



LITIGATION AND FAMILY DON'T MIX

BY MARK B. BAER, ESQ.

Almost all divorces occur because of some level of conflict between the spouses. Research indicates that the process of litigation increases the conflict and trauma for separating parties. This impacts the children of the relationship, and even extended family members. However, if there are children of the relationship, we should be attempting to reduce the conflict. That certainly cannot occur in an adversarial system, where it is the role of the lawyer, once litigation has commenced, to "fight" for the interests of their clients.

The amount of damage that the adversarial system causes families is a matter of degree - some more than others. As I like to always remind my clients, like it or not, if there are children of the relationship (regardless of their age), the family still exists after the relationship ends. The manner in which you end the relationship determines whether your family will be functional or dysfunctional from that day forward.

Unfortunately, only a few years ago, the unofficial slogan of the members of the family law bar (at least in Los Angeles County) was "We are carnivores; we go for the kill." Until recently, when family law attorneys who practice mediation and Collaborative Divorce joined the executive committee of the Family Law Section of the Los Angeles County Bar Association, the members of that organization purportedly made such a claim after booing them.

This attitude is inconsistent with what is needed when dealing with families in conflict. As my esteemed colleague, Pauline Tesler told me, "the most significant variable affecting whether a divorce will be managed well or whether it will slide into high conflict litigation is who the parties select as their lawyers. Lawyers who understand the nature of human conflict and who aim to help people resolve it, right from the start, handle their cases entirely differently from lawyers who may have reasonably positive views of mediation, but who treat it as just another way of getting to a legal-template deal and who see their job as preparing for maximum measurable gain at trial. Family law clients are going to be distressed, angry, fearful, subject to spasms of vengeful intention and other dysfunctions. Their lives are coming unglued. Therefore, choosing the right attorney is one of the most important decisions a person can make. The lawyer needs to be able to hold up for the client an alternate

possibility of working from hope rather than fear. You can lead a lawyer to consensual dispute resolution, but you can't make him or her into a facilitator of deep resolution without changing the lawyers' understanding of what it means to be a divorce lawyer, venturing into the sacred space of primary pair bonds unraveling.”

The key issue is training. Lawyers in the United States are trained to represent their clients through the adversarial forum of a court-room.

A colleague of mine in Ireland who has been involved in family law research over the past three years recently commented, "While legal training I believe should be a pre-requisite for anyone dealing with substantive issues in mediation, it is the suitable 'personality' test that distinguishes competent mediators from great mediators. When I use the term 'great' in this regard, I mean effective problem solvers and diffusers of conflict. I have found that the 'interest' that brings people to practice mediation is invariably a personal experience of the break-down of a family. I believe that this is a strength, not a weakness. It greatly informs the empathy that a mediator ought to have to truly connect with their clients. This does not mean that mediators who have had negative experiences as a child better understand the dynamics of mediation, it just means that they have a greater 'interest' in a peaceful outcome, informed by their own experiences." Roisin O' Shea Dip, BA Hns (Law), Certified Mediator, PhD candidate at Waterford Institute of Technology, Ireland.

Unless I am missing something, the same thing holds true for family law attorneys as well as judges and other judicial officers.

Litigators have been destroying families for decades, including mine. I was a minor child when my parents divorced and was under the control of their purse strings for several years thereafter. In my opinion, divorces have a more direct impact on minor children and/or children who are still under their parents' purse strings because they are not yet independent of their parents.

I certainly don't blame the attorneys for the breakups of families. However, I do hold them accountable for the manner in which the breakups are handled. Attorneys who practice in the field of family law must understand the nature of human conflict. They must also aim to help people resolve that conflict right from the start. Does anyone really believe that this is taught in law school? Moreover, handling cases in such a manner might be considered contrary to the lawyer's own economic interest. However, the adversarial system causes permanent damage to families and to the individual members of those families.

Remember, once litigation has commenced, it is the role of the lawyer to "fight" for the

interests of their clients. This includes taking advantage of the flaws in the legal system in order to obtain a successful outcome for the client. Such zealous advocacy is not only ethical, but arguably necessary in order to competently represent a client. How has the adversarial system benefitted families, the individual members of those families or society at large?

Problem-solving, on the other hand, is a hallmark of a good lawyer. It involves a creative attempt to discover a result that may be outside the specific provisions of law, ruling, or statute, but that will represent the best reasonable outcome for all of the parties involved. The use of the adversarial system is only one way of solving a problem. Since law schools, historically, have not taught problem-solving skills, the American Bar Association (ABA) advises lawyers-to-be that they must enter law school with a reasonably well developed set of analytic and problem-solving abilities, in order to become a competent lawyer. However, unlike medical schools, law schools do not require that incoming students major in any given field of study. Furthermore, very few college majors are of the problem-solving variety, also known as quantitative fields.

If the law schools do not teach such skills because they assume the students have developed those skills before entering law school and if the law schools do not require incoming students to have graduated from college with a problem-solving type of major, how do the students acquire the skills that are needed to become good lawyers? According to the ABA, if the law students did not learn such skills while in college, they may have developed those attributes through extra-curricular and life experiences.

I contend that problem-solving has become a lost art in the practice of law. I don't mean to imply that all lawyers are lacking in such skills. Unfortunately, since it is not mandated that anyone learn problem-solving skills to receive a law degree, most lawyers do not learn such skills. By teaching lawyers to identify problems, but not training them to solve problems, the practice of law has shifted from resolving conflict between parties to creating it. This is particularly detrimental in cases dealing with children and families as heightening conflict causes wounds that often last a lifetime.

