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The Perfect Storm: Lawyer Limitations and the Adversarial Model in Family Law

MARK B. BAER

Family law attorneys typically want to help their clients. Nevertheless, people are becoming increasingly vocal about the fact that lawyers and the legal system are not properly addressing the emotional issues involved in family law matters, and otherwise feel alienated and disconnected from the legal system.¹ Since the vast majority of us care about our clients and want to assist them to the best of our abilities, many family law attorneys find their clients' dissatisfaction very frustrating. This is unfortunate, considering that we "spend almost two-thirds of our life's waking hours in some sort of "work." And, equally important, if you harbor the belief that your engagement with your work life will not impact your nonwork life, you are grossly mistaken."² "No work can ever satisfactorily become you until your voice and your values are all that matter. Then, joy becomes attainable."³ Therefore, wouldn't we all benefit if we were able to improve our client satisfaction? This is a serious question, which requires serious thought.

By recognizing our limitations, we can learn to overcome them and thereby provide a better result for our clients. As Donald Rumsfeld once said, "There are things we know that we know. There are known unknowns. That is to say there are things that we now know we don't know. But there are also unknown unknowns. There are things we do not know we don't know."⁴ In other words, we don't know what we don't know.

DIVORCE AFFECTS DECISION MAKING

Did you know that almost all experts agree that one should avoid making any major decisions within the first year following the death of a spouse?⁵ Did

you know that this is because of the manner in which people process and manage the stress, grief, fear, and loss? Did you know that the death of a spouse or child is the highest level of stress that one can experience?⁶ Did you know that the stress of a divorce comes second only to the death of a spouse? Did you know that marital separation falls just below divorce in the stress assessment?

Studies over the past 30 years or more have found that I.Q. performance levels can decrease by 25 percent and that analytical reasoning scores can drop by 30 percent from low stress to high stress and this applies to everyone from children to corporate leaders.⁷ Did you know that in a divorce, the temporary decrease in one's I.Q. performance level

Mark Baer is recognized as a "thought leader" in many areas of Family Law for his provocative and forward-thinking ideas on improving the way in which Family Law is handled. As a former litigator who advocates the use of mediation and collaborative law whenever possible, Baer points out the inherent flaws that exist in litigating Family Law matters, then reveals more creative and less destructive approaches. He offers clients and other attorneys insight on how the dissolution of familial relationships, as typically practiced, leads to less-than-optimal results, both financially and emotionally. He also highlights the difference between "dispute resolution" and "conflict resolution" to offer simple ways of achieving a better result for all parties involved, including the children. Mr. Baer was recognized as Southern California Super Lawyer in the Family Law category in 2012 and 2013. He has been a columnist for the San Gabriel Valley Psychological Association's newsletter since September 2008, and also has had a blog column in the Divorce Section of the Huffington Post since May 2013.

lasts until approximately one and a half years after the divorce has been finalized?⁸ Did you know that when issues arise postdivorce, that it results in a repeat in the drop in I.Q. performance level? When a person's stress level is sufficiently elevated, the ability to fully and effectively use cognitive ability and emotional intelligence in tandem to make timely and effective decisions is significantly impaired.⁹ This results in displays of some or all of a characteristic set of deleterious behaviors, such as: not listening; over-analyzing; not making decisions; making "emotional" decisions; "flip-flops;" making reactive, short-term, fear-based, or anger-facilitated decisions; acting in such a way as to satisfy only the minimum requirements for achieving a particular result; hedonism; or failing to notice something in plain sight.

ROLE OF THE LAWYER

Thus, whenever family law attorneys are involved, their clients' "effective decisions" may very well be "significantly impaired." In such times of extreme stress, individuals often fail to use their tried-and-true coping mechanisms. The assumption that because clients are adults, that they are thinking clearly, and that they want what they say they want or think they want is a big assumption.

The stress from divorce is second only to the stress from death.

The emotional component in family law involves "uncoupling," and the divorce itself consists of the legal and financial aspects. People going through a divorce understandably and appropriately expect their attorney to explain and help them to navigate the treacherous waters of the divorce process. However, those aspects of the "case" are only a fraction of the issues involved.

