ Asked whether he would do that if he had the resources, he replied, “in a heartbeat.”²⁶⁵ Asked how he felt about her then, almost two years after she had entered her PVS, he replied that she was his “life” and that he “wouldn’t trade her for the world.”²⁶⁶ He further stated, “I believe in my wedding vows.”²⁶⁷ When asked to elaborate, he stated, “I believe in the vows I took with my wife, through sickness, in health, for richer or poorer. I married my wife because I love her and I want to spend the rest of my life with her. I’m going to do that.”²⁶⁸

The Schindlers listened to this testimony and described it as “[m]oving,” “told with passion and conviction, accompanied by Michael’s sobs and tears.”²⁶⁹ The Schindlers reported themselves as having been deeply moved.²⁷⁰ There was no mention of any expressed wish on Terri’s part to discontinue her life if she suffered a traumatic injury.²⁷¹ According to the Schindlers, “Michael had repeatedly told us that any money he won, and Terri won, from the lawsuits would go

258. Copeland & Lawrence, *supra* note 193; Ave & Karp, *supra* note 198 (the Schindlers thought that Michael owed them at least \$10,000 for rent and moving expenses and other costs that they had provided him over the years).

259. Copeland & Lawrence, *supra* note 193 (internal quotations omitted).

260. SCHIAVO WITH HIRSH, *supra* note 32, at 71-72.

261. SCHINDLER ET AL., *supra* note 39, at 50-51.

262. SCHIAVO WITH HIRSH, *supra* note 32, at 64-65.

263. SCHINDLER ET AL., *supra* note 39, at 50.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 51.

269. *Id.*

270. *Id.*

271. *Id.*

toward her rehabilitation.”²⁷² When the verdict was rendered, the Schindlers concluded, “Terri’s financial problems had ended.”²⁷³ Mary Schindler reported that Michael had reassured her, “Mom, you and Dad . . . will never have to worry again a day in your lives.”²⁷⁴

On November 10, 1992, the jury returned a verdict in favor of the Schiavos. The jury found negligence, but determined that Terri was responsible for seventy percent of her damages as a result of her bulimia.²⁷⁵ After the seventy percent reduction as well as a deduction for attorneys’ fees and costs, Terri’s guardianship account was awarded \$725,000, and Michael was awarded \$300,000 for his loss of consortium damages.²⁷⁶

Soon thereafter Mary Schindler – and perhaps her husband as well – went to visit attorney Glen Woodworth.²⁷⁷ Assuming they were entitled to a share of the verdict, Mary Schindler asked him “how long is it going to take for us to get the money?”²⁷⁸ Woodworth replied that he didn’t represent the Schindlers, that the award was exclusively for Michael and Terri, and that under Florida law parents did not have a loss of consortium claim.²⁷⁹ Mary Schindler responded, “are you tellin[g] me after all we’ve been through, after all I’ve been through, that not one single dollar of that money will be turned over to us? Or to me?”²⁸⁰ Woodworth replied that that was exactly what he was telling her, and Mrs. Schindler responded with surprise and frustration, “[w]ell, that is just totally wrong.”²⁸¹

Michael Schiavo received the proceeds of the medical malpractice action in February 1993.²⁸² As the Bible admonishes, “[t]he love of money is the root of all evil.”²⁸³ Sadly, instead of relief, the damages award money brought division and grief. Looking back at the events that shortly followed receipt of the funds, court-appointed guardian *ad litem* Richard Pearse stated:

In February, 1993, the ward’s husband and her parents had a falling

272. *Id.* The Schindlers also reported that when it was suggested Terri be transferred to the Shands Medical Center in Gainesville for rehabilitation, Michael “promised” that this would be their plan. *Id.*

273. SCHINDLER ET AL., *supra* note 39, at 53.

274. *Id.* (internal quotations omitted). “If he said it once, he said it a thousand times.” *Id.*

275. SCHIAVO WITH HIRSH, *supra* note 32, at 71.

276. *Id.* at 74.

277. *Id.* at 75.

278. *Id.* (internal quotations omitted).

279. *Id.*

280. *Id.* (internal quotations omitted).

281. *Id.* (internal quotations omitted).

282. *In re Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at *2 (Fla. 6th Cir. Ct. Feb. 11, 2000).

283. 1 *Timothy* 6:10 (King James).

out. Mr. Schiavo claims the argument arose because he refused to share the settlement money with the Schindlers. They, on the other hand, claim that Mr. Schiavo failed to honor commitments he had previously made to continue to seek aggressive treatments for the ward's condition. The Schindlers retained counsel and sought Mr. Schiavo's removal as guardian²⁸⁴

The Florida circuit court also reached this same regrettable conclusion:

During the period of time following the incident of February 25, 1990, the parties worked together in an attempt to provide the best care possible for Terri Schiavo. On February 14, 1993, this amicable relationship between the parties was severed. While the testimony differs on what may or may not have been promised to whom and by whom, it is clear to this court that such severance was predicated upon money and the fact that Mr. Schiavo was unwilling to equally divide his loss of consortium award with Mr. and Mrs. Schindler. The parties have literally not spoken since that date. Regrettably, money overshadows this entire case and creates potential of conflict of interest for both sides.²⁸⁵

Differing conceptions of who was entitled to the award and how it should be used caused Michael and the Schindlers' relationship to fracture. The Schindlers believed Michael was committed to sharing the \$300,000 loss of consortium award and to utilizing the \$725,000 trust award to obtain a home in which the Schindlers and Terri could reside. This misunderstanding concerning the commitment the Schindlers believed Michael had towards splitting and committing the money played a primary role in the rift that occurred between them.

The parties' differing conceptions concerning how the medical malpractice proceeds would be allocated exploded into open conflict during a meeting that took place in Terri's nursing home room on February 14, 1993 – Valentine's Day.²⁸⁶ Michael was studying at Terri's bedside when the Schindlers arrived.²⁸⁷ "[S]oon after the Schindlers showed up, a fight erupted. Michael Schiavo was on one side, throwing books and pushing a table. His father-in-law was on the other, his fists clenched. Mrs. Schindler, in the middle, kept the two men from coming to blows."²⁸⁸ It was thus that "on Valentines Day 1993, Terri Schiavo's

284. Report of Guardian *ad Litem* Richard L. Pearse, Jr., at 4-5, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. 6th Cir. Ct. Dec. 29, 1998), available at http://www6.miami.edu/ethics/schiavo/pdf_files/122998_Schiavo_Richard_Pearse_GAL_report.pdf.

285. *In re Guardianship of Schiavo*, 2000 WL 34546715, at *2.

286. SCHIAVO WITH HIRSH, *supra* note 32, at 76-79.

287. *Id.* at 76-77.

288. Ave & Karp, *supra* note 198.

husband and parents quit speaking to each other.”²⁸⁹ Michael and the Schindlers’ accounts of that day vary:

According to Schiavo’s testimony, the Schindlers came into Terri’s room in the nursing home, spoke to their daughter, then turned to him.

“The first words out of my father-in-law’s mouth was how much money he was going to get,” Schiavo said. “I was, ‘[w]hat do you mean?’ ‘Well, you owe me money.’”

Schiavo said he told his in-laws that all the money had gone to his wife – a lie he said he told Bob Schindler “to shut him up because he was screaming.”

Schiavo said his father-in-law called him “a few choice words,” then stormed out of the room. Schiavo said he started to follow him, but his mother-in-law stepped in front of him, saying, “[t]his is my daughter, our daughter, and we deserve some of this money.”²⁹⁰

In his book, Michael described the Valentine’s Day fight. Bob Schindler exclaimed, in frustration over the fact that he and Mary Schindler had no legal claim: “This isn’t right. This is my daughter. I deserve money.”²⁹¹ Michael further claimed that it was amidst this argument that Bob Schindler threatened, “I’m going to take over this guardianship; you’ll see!”²⁹² Michael attributed Bob Schindler’s anger to the Schindlers’ financial problems at the time, including Bob Schindler’s “futon business going bust and their subsequent bankruptcy in 1989.”²⁹³

The Schindlers’ version of these events is quite different. Mary Schindler

testified that she and her husband found Schiavo studying. “We were talking about the money and about his money,” she said. “That with his money and the money Terri got, now we could take her (for specialized care) or get some testing done. Do all this stuff. He said he was not going to do it.”

She said he threw his book and a table against the wall and told them they would never see their daughter again.²⁹⁴

Whether it was Michael Schiavo or Bob Schindler who first initiated the argument, the fact that money was at the root of the problem was indisputable. According to both parties, the Schindlers were under the impression that they were entitled to a portion of the monetary award and that Michael made a commitment during the malpractice trial to

289. *Id.*

290. Copeland & Lawrence, *supra* note 193.

291. SCHIAVO WITH HIRSH, *supra* note 32, at 78 (internal quotations omitted).

292. *Id.* at 79 (internal quotations omitted).

293. *Id.* at 78.

294. Copeland & Lawrence, *supra* note 193.

dedicate the funds to Terri's care and custodial needs.²⁹⁵ On the contrary, Michael believed that the guardianship money was controlled by the bank and a trustee and thus was beyond the Schindlers' control; the loss of consortium award, in his mind, belonged exclusively to him.²⁹⁶ For the Schindlers, the Valentine's Day fight represented a change of heart for Michael. The loving husband who at the medical malpractice trial had pledged to love and care for his wife and to use any awarded funds for her treatment and rehabilitation had been transformed into a selfish man who wanted all the money for himself.

In the next few months, Michael's actions heightened the Schindlers' suspicions. Around July or August 1993, some four or five months after Michael received the medical malpractice funds, Michael ordered Terri's nursing home not to treat Terri's recurrent bladder infections.²⁹⁷ Michael acknowledged and described this event in his book,²⁹⁸ although he was vague as to when it occurred. In their book, the Schindlers claimed they learned about the order in June 1993 and that this event precipitated their consulting an attorney for the purpose of removing Michael as Terri's guardian and substituting themselves.²⁹⁹ A nursing home administrator told Michael that the nursing home could not withhold needed treatment and, after the litigation challenging Michael's guardianship began, advised the Schindlers' attorney about Michael's order.³⁰⁰ As a result of the pending litigation, Michael's attorney, Stephen Nilssen, advised him not to press the matter at that point, and he relented.³⁰¹ In his November 19, 1993 deposition in connection with the litigation, Michael acknowledged giving this order to discontinue treatment, mentioning that Dr. Mulroy – one of Terri's nursing home physicians – suggested this course of action at the time Terri originally sustained a urinary tract infection.³⁰² Michael also acknowledged that he was aware that a urinary tract infection left untreated could produce sepsis that would end Terri's life.³⁰³

Bob Schindler attended Michael Schiavo's November 1993 deposition; he, thus, directly heard about their son-in-law's attempt to order

295. SCHINDLER ET AL., *supra* note 39, at 51; SCHIAVO WITH HIRSCH, *supra* note 32, at 75.

296. SCHIAVO WITH HIRSH, *supra* note 32, at 78.

297. Schiavo 1993 Deposition, *supra* note 257, at 13-14 ("I gave an order not to treat a bladder infection Terri had.").

298. SCHIAVO WITH HIRSH, *supra* note 32, at 94.

299. SCHINDLER ET AL., *supra* note 39, at 57.

300. SCHIAVO WITH HIRSH, *supra* note 32, at 95; Schiavo 1993 Deposition, *supra* note 257, at 13-14.

301. SCHIAVO WITH HIRSH, *supra* note 32, at 95.

302. Schiavo 1993 Deposition, *supra* note 257, at 13-14; *see also id.* at 33-38 (describing Dr. Harrison's recommendation that Michael order withholding of treatment).

303. *Id.* at 14-15.

treatment withdrawal regarding Terri's urinary tract infections.³⁰⁴ Moreover, nursing home staff previously informed the Schindlers regarding this situation.³⁰⁵ This must have confirmed their worst fears. This certainly was not the Michael they had known in the first two years after Terri's cardiac arrest. This was not the Michael that seemed so dedicated to their daughter, who sold hot dogs at the beach to raise money to take her to California for experimental treatment.³⁰⁶ This was not the Michael who had fought successfully with Terri's insurance company when it sought to restrict reimbursement for further treatment.³⁰⁷ And this certainly was not the Michael they heard pledging an undying desire to love and care for Terri and who had communicated to them that he would use the medical malpractice proceeds for Terri's treatment and rehabilitation.³⁰⁸ Rather, this was the son-in-law who had refused to share those proceeds and had likewise failed to ensure that the majority of the funds would be used for Terri's care.