Since quantitative reasoning skills are so essential to the competency of an attorney and since so many entering law students lack such skills, some law schools are throwing out decades of tradition by replacing textbook courses with classes that teach more practical skills.

It should also be noted that studies over the past 30 years or more have found that

I.Q. levels can decrease by 30 percent from low stress to high stress and this applies to everyone from child to corporate or world leaders. When a person's stress level is sufficiently elevated, their ability to fully and effectively use their cognitive ability and emotional intelligence in tandem to make timely and effective decisions is significantly impaired. If the elevated stress becomes high enough for a long enough period of time, however, deleterious effects will follow regarding the "higher" level thinking processes, e.g., logic, analysis, decision making, etc. — a significant portion of the IQ. Too much stress results in a drop in cognitive ability (including IQ) and an oversensitive heightened state of emotion. A person loses a significant amount of ability to "control" their emotions, thus becoming temporarily less emotionally intelligent! Stress reduces a person's ability to fully access their IQ and emotional intelligence abilities. This results in displays of some or all of a characteristic set of deleterious behaviors, such as: not listening; over-analyzing; stops making decisions; makes "emotional" decisions; "flip-flops"; makes reactive, short-term, fear-based or anger-facilitated decisions; acting in such a way as to satisfy the minimum requirements for achieving a particular result; hedonistic; or the failure to notice something in plain sight.

Almost all experts agree that one should avoid making any major decisions within the first year following the death of a spouse. The reason for this advice is that the temporary decrease in one's IQ level lasts for approximately one year when the person has suffered such a great loss. In a divorce, the temporary decrease in one's IQ level lasts until approximately 1 ½ years after the divorce has been finalized.

Moreover, the British Journal of Psychiatry recently published an article stating that recent psychological research has found that family arguments and divorce can cause even more Post Traumatic Stress Disorder symptoms than major trauma.

Psychologists and other mental health care professionals are trained to assist people with their emotional issues. However, lawyers do not receive such training, even if they want to practice in the field of family law.

It is therefore incumbent upon the client to carefully interview an attorney before making a hiring decision. Although nothing in life is certain, we can all exercise due diligence in an effort to make reliable intelligent choices when it comes to selecting a lawyer. Before retaining an attorney, the consumer would be wise to do some independent research on the particular attorney and to request references and/or testimonial letters from former clients.

In my twenty one years of practicing law, I have found that clients focus on the wrong things when interviewing an attorney. They often want to know about the law on a

particular issue. Bear in mind that any attorney who practices law in that particular field should be able to answer that question. Therefore, it is not a question that should be asked when interviewing an attorney; rather, it is the type of thing a client should ask after retaining the attorney. Clients also tend to get into the specifics of their case because they want their attorney to tell them the most likely outcome. What the clients need to realize is that cases either resolve through the consensual agreement of the parties involved or because a judicial officer decided the matter. We cannot possibly know whether or not the parties will ultimately reach an agreement or the terms of any such agreement. By the same token, we lose control over the outcome when we allow the matter to be decided by a judicial officer. Judges or juries are responsible for deciding factual issues and then judges are expected to properly apply the law. At a great expense, a person can successfully appeal a judicial ruling if he/she is able to establish that the judicial officer failed to apply the law properly. However, judges are given a great deal of discretion and factual findings are not reversible by the appellate court. Unless the facts are undisputed and the law is very clear on the issue, how likely is it that an attorney can accurately assess the outcome of a case? Research shows that lawyers are overconfident in their predictions, regardless of their years in the profession.

It is a mistake to ignore the fact that judges attended the exact same law schools as those lawyers who argue before them, and are therefore in the same deficient situation when it comes to problem-solving skills.

It should also be noted that countless politicians have pursued law degrees prior to starting their career in politics. The fact that our government is broken is old news. The ability to solve difficult problems requires the willingness to compromise and bipartisanship. Unfortunately, what would our politicians know of problem-solving, when they received no such training? Rather, they were trained to create more problems.

I am determined to ensure that the irreversible damage that litigating family law and probate matters has caused to my family as well as countless others comes to an end. Zealous advocacy might work in criminal law and in certain other areas of law. However, it does not work in family law and probate where families are involved. Litigation and family do not mix.

ABOUT THE AUTHOR



Since 1991, attorney Mark Baer has been protecting his clients' interests in family law cases throughout the greater Los Angeles area. He provides personalized service and creates customized solutions to meet the individual needs of each client. He takes the time to get to know you as a person. He learns about your needs and your concerns and works diligently to accommodate them.

Since September of 2008, Mark has been a regular columnist for the San Gabriel Valley Psychological Association's bimonthly newsletter. In April 2010, the SGVPA won the award for most outstanding psychological association newsletter in California from the California Psychological Association and Mark's column was specifically named as a factor in that decision.

In May 2010, Mark started a Blog. His August 10, 2010 Blog on child support received a great deal of attention. As a result, the article was published in the November 2010 edition of *Valley Lawyer Magazine*, he was profiled in an article entitled "Family Law Par Excellence" in the November/December 2010 edition of the Beverly Hills Bar Association's Newsletter, and will be profiled in the March 2011 edition of *California Lawyer Magazine*.

Mark was included among the 2010 Top Attorneys by *Pasadena Magazine*.

Columnists from the *Pasadena Star-News*, the *Los Angeles Times* and other newspapers use Mark as a resource for their columns. He has been interviewed on KTLA News by Manny Medrano and was a guest speaker for an internationally recognized teleseminar on the topic of Pre and Post-Marital Agreements.

Mark recently joined the State Bar Consensual Dispute Resolution Standing Committee, an organization that drafts and reviews proposed legislation as it pertains to Family Law.

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