Attorneys are perfectly capable of explaining to a client that emotions cloud judgment and that they may well regret making an emotionally based decision. Indeed, logic and reasoning are particularly important in the practice of law. Lawyers use logic, reasoning, and their knowledge of the law to get their clients from point A to point B. However, what does that have to do with the client? If the client's cognitive understanding and reasoning skills are impaired, how is the lawyer's explanation of

any help? What do lawyers know about restoring or at least improving an individual's decision-making capabilities?

Under these circumstances, can anybody reasonably believe that attorneys alone can help navigate people through the treacherous waters of the divorce process? Are such clients sufficiently mentally competent to accept an attorney's advice? Does the fact that an attorney might explain to clients that emotions cloud judgment and that they may well regret making an emotionally based decision solve the problem? Does such a comment somehow restore or at least improve an individual's decision-making capabilities?

Lawyers serve a necessary and useful purpose in family law and for society as a whole. However, if we are not self-aware, we can do more harm than good.

LAW STUDENT ORIENTATION

According to a June 1997 article from the American University Law Review titled, "Lawyer, Knowing Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism,"¹⁰ since around the 1960s, "individuals who chose to enter law school have a low interest in emotions or others' feelings.... Law students' morality" is less concerned about "justice, fairness, equality, and social utility, rather than the formal rules." It has been found that law students disproportionately rely on analytic, rational thought to make decisions, rather than focusing on the emotional or humanistic consequences of their decisions.... A disinterest in emotions and in interpersonal concerns appears to exist long before law school, even though it may be intensified during law school.... As a result of their legal education, "students may ignore the social and emotional consequences of decision-making.... There is recent evidence that lawyers are actually more like engineers than they are like nurses or teachers, being logical and unemotional, yet unlike engineers, in that their work is inextricably involved in interpersonal conflicts and issues. These lawyer attributes, although they may be adaptive for the practice of law because they allow the lawyer to avoid feeling unduly emotional about his or her clients' cases, may be maladaptive in the client counseling part of legal practice."

In 2002, the Section of Litigation of the American Bar Association prepared a report titled, "Public

Perceptions of Lawyers Consumer Research Findings."¹¹ Among other things, it was found that:

[L]awyers have a reputation for winning at all costs..., rather than client interest.... Among other things, that report found that "some consumers feel that lawyers do more harm than good. This is particularly true of people going through a divorce. They say that divorce lawyers can exacerbate an already difficult situation.... This idea does not just come from the media. Personal experiences bear it out.

Unfortunately, in the field of family law, our limitations have the potential of causing a great deal of damage to our clients, their families, the children of those families, future generations of those families, and ultimately society as a whole. That damage is sometimes irreversible and otherwise can take a great deal of therapy to reverse.

Some divorce lawyers can exacerbate an already difficult situation.

According to Deborah Hecker, PhD, "although divorce lawyers do not need to be trained psychotherapists to represent their clients successfully, they need to do what they can to reduce conflict and promote a divorce environment that helps their client remain focused, calm, and goal-directed."¹²

Lawyer Selection

Although it may be expressed in many different ways, the selection of an attorney is the most significant factor in determining how a case will proceed. An attorney's competency is extremely important; however, the attorney's personality and overall philosophy with regard to family law are also of great importance. From a client's perspective, does it make more sense to increase or decrease the level of distrust and conflict? Doesn't the amount of money spent on legal fees and costs increase, as the level of distrust and conflict between the parties and their attorneys grows? When people involved in a legal dispute are unable to communicate constructively with each other, how does that impact legal fees? Did you know that research shows that a significant percentage of self-represented family law litigants were previously represented and spent

an average of \$50,000 getting nowhere?¹³ When an attorney "advises" a client not to communicate directly with the other party, who does that benefit? Research shows that a significant percentage of self-represented family law litigants state that lawyers and judges have undermined their mediation efforts.¹⁴ Research also shows that a significant percentage of self-represented family law litigants found opposing counsel to be unnecessarily offensive.¹⁵ In family law, those clients frequently have children together, whether they are minors or adults. How does such advice ultimately benefit those clients or their families? Remember, like it or not, if there are children of the relationship (regardless of their age), the family still exists after the relationship ends. Things that parents do to each other during a divorce—either on their own or with the assistance of their attorneys—have consequences to families that last forever. Is it the attorneys or the clients, their children and their families that get to live with those consequences?