Moreover, the Schindlers were aware that Michael had begun to date other women and had had relationships with two separate women that endured for several months. At the deposition, Michael described these relationships as "intimate," during which he spent nights at these women's homes.³⁰⁹ In addition, the Schindlers learned that Michael melted down Terri's jewelry to make jewelry for himself.³¹⁰ At the Valentine's Day fight that nearly resulted in physical blows, Michael explicitly backed away from his commitment to use the medical malpractice award for Terri's treatment and to share the funds with the Schindlers for Terri's benefit. As they saw it, not only was Michael not going to use the over \$1,000,000 that had been awarded for their daughter's care and rehabilitation, but he was trying to kill her to inherit the money and spend it on himself and other women.³¹¹ In their view, Michael had broken his promises to share the tort award with them, to use the funds to take care of their daughter, and to buy a house where they all could care for her.³¹² These were the *Schiavo* case's seeds of discontent, which first bore fruit in the form of an initial round of litigation between the parties.

304. *Id.* at 2 (noting appearances at deposition).

305. SCHIAVO WITH HIRSH, *supra* note 32, at 94-95; SCHINDLER ET AL., *supra* note 39, at 57.

306. SCHIAVO WITH HIRSH, *supra* note 32, at 35; SCHINDLER ET AL., *supra* note 39, at 47-48.

307. SCHIAVO WITH HIRSH, *supra* note 32, at 32.

308. See *supra* notes 246-58 and accompanying text.

309. Schiavo 1993 Deposition, *supra* note 257, at 3-8.

310. *Id.* at 80.

311. SCHINDLER ET AL., *supra* note 39, at 50-55; Ave & Karp, *supra* note 198; Copeland & Lawrence, *supra* note 193.

312. Ave & Karp, *supra* note 198; Copeland & Lawrence, *supra* note 193.

B. *Reconsidering the Actions of the Medical Malpractice Lawyers*

In view of the fact that the medical malpractice award and the parties' related misunderstandings appear to have provoked the conflict between Michael Schiavo and the Schindlers, a primary issue for analysis is whether the medical malpractice lawyers could or should have done anything differently. Could the lawyers have done anything to prevent or at least minimize the conflict? In retrospect, what steps would an attorney applying the therapeutic jurisprudence/preventive law model of lawyering have taken?

At the outset, the Schindlers were involved in planning the Schiavos' medical malpractice action. They attended meetings and participated in conversations with Michael that fostered hope that a large recovery – in excess of fifteen million dollars – was possible.³¹³ These conversations and discussions with Michael about his intentions regarding the recovery led them to expect (1) a share of the proceeds and (2) communal living in a home where the Schindlers and Michael would care for Terri. Somehow the Schindlers suffered from the misconception that, as Terri's parents, they were entitled to a share in the loss of consortium award.³¹⁴ Attorney Daniel Grieco, who had referred Michael to attorney Glen Woodworth, expressed the view that this misconception concerning entitlement to a share in the award was at the root of the conflict.³¹⁵

The misconception that the Schindlers had concerning their entitlement to share in the award represents a communication failure. At some point in their early discussions, the medical malpractice attorneys should have clearly expressed to both Michael and the Schindlers that the funds they were seeking would go into a trust established to provide Terri's healthcare and, to the extent that loss of consortium damages were recovered, that they would go exclusively to Michael. Attorney Glen Woodworth had this conversation with Mary Schindler when she came to his office *after* the jury verdict to ask when the Schindlers would receive their share of the money, but a conversation of this kind apparently never occurred before that time.³¹⁶ Even though the attorneys did

313. SCHIAVO WITH HIRSH, *supra* note 32, at 102.

314. See sources cited *supra* notes 277-81 and accompanying text (discussing meeting between Mary Schindler and attorney Glen Woodworth, which occurred after the jury verdict and shortly before payment of the award during which Woodworth attempted to disabuse Schindler of her misconception that the Schindlers were entitled to share in the award).

315. Copeland & Lawrence, *supra* note 193.

316. See sources cited *supra* notes 277-81 and accompanying text. It is possible that such a conversation between the medical malpractice attorneys and the Schindlers occurred beforehand, but nothing in Michael or the Schindlers' books mentions this, and the conversation described in Michael's account of Woodworth's meeting with Mary Schindler indicates that the Schindlers had not heard about this before, or at least, did not understand this news.

not represent the Schindlers, the Schindlers' participation in discussions and meetings with Michael and the lawyers to plan the lawsuit should have suggested to them that a clarification of this kind would have prevented any possible misconceptions about the matter. It probably should have been clear that a misconception of this kind could produce expectations on the part of the Schindlers, the frustration of which could have led to resentment and even anger directed at these lawyers' client, Michael Schiavo. At a minimum, they should have discussed with Michael the advisability of having such a clarifying conversation with the Schindlers, a conversation that might have led Michael to more closely tailor the statements he was making to the Schindlers to ensure that he did not create any misleading effect. In therapeutic jurisprudence terms, this potential problem is a good example of a psycho-legal soft spot.³¹⁷ A therapeutic jurisprudence/preventive lawyer would have been sensitive to such a possibility and would have taken steps designed to attempt to avoid the potential problem it could raise.

The medical malpractice attorneys might not have been aware of private conversations between Michael and the Schindlers in which they discussed purchasing a home together with the medical malpractice lawsuit's proceeds, using the money to provide rehabilitation for Terri, and using some of the proceeds to repay the Schindlers for expenses they had advanced Michael and Terri when they moved to Florida.³¹⁸ However, the Schindlers' participation in meetings with Michael's attorneys to plan the lawsuit should have alerted these attorneys, at a minimum, to the desirability of having a private conversation with Michael during which they could have asked him whether such a misconception on the part of his in-laws might be possible and whether something should be said to clarify the matter. During such a private attorney-client conversation, they might have learned that their client had made promises of this kind or had made statements the Schindlers could have construed as promises along these lines. Such a revelation would have highlighted the need to have a further discussion with the Schindlers and perhaps even a negotiation relating to whether Michael should give them a share in any consortium award he might receive, even though the Schindlers were legally entitled to nothing.

Moreover, the attorneys certainly should have realized that the Schindlers personally bore witness to the statements Michael made at the trial in response to Glen Woodworth's questioning. They should have anticipated that these statements might produce such a misconception on the part of the Schindlers. Michael testified that he planned to

317. See *supra* note 15 and accompanying text.

318. See Copeland & Lawrence, *supra* note 193.

use any funds recovered to bring his wife home and to take care of her. He described his love for her and his steadfast interpretation of his marital vows to love Terri in sickness and health. This was effective testimony that doubtlessly moved the jury to award Michael what Gary Fox described as “one helluva verdict for loss of consortium.”³¹⁹ The Schindlers described this as “[m]oving testimony,”³²⁰ and it predictably confirmed their expectations that Michael would use the money for the benefit of their daughter and fueled their strong sense of betrayal when Michael backed away from this commitment at the Valentine’s Day meeting. In preparing Michael for this testimony, and in preparing Mary Schindler for her testimony that Michael was a loving husband and son-in-law, the attorneys should have anticipated that the trial would produce the Schindlers’ expectations concerning the use of any award obtained, and they should have considered discussing this with their client, Michael Schiavo.

Perhaps if they had had such a discussion with their client, they would have realized that the picture they planned to portray for the jury was not quite accurate. I do not mean to suggest that Michael fabricated his testimony. He may well have legitimately entertained these intentions at that time and then later changed his mind. But, the change came rather quickly – within seven or eight months after his testimony, he was dating other women, converting Terri’s jewelry into jewelry for himself, and attempting to order the nursing home to withhold treatment regarding Terri’s urinary tract infections.³²¹ This change of heart might have occurred entirely after the trial, as Michael asserts in his book.³²² And, perhaps even if the beginnings of this change of heart were occurring at the time of the trial, Michael had not admitted them to himself and would not admit them to his attorneys. In any event, Michael’s attorneys should have anticipated that Michael’s testimony could induce the Schindlers to adopt otherwise unjustified expectations regarding an entitlement to a share of the medical malpractice litigation’s proceeds. Perhaps a clarifying discussion between the attorneys, their client, and the Schindlers could have avoided the severe intra-family legal conflict that ensued.

319. SCHIAVO WITH HIRSH, *supra* note 32, at 73-74 (internal quotations omitted). He continued, “no spouse I have represented . . . has ever gotten that kind of consortium award.” *Id.* (internal quotations omitted).

320. SCHINDLER ET AL., *supra* note 39, at 51.

321. See *supra* notes 297-312 and accompanying text.

322. SCHIAVO WITH HIRSH, *supra* note 32, at 87-88 (referring to conversations Michael had in July or August 1993 with Drs. Mulroy and Harrison during which they told Michael that Terri was in a PVS and would never recover and suggested that Michael consider removing Terri’s feeding tube or declining to treat her future urinary tract infections).

In any case, when Glen Woodworth learned shortly after the verdict that the Schindlers were under the impression they were to receive a portion of the award,³²³ he should have informed his client and considered the propriety of additional discussions or negotiations with the Schindlers. This occurred just before the attorneys were expecting the check from the insurance company in satisfaction of the award and was occasioned when Mary Schindler, perhaps accompanied by Bob Schindler, “found her way to” Woodworth’s office.³²⁴ Although Woodworth attempted to correct Mary Schindler’s misconception by explaining that Florida law did not recognize loss of consortium damages for parents in this situation and that they, therefore, had no right to any share in the proceeds,³²⁵ he failed to tell Michael about the conversation until late 2005, when Michael was preparing the manuscript for his book.³²⁶ That Woodworth never told Michael about this conversation is surprising, as Mary Schindler expressed anger at hearing the news and made it clear that the Schindlers had contrary expectations. “Now how long is it going to take for us to get the money?” Mary Schindler asked Woodworth.³²⁷ When Woodworth told her that they would receive nothing, she exclaimed: “Are you tellin[g] me after all we’ve been through, after all I have been through, that not one single dollar of that money will be turned over to us? Or to me?”³²⁸ When he replied that this was exactly what he was telling her, she replied with surprise and frustration, stating, “[w]ell, that is just totally wrong.”³²⁹ At this point, Woodworth concluded that “her adoration of Michael ceased,” and he predicted that she soon would have a similar conversation with Michael.³³⁰ Yet, even though he understood that there was trouble on the horizon and that there would soon be a confrontation between the Schindlers and his client regarding the litigation proceeds, he neglected to inform his client of this situation and to offer his counsel regarding how to handle the situation.

The problem soon exploded during the Valentine’s Day fight. Yet, Michael apparently never saw this coming. In describing these events, Michael stated that he “was still close to the Schindlers” at the time.³³¹ “[O]ut of nowhere,” Michael described in his book, Bob Schindler asked

323. *Id.* at 74-75.

324. *Id.* at 75 (internal quotations omitted).

325. *Id.*

326. *Id.* (“I never heard this until Glen Woodworth told it to me in late 2005, while we were writing this book.”).

327. *Id.* (internal quotations omitted).

328. *Id.* (internal quotations omitted).

329. *Id.* (internal quotations omitted).

330. *Id.* (internal quotations omitted).

331. *Id.* at 77.

him, “[w]hen’s the money coming?”³³² Michael replied that it was “[a]ny time now” and expressed surprise when Bob Schindler pointedly asked him, “[h]ow much am I going to get?”³³³ Michael then responded, inaccurately, that he didn’t “know how much anybody’s getting yet.”³³⁴ When Bob Schindler pushed further with his questions, Michael responded, “[y]’know something? I’m just gonna give it all to Terri,”³³⁵ even though this was not his true intention.

