

Psychology and Family Law

The Importance of Empathy in the Legal Profession

Part III

By Mark Baer, Esq.



This is the final part of a series promoting the importance of empathy in a lawyer's work and based on a professional program I presented. In Part II, I discussed how argumentative and contentious a great number of lawyers are, even outside of the litigation process itself. Rather than

being empathic or just plain courteous, today's lawyers tend act out an adversarial stance both inside and out of the courtroom. Reflecting on this, the attorneys to whom I presented agreed that it is a lawyer's ethical responsibility to advise clients that it is counter-productive to create unnecessary conflict.

However, one attorney opined there is a need for aggressive lawyering on occasion. Did he mean lawyers who express their opinions, and those of their clients, in a confident and professional manner; or those who are unnecessarily confrontational, belligerent, antagonizing, and otherwise lacking in civility? After a discussion, the group decided that *assertive* lawyering is good, and that *aggressive* lawyering is bad, regardless of field of practice.

"What do you believe is the cause of most conflicts and disputes?" I then queried. "Misunderstandings, based on poor communication," came back the considered response of the audience. Then I asked if there is a difference between conflicts and disputes. I have long made a distinction between conflicts, which are emotionally-driven, and disputes, which are fact-based. After another discussion, the participants reached the same conclusion I had: Disputes are fact-based, and conflicts are emotional. It follows theoretically that most disputes might be resolved by careful and reasoned discussion, whereas emotionally fueled conflicts might be more difficult to solve or otherwise manage.

I then posited that when we, as lawyers, draw clients into an adversarial process, and behave as aggressors and "gladiators" to "win" their case, we are unnecessarily escalating conflict, in order to address a dispute. Nobody present disagreed.

"Lawyers are supposed to zealously advocate for their clients, right?" I then queried. This is a term from the legal code of ethics, with which everyone routinely agreed. However, what does "zealous advocacy" actually mean? As the question circulated the room, it became abundantly clear that the definition is highly subjective; and that of the responses offered, all seemed to connote various levels of aggression on their clients' behalves.

Another lively discussion ensued when I asked them whether those present believed that laws are fundamentally fair.

Quite a few attorneys answered, "Yes," while others asserted that all "American laws are fundamentally fair." Yet, I reminded them that laws vary greatly from state to state, and country to country, and change over time. I asked them, "What the hell are 'American laws,' and how can they be fundamentally fair, if they vary from jurisdiction to jurisdiction?" Everything is a matter of perception, I suggested. We tend to get accustomed to the laws and culture of the jurisdiction in which we live, and to confuse our comfort with those laws, with our innate sense of fundamental fairness.

I then read them the following quote (from a recent article by Laura Meherg): "The art of persuasion is not about nagging, arguing or bullying. It's about empathy and active listening." This invigorated another discussion around the core theme of the presentation—Empathy as an important tool of effective lawyering.

I offered further that the core of empathy is "perspective-taking," using the term of social work researcher Brene' Brown. Perspective-taking is the basis upon which we can recognize the needs of others, and to do so requires empathy. Dr. Brown contends that we can try to remove the lens through which we see the world, in order to try on the lens of another person. We all view the world around us differently, based on our information, insight, and experiences. She adds, "Perspective-taking is listening to the truth as other people experience it, and acknowledging it as *their* truth. What you see is as true, real and honest as what I see; so let me be quiet for a minute, listen, and learn about what you see. Let me get curious about what you see. Allow me to ask questions about what you see. Empathy is incompatible with shame and judgment. Staying out of judgment requires understanding."

As discussion continued, the group concluded that as attorneys, we tend to shame and judge people, rather than trying to gain an understanding of the various perspectives involved and help our clients solve their problems.

As the program drew to a close, I think it's fair to say that everyone felt stirred and intellectually stimulated. There seemed to be a lot of agreement with the notions put forth. Lawyers present found the program very "thought provoking" and "philosophical." One told me that the presentation required people to engage in some very deep thinking. It was a very lively program, and very gratifying for me, I confess.

What I experienced in that room was incredibly powerful and uplifting. It really was one of the most exhilarating experiences of my life because I could not have imagined a better outcome and response to the power of empathy in the practice of law.

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