According to Michael, it was at this point that things began to become heated.³³⁶ Bob Schindler replied, mimicking Michael, “y’know something? . . . You might want to go out and get yourself a lawyer.”³³⁷ Then Michael, feeling that he had “had enough of this crap,” retorted, “[y]ou go ahead and get a lawyer.”³³⁸ At this point, Bob Schindler’s “voice went up a few dozen decibels,” and he replied, “[t]his isn’t right. This is my daughter. I deserve money.”³³⁹ Michael then yelled back, “I don’t know what anybody’s going to get yet,”³⁴⁰ even though at that time he knew the precise amounts that he and Terri would receive. Tempers continued to flair, and Bob Schindler shouted, “I’m going to take over this guardianship; you’ll see!”³⁴¹ The exchanges grew more heated, and Michael, losing his temper, pushed the table at which he was seated, causing it and the books on its surface to fly across the room.³⁴² They shouted at one another and came close to violence.³⁴³

Michael described this as a “knock-down, drag-out fight” in the telephone conversation he had immediately afterwards with his mother; he told her, “[d]on’t ever speak to these people again.”³⁴⁴ In the chapter of his book describing the fight, Michael concluded, “[t]hat’s when the Schindler v. Schiavo battle actually began.”³⁴⁵ Perhaps this fight and the intense conflict that followed were inevitable, but perhaps they were not. Michael reported himself as being surprised at this confrontation with his in-laws, with whom he still had a good relationship at the time. Clearly, had his attorney, Glen Woodworth, described to him the meeting that Woodworth had had shortly before the Valentine’s Day fight

332. *Id.* (internal quotations omitted).

333. *Id.* (internal quotations omitted).

334. *Id.* (internal quotations omitted).

335. *Id.* at 78 (internal quotations omitted).

336. *Id.*

337. *Id.* (internal quotations omitted).

338. *Id.* (internal quotations omitted).

339. *Id.* (internal quotations omitted).

340. *Id.* at 79 (internal quotations omitted).

341. *Id.* (internal quotations omitted).

342. *Id.* at 80.

343. *Id.*

344. *Id.* at 80-81 (internal quotations omitted).

345. *Id.* at 82.

and conveyed to Michael his prediction that there would soon be a confrontation on the money issue, Michael would not have been as surprised and could have prepared more effectively for the discussion that ensued. Indeed, attorney Woodworth could have coached him on how to have this conversation.

Perhaps Woodworth should have sent a lawyer's letter to the Schindlers reiterating their lack of entitlement to a share of the money. It may be that Bob Schindler didn't understand this point, even though Woodworth had explained the situation to Mary Schindler. The Schindlers could have read and digested such a letter, and this may have diminished much of the Schindlers' anger and confusion. At a minimum, attorney Woodworth should have discussed with his client the possibility of sending such a clarifying lawyer's letter or the advisability of Michael discussing the misconception with his in-laws.

Perhaps a meeting between Michael and the Schindlers, which included Michael's counsel and the Schindlers' counsel, would have avoided their disagreement or resolved it in a more amicable way. To the extent that the Schindlers thought Michael owed them \$10,000 for the funds they had provided him and Terri,³⁴⁶ perhaps a repayment offer and maybe even an offer to help the Schindlers with their financial difficulties would have ended the controversy and left the family intact. In any event, a frank and open exchange of views on this issue in the lawyer's office might have avoided the anger and animosity that fueled the bitter course of litigation that followed. A therapeutic jurisprudence/preventive lawyer would have spotted this potential psycho-legal problem and would have taken steps to avoid it.

Did Michael's medical malpractice attorneys ever learn of the fight he had with the Schindlers on Valentine's Day? Neither book mentions this. The medical malpractice lawyers may have had little or no contact with their client after the medical malpractice proceeds were disbursed. Their role, after all, was to litigate the claim, and they did so with great success. However, a question arises: did they have any continued obligation to their client after they disbursed his award? A therapeutic jurisprudence/preventive lawyer views the client holistically, practicing with an ethic of care that values the client's emotional well-being as well as his or her legal interests. The emotional problems the medical malpractice award provoked were fully predictable, especially after Glen Woodworth met with Mary Schindler shortly after the verdict was rendered, if not beforehand. This potential conflict therefore was a proper subject for legal counseling, particularly because it was likely to lead to future litigation between the parties.

346. See *supra* notes 258-59 and accompanying text.

A therapeutic jurisprudence/preventive lawyer would have remained in contact with the client after award disbursement, calling the client in for periodic "legal checkups" to monitor any ensuing funds disputes. Such a legal checkup certainly would have revealed the Valentine's Day fight that fractured the relationship between Michael and his in-laws. It also would have, or at least could have, detected the beginnings of Michael's change of heart. While the Schindlers were plainly angry with Michael following the Valentine's Day meeting and may have consulted with an attorney about what they should do, no litigation occurred until after Michael took steps to deny the Schindlers information regarding their daughter's medical condition and to order the nursing home to withhold treatment of Terri's urinary tract infections.³⁴⁷ This occurred in July or August 2003, four or so months after the Valentine's Day fight. Had the medical malpractice attorneys held a follow-up meeting with Michael, they might have discovered that he was undergoing a change of heart, and they could have counseled him as to how to deal with the Schindlers concerning their possibly hostile reaction.

Denying the Schindlers access to Terri's medical information and care status might have been an angry reaction on Michael's part to the fight he had had with Bob Schindler on Valentine's Day. Should he have taken this step? Did he understand the full ramifications of doing so? Perhaps the Schindlers had consulted with an attorney after the Valentine's Day fight to determine whether they had any legal claim to a share of the proceeds. If so, they probably were advised that they did not. They may have been unhappy with such advice, but they did not then file a lawsuit against Michael seeking a share of the proceeds and could not have succeeded had they done so. Being denied access to medical information about their daughter, however, constituted an additional provocation. Moreover, ordering the nursing home to deny treatment was probably something the Schindlers were not willing to ignore. Should Michael have escalated the conflict in this way? These are questions that could have been the subject of legal counseling had the lawyers kept in touch with their client and learned what was transpiring in the several months after he had received the medical malpractice proceeds. Would such counseling have convinced Michael to be more conciliatory toward the Schindlers or more sensitive to their probable reactions? Perhaps not, but these lawyers undeniably should have attempted such ameliorative, preventative measures based on their client's best interest.

Personal injury lawyers may typically view their role as ending when they have achieved a successful recovery for their clients. How-

347. See *supra* notes 297-312 and accompanying text.

ever, when, as here, telltale signs exist indicating that future legal problems may emerge as a result of the recovery, they may have a continued obligation to keep in touch with their clients. Moreover, this may also be true when, as here, they are aware of express or implied promises that were made during the course of the litigation, or of family dynamics that seem likely to progress into conflict. In such cases, the lawyers should have a continuing duty to debrief their clients about these potential problems and to keep in touch with them in an effort to spot future problems and to assist their clients in avoiding them.

C. *Reconsidering the Actions of the Lawyers Involved in the Guardianship Litigation*

The conflict between Michael and the Schindlers widened after the Valentine's Day rift when Michael, as Terri's guardian, ordered the nursing home not to provide the Schindlers Terri's medical information.³⁴⁸ The tension further escalated when Michael filed a "do not resuscitate" order with the nursing home,³⁴⁹ and the Schindlers' worst fears were confirmed when, in July or August 1993, Michael attempted to order the nursing home not to provide Terri treatment should she again suffer a urinary tract infection.³⁵⁰ Both sides viewed the other as motivated by greed.³⁵¹ The Schindlers felt Michael had deceived and betrayed them by failing to live up to his prior pledge to remain the loving husband and wonderful son-in-law whose moving testimony they heard at the medical malpractice trial. Because Terri had no will, Michael would inherit her entire guardianship estate upon her death,³⁵² and the Schindlers increasingly began to view Michael as an individual attempting to kill their daughter for personal profit.³⁵³

Michael's actions increasingly isolated the Schindlers, leading to extreme frustration on their part due to their lack of information regarding Terri's care and their lack of input regarding the decisionmaking

348. Schiavo 1993 Deposition, *supra* note 257, at 50-51.

349. Report of Guardian *ad Litem* Richard L. Pearse, Jr., *supra* note 284, at 5.

350. See *supra* notes 297-312 and accompanying text.

351. *In re Guardianship of Schiavo*, 780 So. 2d 176, 178 (Fla. 2d Dist. Ct. App. 2001).

352. Report of Guardian *ad Litem* Richard L. Pearse, Jr., *supra* note 284, at 9.

353. SCHINDLER ET AL., *supra* note 39, at 54-55; see also *id.* at 57 ("It was like being hit by lightning when we later found out that in June [1993] Terri had another UTI and that Michael had ordered Sabal Palms to refuse her any medication. The action was a potential death sentence. Untreated, the infection – sepsis – would spread throughout Terri's body and she would die."); *August 13: Michael Schiavo Wants to Remove His Wife from Life Support, and Her Family Is Giving Him the Fight of Their Life* (Fox News television broadcast Aug. 13, 2005), available at <http://www.foxnews.com/story/0,2933,94748,00.html>.

process concerning Terri's medical condition.³⁵⁴ At some time during the spring or early summer of 1993, the Schindlers consulted with attorney James Sheehan.³⁵⁵ They also wrote Michael a letter dated July 16, 1993.³⁵⁶ The Schindlers' book does not reveal whether they wrote the letter or whether their attorney drafted it on their behalf; however, based upon its wording, I suspect Mr. Sheehan had at least a hand in preparing the letter. The letter is worth quoting in full:

July 16, 1993

Mike[,]

Long before and during the malpractice trial, you made a number of commitments to Mary and myself. One of your commitments was that award money was to be used to enhance Terri's medical and neurological care

Since the trial and the ensuing award, you have chosen to ignore your commitments and have totally removed Terri from our lives. You have not communicated to us anything concerning her medical nor neurological status.

We want to know what Terri's latest evaluations are both medically and neurologically. It is very upsetting to be told by her medical attendants that you instructed them to withhold any and all information concerning our daughter's medical status

I/we are requesting you to keep us informed, on a weekly basis, of Terri's condition and progress. Simply drop us a note telling us what is happening. It will only take a few minutes. I am sure we will all sleep more comfortably.

On a long term basis, I would like you to consider giving Terri back to us, so we can give her the love and care she deserves. Logically and realistically you still have a life ahead of you.

Give this some thought. Are you ready to dedicate the rest of your life to Terri? We are! Let us know your feelings.

Mary and Bob Schindler³⁵⁷

This was a reasonably worded letter written in a tone that invited reconciliation. Yet, Michael ignored it.³⁵⁸ I assume that Mr. Sheehan either counseled the Schindlers regarding how to draft the letter or drafted it himself, yet the Schindlers themselves sent the letter rather than Mr. Sheehan. In retrospect, it may have been better for their lawyer to send the letter or a somewhat different communication containing similar requests. Perhaps if the letter had come from the lawyer,

354. Report of Guardian *ad Litem* Richard L. Pearse, Jr., *supra* note 284, at 12; SCHINDLER ET AL., *supra* note 39, at 58.

355. SCHINDLER ET AL., *supra* note 39, at 58-59.

356. *Id.* at 57-58.

357. *Id.* (italicization omitted).

358. SCHINDLER ET AL., *supra* note 39, at 58 ("There was no reply.").

Michael would have taken it more seriously. Perhaps he then would have consulted with his own lawyer concerning how to respond. Had this occurred, Michael's counsel could have pointed out that at least some of the points the Schindlers made in their letter appeared reasonable and that it might be to his advantage to consider meeting the Schindlers halfway on at least some of their requests, notably, sharing information about Terri's medical condition. Maybe Michael would have ignored even this alternative initiative, but perhaps if the Schindlers' lawyer had written the letter, or followed up with a letter of his own, it would have made a difference. In any event, Michael ignoring the letter induced the Schindlers to react in a predictable manner – they filed a lawsuit thirteen days later seeking to remove Michael as Terri's guardian.

Michael's book does not mention whether he discussed the Schindlers' letter with an attorney. Soon after the letter was sent, on July 29, 1993, attorney James Sheehan filed a lawsuit challenging Michael's guardianship and asking for appointment of a guardian *ad litem* to determine whether Michael had abused Terri.³⁵⁹ Why did attorney Sheehan act so quickly in filing this lawsuit? Was thirteen days post-written communication a sufficient amount of time for the Schindlers to wait before proceeding with this lawsuit? Was it proper for attorney Sheehan to conclude that negotiation and other litigation alternatives would be ineffective at this point? Even if Michael timely received the July 16 letter, there may not have been sufficient time for him to fully consider its contents and how to formulate a proper response. Moreover, Michael may not have had adequate time to consult with his attorney regarding the letter. Thus, in my opinion attorney Sheehan may have acted too precipitously in filing the Schindlers' probate court guardianship petition less than two weeks after the Schindlers sent their July 16 letter.

The Schindlers' July 16 letter represented an invitation for Michael to reconsider his choices, not a threat to commence litigation. Indeed, it did not mention that the Schindlers were considering litigation as a potential response. Nor did the letter give Michael any deadline within which to respond. Perhaps Michael was still considering the possibility of reaching a compromise with the Schindlers concerning some or all of the issues raised in the letter when the Schindlers filed their lawsuit. The lawsuit asserted that Michael abused Terri,³⁶⁰ and, therefore, constituted a public rebuke and insult that probably angered Michael. This decision to commence litigation considerably reduced any interest Michael may have entertained in reaching a compromise with the Schin-

359. See *supra* note 45 and accompanying text.

360. EISENBERG, *supra* note 21, at 22.

dlers. Indeed, the lawsuit likely rekindled Michael's anger stemming from the Valentine's Day argument, and Michael probably viewed the suit as Bob Schindler's attempt to make "good on his Valentine's Day threat to try to take the guardianship of Terri away from [him]."³⁶¹

Before filing suit, therefore, attorney Sheehan should have considered sending a letter to Michael on behalf of his clients seeking to initiate negotiations and suggesting that if no response were received within a reasonable period, the Schindlers might take appropriate legal action. This type of lawyer's letter may not have succeeded, but it should have been attempted. Why did attorney Sheehan move with such haste? Did he discuss these possibilities with the Schindlers? In their book, the Schindlers described their meeting with attorney Sheehan, noting that Sheehan was "outraged" by Michael's attempt to order the nursing home to deny Terri medication, and declared, "[t]his is wrong. He can't do that."³⁶² According to the Schindlers, Sheehan "promptly went after Michael's guardianship of Terri."³⁶³ Because there is no further discussion of the matter in the Schindlers' book, this is all we know regarding what Sheehan might have told his clients about the prospects of litigation. However, if this is all that he told the Schindlers, his counseling was highly questionable.

Expressing outrage at Michael's actions and telling his clients that Michael's attempt to order non-treatment was "wrong" and that "[h]e can't do that," undoubtedly fed the Schindlers' sense of outrage and created an expectation for litigation.³⁶⁴ Telling clients what they want to hear may help achieve retention of continued employment, but creating false expectations concerning the prospects of winning a lawsuit can produce disastrous consequences. Litigation is always risky, even when the law clearly favors the plaintiff's position. In this instance, the law was far from clear concerning a guardian's ability to discontinue treatment for an incompetent ward.³⁶⁵ If this is all Sheehan had told his

361. SCHIAVO WITH HIRSH, *supra* note 32, at 89.

362. SCHINDLER ET AL., *supra* note 39, at 58 (internal quotations omitted). All we know about this conversation between the Schindlers and attorney Sheehan is what is reported in their book. Perhaps attorney Sheehan attempted to counsel his clients about resolving the controversy by means other than litigation, but since the only account of this conversation is what appears in the Schindlers' book, my analysis of Sheehan's conduct assumes that this was all that had occurred.

363. *Id.* at 58-59.

364. *See id.* at 58.

365. In subsequent litigation, Michael ultimately prevailed regarding his contention that Terri had previously expressed her wishes while competent that she would prefer to discontinue life-prolonging treatment and nourishment in the event she was in a PVS. *In re Guardianship of Schiavo*, 780 So. 2d 176, 179-80 (Fla. 2d Dist. Ct. App. 2001). Moreover, although Michael withdrew his 1993 order not to treat Terri's urinary tract condition, the probate court ultimately rejected Sheehan's contention that Michael had abused his authority as Terri's guardian and rejected Sheehan's petition. *See In re Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL

clients, then he exaggerated their chances of success. Moreover, if this is all that was said, attorney Sheehan failed to inform his clients about the risks of litigation – financial, emotional, and relational – and the possible alternative means of responding to such a dispute. To the extent the Schindlers' objective was to gain information about Terri's medical condition and treatment and to regain healthcare decisionmaking input, as stated in their July 16 letter, litigation was arguably not the best approach. A legal challenge to Michael's guardianship would predictably place these objectives at risk and possibly prompt Michael to refuse the Schindlers' visitation requests. Sheehan's prompt action therefore might have been a serious disservice to his clients. They ultimately lost the case, and, in the process, probably hindered the possibility of achieving reconciliation with Michael and persuading him to move on with his life and allow the Schindlers to care for their daughter. In sum, attorney Sheehan's actions conflicted with the Schindlers' long-term objectives as expressed in their letter of July 16, 1993.

Assume an angry Bob Schindler visited attorney Sheehan to seek legal counsel willing to petition the probate court to remove Michael as Terri's guardian – recall that this had been Bob's threat to Michael at their Valentine's Day fight.³⁶⁶ Bob's anger and feelings of betrayal were escalating; thus, it is entirely likely that an angry potential client visited Sheehan that day demanding that the Sheehan sue Michael. It is not uncommon for attorneys to receive visits from angry potential clients seeking to hire them to "sue the bastards." They are there to hire a trial lawyer, and it is a pit bull they want, not a peacemaker. For them, litigation seems to be the only possibility. They are self-righteous and vindictive and want to punish their adversary. Such a client may be psychologically unable to consider the possibility of settling the dispute. The purpose of hiring the lawyer, to them, is to bring a lawsuit.

This is probably the kind of prospective client attorney Sheehan met with that day. He likely mirrored the client's anger by labeling Michael's conduct as outrageous and telling the Schindlers "[h]e can't

34546715, at *2 (Fla. 6th Cir. Ct. Feb. 11, 2000) ("By all accounts, Mr. Schiavo has been very motivated in pursuing the best medical care for his wife, even taking her to California for a month or so for experimental treatment. It is undisputed that he was very aggressive with nursing home personnel to make certain that she received the finest of care. In 1994, Mr. Schiavo attempted to refuse medical treatment for an infection being experienced by his wife. His unrefuted testimony was that his decision was based upon medical advice. Mr. and Mrs. Schindler filed an action to have him removed as Guardian based upon numerous allegations, including abuse. Mr. Schiavo relented and authorized the treatment after which a Guardian Ad Litem appointed by this court found that there was no basis to have him removed. Mr. and Mrs. Schindler ultimately dismissed their petition citing financial considerations as their motivation.").

366. SCHIAVO WITH HIRSH, *supra* note 32, at 89.

do that.”³⁶⁷ This promptly led to litigation. What would a therapeutic jurisprudence/preventive law lawyer have done when faced with such an angry client? Understanding that a lawsuit is frequently not the ideal means of resolving a dispute, a therapeutic jurisprudence/preventive lawyer faces the challenge of helping the client reframe the purpose of hiring a lawyer. It is not to litigate each and every controversy, but to resolve resolvable conflicts. The lawyer’s challenge is to redefine the attorney-client relationship’s purpose. If that relationship’s goal is defined as winning a lawsuit, then a lawsuit is inevitable. If, however, the attorney-client relationship’s goal is to resolve the dispute, then many creative possibilities will emerge.

The therapeutic jurisprudence/preventive attorney is a creative problem solver. As such, the attorney must strive to see the problem in different ways, rather than merely accepting the manner in which the client defines the problem.³⁶⁸ Defining the problem inevitably dictates the solutions that the attorney recommends and attempts. If the attorney can successfully reframe the problem as resolving a dispute rather than as winning a lawsuit, an entirely new range of options becomes available. Litigation is only one way to resolve a dispute, and once the lawyer can help the client redefine the professional relationship’s goal as dispute resolution rather than litigation, counseling the client about the various alternative dispute resolution methods becomes a realistic option. Rather than exploring these alternative avenues, attorney Sheehan appears to have fanned the flames of his clients’ anger and begun the war that “Schindler v. Schiavo” became. I base this conclusion on the Schindlers’ recounting of their conversation with attorney Sheehan, which is the only record available on the question.³⁶⁹

Lawyers need to adopt a problem solving orientation, even if they are litigators. They need to view – and strive to help their clients view – disputes as problems that can be resolved in myriad ways, not all of which are equally beneficial in terms of client well-being. Instead of seeing the dispute as a fight, therapeutic jurisprudence/preventive lawyers ascertain their clients’ interests and those of the adversary, exploring whether compromises that would accommodate both might be possible and attempting to produce win-win solutions, or at least the “least bad” result for both parties. The Schindlers’ lawyer appears not to have applied this approach. Did Michael Schiavo’s attorney similarly decline to act as a therapeutic jurisprudence/preventive lawyer?

367. SCHINDLER ET AL., *supra* note 39, at 58.

368. For a useful analysis of creative problem solving, see Edward A. Dauer, *Reflections on Therapeutic Jurisprudence, Creative Problem Solving, and Clinical Education in the Transactional Curriculum*, 17 ST. THOMAS L. REV. 483 (2005).

369. SCHINDLER ET AL., *supra* note 39, at 58.

Attorney Stephen J. Nilssen represented Michael in the guardianship proceeding. Debbie Bushnell, the attorney who handled Terri's trust, recommended Nilssen to Michael.³⁷⁰ Before the case's depositions, which were scheduled for August 1993, Nilssen called the Schindlers' attorney, James Sheehan, presumably to discuss settlement possibilities, and followed up with a letter.³⁷¹ The letter stated in part:

I have represented to you that I am willing to start working immediately toward a stipulation between Michael Schiavo and Mr. and Mrs. Schindler for the appointment of an independent guardian of the person which would provide that Mr. Schiavo and Mr. and Mrs. Schindler all have the ability to see medical records, be informed of medical decisions and have input into the care of Theresa Marie Schiavo . . . Please feel free to have Mr. and Mrs. Schindler visit Theresa Marie. There are no orders issued by Michael to prohibit the Schindlers from seeing their daughter.³⁷²

Neither the Schindlers nor their attorney responded to this letter.³⁷³

Attorney Nilssen's letter constituted a reasonable settlement proposal regarding the Schindlers' guardianship challenge. It seemed to satisfy many of the Schindlers' concerns outlined in their letter of July 16, 1993, by offering to share medical information with them, by reminding them that they were free to visit their daughter, and by prospectively consenting to the appointment of an independent guardian for Terri. If an independent guardian had been appointed, this would have provided the Schindlers access to participation in medical decisionmaking. Moreover, it would have removed the possibility that Michael – whom they assumed wanted to end their daughter's life in order to inherit her estate – could unilaterally end Terri's life by ordering discontinuation of treatment.

The letter was conciliatory in tone and offered considerably more than the Schindlers were entitled to legally. Yet, there was no response to this initiative. The Schindlers' book fails to mention the letter or the extent they discussed it with their attorney, James Sheehan. Perhaps they discussed it with Sheehan and decided that they would prevail in their attempt to end Michael's guardianship. But Michael was in effect offering to relinquish his guardianship³⁷⁴ and to consent to appointment

370. SCHIAVO WITH HIRSH, *supra* note 32, at 89.

371. *Id.*

372. *Id.* at 89-90 (internal quotations omitted).

373. *Id.* ("There was no response.").

374. The offer proposed that Michael would consent to the appointment of an independent guardian for Terri's person. This may have left open the question whether Michael would continue to function as guardian of Terri's property, thereby controlling, albeit as a fiduciary, her finances. If, as Michael was convinced, the Schindlers' actions were motivated by monetary considerations, they may have wished to dislodge him from this role as well. If so, the offer

of an independent guardian. Perhaps they assumed that if they succeeded in dislodging him as guardian, the probate court would appoint them in his place. This, however, seems rather unlikely. First, it is unlikely that the probate court would find a sufficient abuse of discretion to remove Michael as guardian – something it ultimately declined to do after the court-appointed guardian *ad litem* absolved Michael of any asserted abuse and recommended that Michael continue as guardian. Second, even if the court were to remove Michael as guardian, in view of the acrimony between the parties it would seem unlikely that the court would appoint the Schindlers as guardians. Rather, it probably would have appointed an independent guardian. This, however, is precisely what attorney Nilssen's letter offered.

We do not know whether attorneys Nilssen and Sheehan subsequently discussed a possible settlement, but Michael and the Schindlers' books fail to mention any such discussion, which suggests none occurred. In addition, there were no meetings or negotiation sessions between the parties concerning a possible settlement.³⁷⁵ Why did attorneys Nilssen and Sheehan not make further attempts to resolve the dispute, schedule a client meeting, or schedule a negotiating session? In view of litigation's high monetary and emotional costs generally, as well as its potential to destroy any preexisting relationship between the conflicting parties, a therapeutic jurisprudence/preventive lawyer attempts to avoid litigation whenever possible and to achieve a settlement involving his or her client before things get out of hand.³⁷⁶ Attorneys applying this model of lawyering seek to counsel their clients about litigation's disadvantages and the alternative modes of resolving a dispute. They understand the difference between a client's stated position and his or her underlying interests³⁷⁷ and strive to ascertain whether a basis exists for accommodating the conflicting parties' interests. They explore with their clients the various alternative-dispute-resolution mechanisms that exist. These include negotiation and settlement, mediation, arbitration,

would not have satisfied all of their interests, even though it would have satisfied many of them. However, their July 16 letter did not mention any concern that Michael was abusing his authority in administering Terri's trust funds. Rather, their letter focused exclusively on their interest in medical information and decisionmaking concerning their daughter and ultimately in allowing them to assume the role as her caretakers.

375. In his discussion of the depositions that commenced in August 1993, Michael Schiavo mentioned that this occasion was the first time he had seen Bob Schindler since the less-than-amicable 1993 Valentine's Day meeting in Terri's nursing home. SCHIAVO WITH HIRSH, *supra* note 32, at 90.

376. See generally Winick, *Overcoming Psychological Barriers*, *supra* note 11; *supra* notes 4-17 and accompanying text.

377. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1992).

and collaborative law.³⁷⁸ They counsel their clients regarding each of these techniques' advantages and disadvantages and assess with the client whether any are worth attempting under the circumstances.

Both parties could have accomplished their most pressing objectives via the appointment of an independent guardian, which is precisely the course attorney Nilssen suggested in his abovementioned letter. Why did the attorneys not attempt to achieve a settlement through one of these alternative dispute resolution approaches? Getting the parties together at a negotiating session could have provided an opportunity for each to voice their concerns and to achieve a measure of healing and reconciliation.³⁷⁹ Moreover, the opportunities that such a negotiating session would provide each party – which includes a sense of “voice” (the ability to give their side of the story) and “validation” (the sense that others are listening to them and taking them seriously) – can itself bring the parties together, potentially achieving a form of reconciliation and generating a willingness on both sides to accept a settlement even if it fails to meet all of their objectives.³⁸⁰

If Michael and the Schindlers were too angry with one another at this point to meet in the same room, their attorneys could have conducted further negotiations that might well have been fruitful. Moreover, it is possible that Michael and the Schindlers could have identified a trusted friend or relative who might have played the role of mediator or arbitrator in resolving their conflict. Alternatively, they could have sought a professional mediator's services. Finally, they could have considered the emerging approach of collaborative law, although the level of anger would probably have made such an approach unworkable under the circumstances. Collaborative law is a technique in which parties who wish to preserve their relationship beyond the particular dispute agree to negotiate in good faith, to share information voluntarily, and to retain lawyers whose role is limited to achieving a settlement.³⁸¹ This

378. See Winick, *Overcoming Psychological Barriers*, *supra* note 11, at 344.

379. See generally Gerald R Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1; Winick, *Overcoming Psychological Barriers*, *supra* note 11, at 344; Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 113 (2000).

380. See sources cited *supra* note 379; see e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978). The likelihood that the individual will experience feelings of coercion will increase if they are not accorded procedural justice. See Winick, *supra* note 379, at 116-17 (reviewing research by the MacArthur Research Network on Law and Mental Health concerning the perception of coercion by patients in the civil commitment context).

381. See generally JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE*

technique is particularly suited for family disputes and has been increasingly used in divorce and child custody contexts where the parties wish to maintain a future working relationship regarding their children's care.³⁸²

Before the Valentine's Day fight, Michael and his in-laws worked together to try to help Terri. Perhaps at this point – only several months after the Valentine's Day argument – the family relationship remained salvageable. Attempting any of these alternative dispute resolution approaches might have achieved this result, or at least might have secured a compromise that both sides could have accepted. Such a settlement could have avoided the intense litigation and animosity that followed. Yet, it would appear that their respective attorneys failed to attempt any of these approaches – instead, the two lawyer's letters were ships passing in the night, seemingly promising opportunities overlooked due to shortsightedness.

D. *Reconsidering the Actions of the Lawyers Involved in the Feeding Tube Removal Litigation*

On March 1, 1994, the probate court rejected the Schindlers' petition to remove Michael as guardian.³⁸³ During the months that preceded the court's decision, Michael pondered the suggestions two doctors had previously offered regarding Terri's condition. Both told Michael that Terri's condition would never change and that he should consider "letting her go," either by cutting off her feeding tube or ordering that she not be treated for one of her recurring urinary tract infections.³⁸⁴ At the

TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (1996); STEPHEN GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (3d ed. 2000); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (1994); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (2d ed. 1996); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (2d ed. 1997); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). For a discussion of the relatively new dispute resolution model known as collaborative law, see generally PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001), Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967 (1999), and Pauline H. Tesler, *Collaborative Law: What It Is and Why Lawyers Need to Know About It*, in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 1, at 187.

382. Jane Gross, *Amiable Unhitching, with a Prod*, N.Y. TIMES, May 20, 2004, at F1, available at 2004 WLNR 5455082.

383. SCHIAVO WITH HIRSH, *supra* note 32, at 110.

384. Michael described his meetings with these two doctors in a chapter of his book titled

same time, he was falling in love with Jodi, his eventual spouse and the mother of his two children.³⁸⁵ During this period, Michael seemed ambivalent about what to do about Terri. Although he was falling in love with Jodi, Michael still loved his wife³⁸⁶ and brought her roses when he visited her at the nursing home on Valentine's Day 1994.³⁸⁷ And although he was beginning to come to grips with the fact that she was in a PVS from which she never would recover, he continued to visit her and was assertive with the nursing-home staff when he felt Terri's care was inadequate.³⁸⁸ In October 1994, Michael gave Jodi an engagement ring, even though they both knew that they would not marry until after Terri's death.³⁸⁹ In 1995, they built a house together in which they both began to live.³⁹⁰

In 1996, Michael's mother was dying of cancer, and one day near the end she told him, "[y]ou know something? It's okay."³⁹¹ Michael interpreted this as his mother telling him "it was okay to die, and to stop being selfish."³⁹² In his book, Michael claimed that it was at this point that he made his decision about Terri – that he should let her die and that he could no longer continue to be selfish, keeping her alive for himself.³⁹³

Following his mother's death in June 1997, Michael visited Debbie Bushnell, his guardianship attorney, and was referred to George Felos, the litigator who previously argued *Browning*, Florida's landmark right-to-die case.³⁹⁴ Michael recounted for Felos the several instances when Terri had mentioned her wish not to be kept alive in an artificial state,

"Reality Strikes." *Id.* at 87-88, 98-100. Michael had been in denial about the reality of his wife's PVS, hoping that with appropriate rehabilitation she would improve. In his conversations with these two doctors, however, Michael began the process of realizing recovery was not going to occur. Although originally he resisted the idea of cutting off Terri's feeding tube, Michael considered the doctors' separate recommendations that the nursing home not treat Terri when she next suffered a urinary tract infection. He gave this order around July or August 1993, Schiavo 1993 Deposition, *supra* note 257, at 12-14, but later rescinded the order when a nursing home administrator told him the nursing home could not comply, and his attorney, Stephen Nilssen, suggested that this was not the time to press the point as the guardianship challenge was looming. SCHIAVO WITH HIRSH, *supra* note 32, at 95. In addition, any concern that Michael was mismanaging his wife's financial affairs or breaching his fiduciary duty as guardian of her property could have been remedied by seeking an accounting.

385. *Id.* at 107-118.

386. *Id.* at 108.

387. *Id.* at 109-10.

388. *Id.* at 110.

389. *Id.* at 111-12.

390. *Id.* at 112.

391. *Id.* at 114 (internal quotations omitted).

392. *Id.*

393. *Id.*

394. *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990); SCHIAVO WITH HIRSH, *supra* note 32, at 115.

and Felos advised him that they would need to prove that this was her wish by clear and convincing evidence.³⁹⁵ Although Felos told Michael that it would take from eight months to one year to prepare the case,³⁹⁶ Michael and Felos did not attempt to contact the Schindlers to explain what Michael was planning. Apparently no one attempted to arrange a meeting at which Michael could talk with the Schindlers about how and why he had come to this difficult decision.

Michael's attorneys knew how difficult this news would be for the Schindlers and anticipated the Schindlers' probable resistance. On May 7, 1997, Michael's guardianship attorney, Deborah Bushnell, sent a letter to the probate court requesting that the Schindlers be notified of all future pleadings regarding withdrawal of life-prolonging treatment and nutrition, reasoning that their receipt of a petition for payment of attorneys' fees "would not be the best and kindest way for the ward's parents to learn that this issue was being considered."³⁹⁷ On August 23, 1997, the Schindlers learned of Michael's plans through a letter Felos sent.³⁹⁸ It was a formal, impersonal attorney letter announcing that Felos had been retained concerning "the issue of withdrawal and/or refusal of medical treatment for your daughter."³⁹⁹ The Schindlers again felt the sting of betrayal. They questioned how a husband who loved his wife could petition for her death.⁴⁰⁰ Although Michael had come to accept the irreversibility of Terri's condition, the Schindlers could not; they still clung to the hope that, with proper rehabilitation, their daughter would improve. As a result, they saw Michael's effort as an attempt to "murder" their daughter.⁴⁰¹

In May 1998, attorney Felos filed a petition on Michael's behalf with the probate court seeking authorization to discontinue life support and suggesting appointment of a guardian *ad litem* to assist the court in making its decision.⁴⁰² On June 11, 1998, Judge Greer appointed attorney Richard L. Pearse as Terri's guardian *ad litem* to assist the court in assessing Michael's petition for termination of life support.⁴⁰³ Because Pearse had raised the concern that Michael labored under a conflict of interest, inasmuch as he stood to inherit Terri's estate if the petition were granted, attorney Felos sent a letter to the Schindlers' lawyer, with a

395. SCHIAVO WITH HIRSH, *supra* note 32, at 115.

396. *Id.* at 116.

397. Letter from Deborah A. Bushnell, Esq. to the Honorable Mark I. Shames (May 7, 1997), available at <http://www.apfn.org/Schiavo/bushnell051497.pdf>.

398. SCHINDLER, ET AL., *supra* note 39, at 63.

399. *Id.* (internal quotations omitted).

400. *Id.* at 65. Bob Schindler "felt like someone had sucker-punched him in the stomach." *Id.*

401. *Id.*

402. SCHIAVO WITH HIRSH, *supra* note 32, at 119.

403. *Id.* at 121.

copy to Pearse, stating that Michael would donate all of his inheritance to charity if the Schindlers would withdraw their opposition to the petition.⁴⁰⁴ The letter provided that the offer would be withdrawn within ten days if it were not accepted; on November 5, Pearse wrote Felos, explaining that the Schindlers had rejected Michael's offer.⁴⁰⁵

In response to the petition, the Schindlers hired attorney Pamela Campbell.⁴⁰⁶ She apparently conveyed an offer to Michael through Felos that an anonymous private donor would be willing to give Michael \$700,000 if he would "give Terri to her parents and walk away."⁴⁰⁷ Michael was insulted at what he considered "an attempt to buy Terri" and rejected the offer.⁴⁰⁸ On July 13, Felos sent Pearse a letter stating that Michael did not believe that this proposal was made in good faith.⁴⁰⁹ The letter further questioned the proposal's legitimacy by asserting that Michael "is certain the Schindlers realized that he would never accept the proposal, and therefore believes the Schindlers made the proposal just for purposes of posturing."⁴¹⁰

In sum, to impress the guardian *ad litem* who would be making a recommendation to Judge Greer, both attorneys made settlement offers that they almost certainly knew the other side would reject. The Schindlers, still believing their daughter could be restored to health and that Michael's attempt to withdraw her feeding tube amounted to "murder,"⁴¹¹ would certainly have been unwilling to drop their opposition to his petition in exchange for his willingness to donate what remained of her estate to a charity of his choosing. Moreover, Michael – having reluctantly concluded that his wife would never recover, but would remain in a PVS and that her wish would have been to discontinue life-prolonging support in this situation – would predictably have been offended by what he saw as an effort to "buy" his wife for \$700,000. Both sides were posturing.

Because neither attorney went beyond these unrealistic proposals, we are left to wonder whether the parties could have reached a compromise that would have avoided the intense litigation that ensued during the following five years. Even if a compromise appeared unlikely, each attorney should have made a good faith attempt. Both seemed commit-

404. *Id.* at 125.

405. *Id.* at 126.

406. SCHINDLER ET AL., *supra* note 39, at 65.

407. SCHIAVO WITH HIRSH, *supra* note 32, at 121.

408. *Id.* at 122. Michael also rejected parallel offers of what he described as one million dollars and several million dollars. *Id.*

409. *Id.*

410. *Id.* (internal quotations omitted).

411. SCHINDLER ET AL., *supra* note 39, at 65.

ted to litigation and failed to explore alternative avenues that might have forged a compromise. George Felos was a litigator who had pioneered the right to die in Florida and who saw the *Schiavo* case as an assault on the right to refuse unwanted medical treatment that he had championed.⁴¹² He, therefore, may have had a political agenda – litigating a test case that would potentially make Florida law, something that a settlement would have precluded.⁴¹³

Over the next six years, as the case went through numerous twists and turns under the glare of intense international media coverage, the controversy took on a life of its own; Michael and the Schindlers became mere pawns in a game that competing political and religious philosophies seemed to drive. The case got caught up in abortion politics and pitted the right-to-life movement against those supporting a libertarian right to die. In the process, the parties' interests became submerged in a larger war from which they could not escape. It absorbed their lives, sullied their reputations, invaded their privacy, and imposed severe emotional, relational, and moral costs upon them – costs that neither Michael nor the Schindlers may ever transcend.

Was there a way of avoiding this most horrible of lawsuits? Maybe not, but the lawyers altogether failed to explore the possibilities. What could a therapeutic jurisprudence/preventive lawyer have done to attempt to avoid this fiasco? At the outset, it might have been productive to arrange a face-to-face meeting between the parties where they could have talked about their differences and explained to each other why they felt the way they did. They each were intensely angry with their adversary and had demonized one another. If only they could have looked forward to glimpse the devastation that would follow, perhaps they could have transcended their anger and achieved a measure of reconciliation. They all loved Terri and, at least in the early years, shared the burdens and sorrows of the calamity that befell her. Could they somehow have remembered these good feelings and found a way to

412. George Felos, Felos on Schiavo, Speech at the Stetson Law Review Symposium: Reflections on and Implications of Schiavo, Lectures on Schiavo (Jan. 28, 2005), in 35 STETSON L. REV. 9, 12 (2005). He was a "cause" lawyer with a spiritual calling. See GEORGE J. FELOS, LITIGATION AS SPIRITUAL PRACTICE (2002); see also EISENBERG, *supra* note 21, at 226-31 (account by another one of Michael's attorneys who also saw the case as a spiritual and political quest).

413. Similarly, the lawyers who rallied to the Schindlers' cause had a political agenda that favored litigating rather than settling the case. See, e.g., DAVID C. GIBBS III & BOB DEMOSS, FIGHTING FOR DEAR LIFE: INSIDE THE TERRI SCHIAVO STORY AND THE LIFE-AND-DEATH BATTLE IN AMERICA 251-66 (2006); David C. Gibbs III, Gibbs on Schiavo, Speech at the Stetson Law Review Symposium: Reflections on and Implications of Schiavo, Lectures on Schiavo (Jan. 28, 2005), in 35 STETSON L. REV. 17, 23-24 (2005); see also David Karp, *Schindlers' Attorney Is Used to Tough Cases*, ST. PETERSBURG TIMES, Mar. 31, 2005, available at http://www.sptimes.com/2005/03/31/Tampabay/Schindlers_attorney_.shtml.

rekindle them? Could they have genuinely listened to one another and felt the pain and anguish that each had suffered? Could they have moved beyond their disappointments with one another and put aside the feelings of betrayal to share the sorrows of this human tragedy? Could they have empathized with one another? Could they have put aside their bruised egos and apologized to one another for their transgressions? Could they have cried together and forgiven one another? Could they have let go of their dispute and moved forward with their lives?

Perhaps neither Michael nor the Schindlers could have done any of this. Certainly, the one failed attempt to get the parties to talk – mandated by the court several years later – suggests that none of this would have been possible. On February 13, 2002, Michael Schiavo and Mary Schindler met at a courthouse conference room in the presence of a retired judge whom Judge Greer had asked to mediate the controversy.⁴¹⁴ By this point, however, it was obvious that no compromise was possible. In his subsequent description of this session, Michael wrote that, at the time, he was thinking, “[w]here are we going with this? What is this going to fix? They hate me and I hate them.”⁴¹⁵ Mary Schindler, reflecting on the meeting, recalled, “how futile that day was. I felt sick. Mute. Hollow. Abused.”⁴¹⁶ The parties – forced to meet even though they did not wish to do so and feeling a sense of futility about the process’ value – failed even to begin a dialogue. At that point, however, there may have been no turning back. By then, the parties’ positions had hardened and their ideological agendas had become involved in ways that seemed to permeate the controversy.

In 1998, however, their positions and their psychological investment in prevailing were not as strong. Had the parties’ attorneys offered them a glimpse of the extremely negative consequences high-intensity litigation involves, perhaps both sides could have been motivated to discuss their dispute in an open and flexible forum before “going to war.” But, the attorneys made no such attempt, and based on Michael and the Schindlers’ books, it seems unlikely that the parties were warned about high-conflict litigation’s numerous drawbacks. Indeed, the books make it clear that neither party was aware that the impending trial before Judge Greer would not end the controversy. Neither was told about the likelihood of an appeal following a judgment in the probate court and that the dispute could continue, as it did, for many additional years.⁴¹⁷

414. SCHIAVO WITH HIRSH, *supra* note 32, at 193.

415. *Id.* at 194 (emphasis omitted).

416. SCHINDLER ET AL., *supra* note 39, at 120.

417. SCHIAVO WITH HIRSH, *supra* note 32, at 166-67; SCHINDLER ET AL., *supra* note 39, at 86-87.

How would a therapeutic jurisprudence/preventive lawyer have counseled Michael Schiavo concerning whether to file a lawsuit seeking to permit withdrawal of life support for his wife? At the outset, such a lawyer would fully inform the client about litigation's negative consequences. Any client who initiates a lawsuit should do so only with a full awareness of the risks and costs – financial and personal – that might occur. This type of attorney would also inform his or her clients regarding the long delays that are likely, not only at the trial court level, but also on appeal. It appears that Michael never knew that the trial phase would not necessarily end the war that his petition in probate court began. After closing arguments before Judge Greer, Michael discussed the case with attorney Felos over dinner and heard for the first time that an appeal might follow the court's decision.⁴¹⁸ As we now know, multiple appeals and petitions would follow, both in state and federal court, and would last an additional five years.⁴¹⁹ While it would have been impossible to predict the many twists and turns that followed, attorney Felos should have informed his client, at the initial meeting, that the issue would likely be highly contested and that appeals and attempts at extraordinary relief might occur for years to come. Perhaps the many ways in which this litigation would consume Michael's life for the next five years could not have been predicted, but attorney Felos should have conveyed to Michael some sense of the possibilities.

Would Michael Schiavo have filed the lawsuit anyway? Maybe so, and maybe this was appropriate, but he certainly should have done so with eyes wide-open. Moreover, he should have explored with his attorney the possible alternative approaches for accomplishing his objectives. The possibilities of meeting with the Schindlers to see whether a negotiated settlement could be reached, as well as the possibilities for mediating the dispute, should have been discussed in an attorney-client conversation. Was there a mutually respected friend or relative, or perhaps a member of the clergy, whom both sides trusted to mediate their dispute? An attempt to settle the conflict with the Schindlers, if successful, might have allowed both sides to get on with their lives – rather than being mired in the conflict for what was sure to be several additional years. Holding on to anger and hatred during this several-year period was unhealthy, both psychologically and physically. Resolving the conflict could have allowed Felos' client to experience a degree of peace, relaxation, and joy in life that would otherwise have been impossible under a cloud of litigation.

At the time, Michael was in love with Jodi, his fiancée, and the two

418. SCHIAVO WITH HIRSH, *supra* note 32, at 166-67.

419. See Cerminara & Goodman, *supra* note 234.

were undoubtedly thinking about their future together. Perhaps this was an important factor in Michael's decision to let Terri go. Michael's conversations with his mother just before her death convinced him that he was keeping Terri alive not for Terri's sake, but for his own.⁴²⁰ Although Terri made statements to Michael in the past concerning her desire not to be artificially kept alive in a PVS, Michael had not previously recalled his promise to honor Terri's wishes in that regard.⁴²¹ Even though, beginning in 1993, Michael was coming to grips with the fact that his wife was in a PVS from which she never would emerge, he declined to order the removal of her feeding tube or to seek judicial permission to do so until after he met with George Felos in 1998. In the interim, Michael was opposed to the idea or, at the least, had mixed feelings about it and did not resolve those feelings until the conversation with his mother just before her death.

If attorney Felos had taken a therapeutic jurisprudence/preventative law approach in his early attorney-client communications, he probably would have asked whether Terri had living parents or siblings, and if so, how they would feel about Michael's attempt to discontinue her life support. Learning, as Felos probably did, from his client that the Schindlers would have strong opposition to discontinuing Terri's life support and had expressed a desire to take over her care, Felos should have probed his client concerning the strength of his desire to end Terri's life. Most likely Felos would have learned about the July 16, 1993 letter the Schindlers sent Michael expressing their interest in taking over Terri's care.⁴²² Perhaps attorney Felos should have queried whether this was the best course for Michael. Would Michael have considered this course of action? To the extent that Michael had reached his conclusion to discontinue Terri's life support because he realized that he was keeping her alive for his own selfish reasons,⁴²³ allowing the Schindlers to take over Terri's guardianship and control her care would not have been inconsistent with this objective. Moreover, acceding to their request could have effectuated reconciliation with the Schindlers, ending whatever bad feelings and mutual antagonism that persisted between the parties. Perhaps this would have been good for Michael. It certainly would have been

420. See *supra* notes 391-93 and accompanying text.

421. Michael mentioned these statements during his 1993 deposition in the litigation over his guardianship. Schiavo 1993 Deposition, *supra* note 257, at 38-41. In July or August 1993, he ordered the nursing home not to treat Terri should she have another urinary tract infection; after the nursing home objected, however, Michael withdrew this order. See *supra* notes 39-40 and accompanying text. He did not thereafter pursue the matter until his 1998 meeting with George Felos.

422. See *supra* notes 357 and accompanying text.

423. See *supra* notes 391-93 and accompanying text.

good for his relationship with his fiancée, Jodi.⁴²⁴

It may well be, of course, that none of these considerations would have persuaded Michael to change his mind. If raised with sensitivity, however, Michael probably would not have resented considering these factors in an effort to ensure that litigation, with all its attendant risks and personal and financial costs, was truly what he wanted. In his book, Michael described the moving opening statement that Felos gave regarding the removal of Terri's feeding tube.⁴²⁵ Felos told the court that regardless of how it ruled on Michael's petition, nothing would bring Terri back.⁴²⁶ If the court granted the petition, he stated, "all the parties will have to suffer the agony of watching a beloved one die," even though his client believed that this is what his wife would have wanted.⁴²⁷ On the other hand, if the court denied the petition, Felos stated that "Theresa Schiavo's body will be maintained," in her PVS "perhaps for decades, and there is no victory or win in that for anyone."⁴²⁸ Reflecting on this dichotomy, Michael stated: "I found myself listening to George with tears in my eyes. I'd thought about the outcome of the trial often, and there were times when I didn't know which of the two alternatives he'd just pointed out was worse."⁴²⁹

This continued ambivalence on Michael's part is significant. If he did not know which of these two alternatives was worse, then he also did not know which was better. And, if he didn't know which was better, perhaps he would have been willing to allow the other alternative possibility to occur – keeping Terri alive in her PVS – in accordance with the Schindlers' very strong preferences. This suggests that earlier face-to-face negotiations might conceivably have led to a negotiated settlement whereby Michael allowed Terri to remain alive and, perhaps, even turned control of her care over to her parents. Michael, free of the profound burden that Terri's PVS posed for him, could have then moved forward with his new life with Jodi. If only Michael could have foreseen the difficult years of vexatious litigation and appeals that would follow, this resolution might have appeared reasonable to him. Although the litigation's extent was uncertain, had his attorney given

424. This suggestion does not necessarily mean that Michael should have formally divorced Terri; that would raise a different question. He could have remained married to Terri yet maintain his relationship with Jodi, as in fact he did until after Terri's death – when he finally had the opportunity to marry Jodi, and did so. Remaining Terri's husband, of course, would continue his entitlement to whatever might remain of her estate upon her death, and this might have been an important consideration.

425. SCHIAVO WITH HIRSH, *supra* note 32, at 135-36.

426. *Id.* at 135.

427. *Id.*

428. *Id.*

429. *Id.* at 136.

Michael a sense of the potential drawbacks associated with that path, Michael may have been willing to negotiate a settlement with the Schindlers. Regardless of whether this alternative approach would have worked, Michael certainly should have been given the full picture before deciding how to proceed.

Let us assume that even after considering all of these factors, Michael would still have decided that, as Terri's guardian, the best decision was to terminate Terri's life support. This certainly would have been a determination that his attorney would have accepted and sought to effectuate, but it would have remained sensible to undertake an exploration of whether the Schindlers could be persuaded to accept Michael's conclusion. If they would have been willing to attend a meeting with Michael, with or without counsel, the opportunity for each side to hear one another's positions, the reasons why they had reached them, and how they felt about the situation might have allowed for a breakthrough and a softening of positions.

Let us envision what might have occurred during such a meeting. The Schindlers were skeptical about Terri having previously expressed the view that she would not wish to be kept alive artificially. Perhaps such a meeting could have been an opportunity for Michael to present the evidence that he later introduced at trial in support of Terri's wishes – e.g., his own testimony, and that of his brother and sister-in-law, concerning conversations on the subject with Terri. If Michael had presented these family stories, perhaps the Schindlers would have understood his position. Moreover, at such a meeting, the Schindlers could have presented their own stories about how their family members had reacted in situations in which they faced potential death. Dialogues of this kind could have fostered better appreciation of the other side's feelings and motives. Doctors could have been invited to attend such a meeting and, upon hearing these family narratives, could have helped the parties by explaining how Terri's situation differed from, or resembled, the situations presented by their family stories.

In addition, Michael could have used such a meeting as an opportunity to explain his delay in revealing Terri's intentions and in acting on them – which heightened the Schindlers' suspicions regarding his motives – by describing his own inability to come to terms with the hopelessness of her condition. Michael could have described his anguish and ambivalence about ending Terri's life support and the epiphany that he had at the deathbed conversation with his mother. He also could have apologized for the 1993 misunderstanding concerning the medical malpractice award proceeds. He could have expressed his regret that his own lawyers had not clarified the Schindlers' lack of enti-

tlement to any of the recovery and his regret that the Schindlers had misapprehended the statements he made during the medical malpractice trial and during private conversations. He could have recounted how faithfully he had attempted to care for Terri and how he had taken every conceivable step, including experimental treatment, to restore her to her former self. He could have expressed his profound sorrow that none of this had worked and described the conversations with Drs. Mulroy and Harrison that had led to his conclusion that Terri was in an irreversible PVS. He could have expressed understanding and empathy for their feelings, but might have explained that he had reluctantly come to the conclusion that there was no chance of Terri recovering and that they all would be better off to recognize this and move forward with their lives.

Should an attempt of this kind have been made? It may have seemed unlikely to succeed given the Schindlers' deep denial about the truth of their daughter's condition and their profound hope that – with proper treatment – Terri would one day awaken from her PVS.⁴³⁰ It is certainly understandable that their hope for recovery would allow them to see positive signs in what they thought were Terri's reactions to environmental stimuli. We now know as a result of the autopsy, however, that Terri had suffered such profound brain damage that she never would recover – that she in fact was blind and that what seemed to be her reactions to environmental stimuli were merely random responses and reflexes that did not suggest her diagnosis and prognosis were incorrect.⁴³¹ But, unless the Schindlers could have accepted this sad truth, they would have persisted in characterizing Michael's attempt to disconnect Terri's feeding tube as murder.

How could Michael and his attorney have attempted to break through this denial to which Terri's parents understandably clung?⁴³² This may have been an impossible task, but perhaps not so impossible that it should not have been attempted. Maybe Michael's attorney could have suggested to the Schindlers that a neutral, well-regarded neurologist, perhaps the chairperson of the department of neurology at a medical school of their choosing, be selected to evaluate Terri's records and perform an examination. The Schindlers' distrust of Michael would have predictably caused them to suspect any expert he chose, but what of one the Schindlers or a neutral authority chose? Since so much of their disagreement with Michael was based on differing conceptions of Terri's

430. SCHINDLER ET AL., *supra* note 39, at 57-58.

431. See *supra* note 23 and accompanying text.

432. As their book demonstrates, even after Terri's death and the autopsy that confirmed her PVS, the Schindlers continue to deny the reality of their daughter's condition and persist in their belief that she was, in effect, murdered. See generally SCHINDLER ET AL., *supra* note 39, at 212-19.

diagnosis and prognosis for recovery, Michael's attorney might have suggested to the Schindlers, "why don't we together find out what the true facts are by obtaining the assistance of a neutral expert?"

The attorneys could have attempted still other methods of breaking this impasse. Perhaps the parties should have consented to an ethics consultation involving a neutral bioethicist or hospital ethics committee.⁴³³ Perhaps a consultation with a neutral member of the clergy would have helped. None of these possibilities were attempted. Maybe none would have made a difference, but a therapeutic jurisprudence/preventive lawyer certainly would have explored them with his client and, if the client were willing, would have proposed these alternatives to the Schindlers as vehicles for clarifying the medical and scientific facts that were essential predicates for sensible decisionmaking. Michael's attorneys should have discussed these possibilities with Michael before the decision was made to launch a lawsuit.

During this period, as well as during the trial before Judge Greer, Pamela Campbell was the Schindlers' attorney.⁴³⁴ The Schindlers' book is fairly silent about their discussions with Campbell in the pre-trial phase, although it does discuss her trial performance.⁴³⁵ There was no indication that she attempted to settle the case, other than the offer she apparently conveyed to Felos indicating that an anonymous third-party was willing to pay Michael \$700,000 to relinquish Terri to her parents – an offer that Felos had dismissed as "posturing."⁴³⁶ There was no indication that Campbell attempted to negotiate on behalf of her clients, or attempted to arrange a negotiating session between her clients and Michael. The absence of any reference to such an initiative in either Michael or the Schindlers' books – each of which contain extensive discussions of the litigation – suggests that no such attempts were undertaken. Just as Felos should have counseled Michael concerning the financial and emotional costs of litigation, Campbell, too, should have spoken with her clients about these issues and explored settlement possibilities with them.

Even though the previous attempt at negotiation initiated by the Schindlers' July 16, 1993 letter to Michael failed to produce discussions,⁴³⁷ the potential for negotiation and settlement might have changed over the four years to come. Interestingly, in October 2004, attorney David Gibbs, who had become the Schindlers' new lead counsel,

433. See generally Coombs, *supra* note 233.

434. SCHINDLER ET AL., *supra* note 39, at 65.

435. *Id.* at 68-82.

436. See *supra* notes 410-13 and accompanying text.

437. See *supra* note 357 and accompanying text.

attempted just such an initiative.⁴³⁸ According to Gibbs, however, “[Felos] simply rejected our offer out of hand.”⁴³⁹ Gibbs then explored the possibility of former President Jimmy Carter mediating the dispute, but the Carter Center declined to become involved.⁴⁴⁰ A further attempt by Gibbs to arrange a private meeting between the parties also failed.⁴⁴¹ These initiatives, which occurred during late 2004, the litigation’s final phase, failed because they came too late – at a time when the parties’ mutual anger and antagonism had reached a point of no return. But attorney Gibbs’ actions in attempting to settle the case are commendable. Why did attorney Campbell not make such an attempt seven years earlier, when the parties’ positions may not have been as intractable?

Of course, even if Campbell had tendered such an offer earlier on, it might not have succeeded. Even if the Schindlers were willing to assume the full burdens of Terri’s continued care, Michael may well have persisted in his determination to end Terri’s life in accordance with what he understood to be her wishes. Did the Schindlers remain flexible at this point? Their inability to accept the fact that their daughter never would recover would obviously have made it extremely difficult for them to consider any proposal that involved discontinuing Terri’s life support. Interestingly, attorney Campbell apparently understood that Terri was in a PVS. Indeed, Campbell conceded this in her opening statement during the trial.⁴⁴² But, she apparently had neither discussed this fact with the Schindlers, nor attempted to persuade them to accept the reality of this diagnosis.⁴⁴³ Campbell later defended her concession and told her clients that “she wasn’t sure she could find a doctor who would disagree with that diagnosis.”⁴⁴⁴

Campbell had thus come to the conclusion that there was no medical evidence that could rebut Michael’s claim that Terri was in a PVS.

438. GIBBS & DEMOSS, *supra* note 413, at 90-99. In an October 26, 2004 letter to Michael’s attorneys, Gibbs proposed (on behalf of the Schindler family) a deal in which the Schindlers would be able to assume the care and custody of their daughter, at their own expense. In return, the Schindlers would provide Michael with a legal guarantee that they would never seek any money from him and that he could retain any money relating to the medical malpractice action or assets remaining in Terri’s estate. Michael would retain any visitation rights with Terri he might care to exercise, and the Schindlers would release him from any and all legal claims they might have against him. In addition, they would wish him well in his relationship with Jodi, would sign any necessary papers to facilitate a divorce from Terri, and would agree that he could retain all of her estate upon her death even if they then were divorced. *Id.* at 98-99.

439. *Id.* at 94.

440. *Id.* at 95-97.

441. *Id.* at 97.

442. SCHINDLER ET AL., *supra* note 39, at 68-69.

443. In their book, the Schindlers reported “amazement” at hearing Pamela Campbell make this concession during her opening statement. *Id.* (“In her opening statement, to our amazement, Pamela acknowledged that Terri was PVS. . . . [W]e wanted to scream.”).

444. *Id.*

Why, then, did she not discuss this sad reality with her clients and attempt to disabuse them of their misconception? As stated earlier, it is certainly understandable that Terri's parents could not accept that their daughter was gone and were in denial about her prognosis for recovery. But, if their own lawyer understood and accepted this sad reality and was prepared to concede it in court, why did the lawyer not also attempt to explain her conclusions on this critical issue to her clients and help them understand and accept the truth?

Having this kind of conversation with a client, of course, is quite difficult. It requires sensitive interviewing and compassionate counseling – skills that are highly valued within the therapeutic jurisprudence/preventive law model of lawyering.⁴⁴⁵ Lawyers practicing in this fashion, when faced with clients whose decisions about legal matters are based on misconceptions or cognitive distortions, attempt to correct these misconceptions and try to help the client redefine or reframe the problem and its potential solutions.⁴⁴⁶ This is an extraordinarily sensitive conversation to have with the client; it can only be done if the attorney has first earned the client's trust and confidence. To be successful in this effort, the attorney must be a good listener, must be able to establish rapport with the client, and must be able to convey empathy.⁴⁴⁷ What is called for is a sense of understanding, not confrontation. The attorney needs to have emotional and social intelligence⁴⁴⁸ to be an "affective lawyer."⁴⁴⁹

445. See generally Winick, *supra* note 2 (describing the author's course at the University of Miami School of Law, *New Directions in Lawyering: Interviewing, Counseling, and Attorney/Client Relational Skills*, which is designed to teach these skills).

446. Winick, *Overcoming Psychological Barriers*, *supra* note 11, at 346-62 (suggesting ways in which lawyers can attempt to correct such client misconceptions or distortions).

447. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* ch. 3 (2004) (discussing active listening); DANIEL GOLEMAN, *SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS* 27-37 (2006) (discussing rapport); *id.* at 58-59 (discussing empathy); *id.* at 88 (discussing listening); Timothy W. Floyd, *Spirituality and Practicing Law as a Healing Profession: The Importance of Listening*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION*, *supra* note 11, at 473 (discussing listening skills); Winick, *The Expanding Scope*, *supra* note 11, at 195-96 (discussing the need for increased "psychological sensitivity").

448. See generally DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995); Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 *PSYCHOL. PUB. POL'Y & L.* 1173 (1999).

449. See *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION*, *supra* note 11; Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 *GEO. WASH. L. REV.* 1071, 1073 (1995); Carrie J. Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacGrate Report – Of Skill, Human Science, and Being a Human Being*, 69 *WASH. L. REV.* 593, 595, 619-12 (1994); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 *CORNELL L. REV.* 1225, 1228 (1996); Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation*, in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 1, at 419, 421-22.

What could attorney Campbell have done to help her clients reconsider their assumptions about Terri's medical condition? In a non-judgmental, empathic way, she could have suggested that they consult an independent neurologist to enhance their understanding of the true nature of Terri's condition and recovery prognosis. Had the Schindlers been willing, Campbell could have hired such an expert and could then have shared with this expert whatever medical records Campbell might have had, including copies of any previous medical reports or medical testimony that were parts of the record in the 1992 medical malpractice case or the 1993 guardianship case. The analysis of an expert hired by an attorney in this way would constitute attorney work product and, as such, would not be subject to discovery by an adverse party.⁴⁵⁰

Campbell may have said something similar to the following:

Let's get a better understanding of the medical picture, so we can make sure that our decisionmaking about what to do and what strategy to take in the litigation is based on a firm foundation. If the independent expert favors our position, she can, of course, be used as an expert witness in our behalf. If not, she would not need to be called as a witness. If she concludes that Terri is not in a PVS and might have some potential for improvement, we then can consider arranging for her to perform a physical and neurological examination of Terry and whether to call her as an expert witness on our behalf at the trial.

But Campbell apparently never had such a conversation with the Schindlers, leaving them to remain in denial about their daughter's condition.

Had the Schindlers agreed to such a suggestion, they might have been more open to accepting a neutral expert's opinion and, in light of it, might have been willing to negotiate a compromise with Michael. Maybe this wouldn't have persuaded them, but it might have allowed them to consider whether it was time to question their fundamental assumption that Terri's condition was reversible. Questioning one of their major assumptions and learning whether it was accurate could only have increased the quality of their decisionmaking process. If a suggestion of this kind by attorney Campbell would have helped them to reexamine their position and to at least consider whether a compromise with Michael might have been possible, this could have been beneficial to her clients, especially in light of all that followed in the next six to seven years. As long as done with sensitivity, attorney Campbell's clients might not have deemed a suggestion of this kind offensive. Sometimes an attorney has to ask her clients to question their assumptions, and this certainly is appropriate when the attorney herself doubts their accuracy.

450. See, e.g., FLA. R. CIV. P. 1.280(b)(4).

A proposal from Campbell suggesting that the Schindlers seek a neutral neurological review of Terri's condition might have been worth a try.

Attorney Campbell's failure to attempt such an approach led to another problem. She conceded during her opening statement, to the amazement of her clients, that Terri was in a PVS.⁴⁵¹ As "she wasn't sure she could find a doctor who would disagree with that diagnosis,"⁴⁵² she may have felt that she could not ethically contest the issue or even plausibly attempt to do so. But she certainly should not have surprised her clients with that concession. Rather, she should have discussed it with the Schindlers beforehand. The Schindlers' amazement at hearing such a concession demonstrates that Campbell had not done so.

This is something that a therapeutic jurisprudence/preventive lawyer would be careful never to do. The literature on the psychology of procedural justice demonstrates the importance of litigants having a sense of "voice" in judicial and other legal proceedings.⁴⁵³ Litigants' feeling that they are able to tell their side of the story is an essential component of their satisfaction with judicial hearings and also with their willingness to accept and comply with litigation's outcome, even if unfavorable. Typically, however, it is the lawyer who is the instrument of the client's voice; the lawyer must, therefore, ensure that it is the client's story that she is telling and not a story with which the client would disagree.⁴⁵⁴ Upon hearing attorney Campbell's concession, the Schindlers "wanted to scream."⁴⁵⁵ Campbell was conceding "half our case,"⁴⁵⁶ and the Schindlers, therefore, must have felt that their own attorney had betrayed them.

V. CONCLUSION

Although the case endured an additional five years, I stop my rewind exercise at this point because it focuses mainly on the lawyers' conduct during the conflict's early and middle stages.⁴⁵⁷ Much of the

451. See *supra* notes 442-44 and accompanying text.

452. SCHINDLER ET AL., *supra* note 39, at 68-69.

453. Winick, *supra* note 379, at 116-19.

454. *Id.* at 117.

455. SCHINDLER ET AL., *supra* note 39, at 68; see also *supra* notes 442-44 and accompanying text.

456. SCHINDLER ET AL., *supra* note 39, at 68; see Winick, *supra* note 379, at 116.

457. Rewinding the story even further gives rise to another potential preventive law intervention. Prior to the cardiac arrest that produced her PVS, Terri could have executed a living will or advanced directive instrument dealing with health care. See generally Symposium, *Advance Directive Instruments for Health and Mental Health Care: Legal, Ethical, and Clinical Issues*, 4 PSYCHOL. PUB. POL'Y & L. 577 (1998). In such an instrument, Terri could have specified, in accordance with what testimony showed her wishes to be, that life-sustaining treatment or nutrition be discontinued in the event she entered a PVS. She either could have so directed or appointed her husband or another relative or friend as a healthcare proxy – delegating

rewind analysis probes the ways in which the lawyers failed to counsel their clients and thereby failed to prevent or minimize the emotional harm that this endless and high-conflict dispute imposed upon all of them. Lawyers practicing with a therapeutic and preventative orientation would have acted differently, and the rewind exercise provides a case study that illustrates why lawyers need to bring this approach into their professional practices. Even litigators need to adopt a problem-solving orientation that is flexible and allows one to explore settlement possibilities before jumping headlong into litigation.⁴⁵⁸

Much of the rewind analysis focused on how the lawyers might have attempted to prevent the lengthy and emotionally damaging litigation that occurred. I have criticized much of the lawyering that occurred during these stages of the litigation because it did not sufficiently attempt to prevent or settle the dispute and thereby failed to avoid the train wreck that eventually occurred. In the end, the litigation took on a life of its own and swept the parties into a drama they probably could no longer control. But the potential for avoiding this collision was far greater during the early and middle stages, and this is why they were the focus of my rewind exercise.

The moral is clear. In pursuing their clients' legal interests, lawyers should not ignore their client's emotional interests. Lawyers should account for their client's concerns in their counseling and every other aspect of their lawyering. In the way they interact with their clients and handle their legal affairs, lawyers inevitably function as therapeutic agents. Recognizing this, lawyers should strive not to be anti-therapeutic, but should seek to avoid or minimize predictable emotional harm.

Not only is the orientation I call for an aspect of good lawyering, but I also think it should be the lawyer's ethical obligation. Just as physicians are enjoined by the Hippocratic Oath to do no harm to their

to that proxy the authority to make the decision on her behalf, perhaps providing a statement concerning her values that would have guided the proxy's decisionmaking. Of course, Terri may not have been represented by counsel at this point, but had she sought the advice of counsel concerning estate planning or other matters, she could have learned that this legal planning tool could have avoided all the difficulties that followed. A preventive lawyer would have raised this possibility with the client. While a client of Terri's then-tender years might have resisted the need for advance planning about her potential death – always a difficult issue to deal with psychologically – the therapeutic jurisprudence/preventive lawyer possesses tools for dealing with the client's psychological resistance. See generally Winick, *supra* note 15 (discussing techniques for attorneys to deal with such denial or psychological resistance in the advance directive instrument context).

458. See generally Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103 (2005) (arguing for such a problem solving orientation and demonstrating how it can be applied in negotiation and mediation contexts).

patients,⁴⁵⁹ lawyers should also have an ethical obligation to avoid harming their clients. This injunction may apply with particular force when the lawyer is considering whether to file a lawsuit on behalf of the client and whether to attempt settlement or other alternative modes of dispute resolution. The Model Rules of Professional Conduct contemplate that a lawyer discuss moral, economic, social, or political factors with the client that may be relevant to the attorney's advice.⁴⁶⁰ Although the rule does not say so, it should include emotional considerations. The lawyer in counseling a client should go beyond advising the client about the technicalities of the law and should bring other relevant factors to bear upon the analysis. When lawyers advise their clients about bringing a lawsuit, they should warn of the negative consequences that can result – e.g., economic, emotional, relational, reputational, and moral harm. They should be required to explain the risks and benefits of going to court and the alternative possibilities that may exist in resolving the dispute. Many lawyers do not do this, with the result that many clients become embroiled in unnecessary litigation.

Just as physicians have a duty to obtain their patients' informed consent before performing surgery or treatment,⁴⁶¹ lawyers should be required to obtain a form of informed consent from their clients before filing a lawsuit on their behalf. The lawyers should tell their clients not only about litigation's potential benefits, but also about the serious risks and costs – both financial and personal – that can ensue. Sometimes litigation is appropriate and even necessary, these costs notwithstanding. But often litigation results in greater harm than benefit. Ambrose Bierce described a lawsuit as “[a] machine which you go into as a pig and come out as a sausage.”⁴⁶² Voltaire is reported to have once said, “I was never ruined, but twice. Once when I lost a law suit, and once when I won one.”⁴⁶³ Litigation brings out the worst in people, and there are rarely real winners.⁴⁶⁴ In view of this, an attorney recommending litigation should ensure that his or her client is making an informed choice. This should be a lawyer's ethical duty.

459. LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION* (1943).

460. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006).

461. JESSICA W. BERG ET AL., *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* 12 (2d ed. 2001); *see also* RUTH R. FADEN ET AL., *A HISTORY AND THEORY OF INFORMED CONSENT* 3 (1986); WINICK, *THE RIGHT TO REFUSE*, *supra* note 6, at 345-69.

462. *THE TIMES BOOK OF QUOTATIONS* 410 (2000) (quoting AMBROSE BIERCE, *THE CYNIC'S WORD BOOK* (1906)).

463. *AN EDITOR'S TREASURY: A CONTINUING ANTHOLOGY OF PROSE, VERSE, AND LITERARY CURIOSA* 1032 (H. Mayes ed. 1968) (internal quotations omitted).

464. Wayne Martin, Chief Justice of W. Austl., Address to the 3rd International Conference on Therapeutic Jurisprudence, Perth, Australia 7 (June 7, 2006), *available at* <http://www.supremecourt.wa.gov.au/publications/pdf/TherapeuticJurisprudence-07062006.pdf>.