Effect on Families

People don't get along well after having litigated against each other. Nonetheless, we subject parents to the litigation process and somehow expect that they will react differently because they happen to have children together. We should recognize the fact that even parents of adult children are still parents, and part of a real family that persists after any divorce, until the death of the older generation. Therefore, parents are, in essence, bound together for life by their children. We must not ignore this reality just because the court does not have jurisdiction over such issues.

How can we really expect that families will not be permanently damaged by litigation? Divorce doesn't impact children, especially if they are adults, does it? When families are ripped apart by divorce, it has consequences.

On June 7, 2013, a "deranged California man gunned down four people and unleashed violence on the streets of Santa Monica and did so because he was angry over his parents' divorce."¹⁶ By the way, the family had apparently been "ripped apart by the divorce."¹⁷ This was by no means the first such tragedy stemming from divorce.

DOMESTIC VIOLENCE ISSUES

It is well recognized in psychological communities that the stress of divorce itself is monumental,

often reaching a 9 out of 10 magnitude on the SUDS scale (Subjective Units of Disturbance Scale). Stress is a pain and a pressure that seeks relief, and sometimes, tragically, release from the pressure is expressed in violence. The American Bar Association acknowledges, for example, that in child custody battles, reports of domestic violence are common, and by some estimates as many as 50 percent of child custody disputes involve domestic violence.¹⁸ Below are some examples.

Continuances and other delays are typically considered benign—but, are they?

In one month alone, in October 2011, three tragic incidents made headlines:

- In Dallas, after a court awarded a father sole custody of his seven-year-old boy, the mother shot her son and herself, even as her estranged husband waited outside with police.
- In New York State, a successful attorney, who was reportedly distraught at the prospect of losing custody of his children in an upcoming trial, killed his wife and his children before turning the gun on himself.
- In Seal Beach, California, Scott Dekraai—a despondent husband who had just faced a court imposed delay in his bid to obtain full custody of his son, blasted into the work place of his estranged wife, killing her and seven others.

Although it is facile to argue that such instances can be attributed to the essentially unbalanced state of the individuals, this argument avoids dealing with the fact that the legal system aggravates the possibility that fragile people under enormous stress will lose control. For example, in the Seal Beach situation, Dekraai had just come from a hearing that would have forced him to wait an additional two months for a ruling. Continuances and other delays are typically considered 'benign'—but are they, really? Forcing suffering people to endure frustrated expectations and prolonged ambiguity, as the family law system routinely does, is unquestionably—if passively—malignant, and can be a real trigger for violent behavior.

As a prominent family court judge has observed, "The court system was not built to house these [violent] emotions, and attorneys are not trained to reduce this kind of suffering."¹⁹

EFFECT OF LEGAL SYSTEM

The American legal system unintentionally aggravates conflict in divorce situations, even though models that are designed to reduce conflict—such as mediation, and other collaborative approaches—are available as alternatives.

Parents need to understand that their behavior—what they do and say and how they act toward the other parent—has long-term consequences. The things people do, with or without the assistance of their attorneys, have consequences that will last for generations to come. Since divorce is a fact of life, all we can do is to make it a less destructive process. According to Joan Kelly, PhD, 80 to 85 percent of family law matters can be resolved without litigation. Since you cannot unring the bell, should all cases be litigated just because 15 to 20 percent of cases (one in every five to six cases) may ultimately be litigated?²⁰

Although there may be disagreement regarding whether or not divorce in and of itself is damaging to children, no reasonable person can disagree that the way in which people divorce plays a significant role. All the top researchers in the field have come to the conclusion that it is the way in which people divorce (including what they do or don't tell their children) and the parental conflict that damages children. "Children are harmed from the following things: (1) Powerlessness/Helplessness; (2) Lack of Predictability (stability and predictability are not the same thing); (3) Parental Conflict (a major cause of helplessness and unpredictability); (4) Poor Parenting (caused in part from parental conflict, which happens to be increased by the adversarial process); and (5) Poverty (which increases all of the other factors)," says Ruth Bettelheim, PhD.²¹

According to Ursula Kodjoe, MA, "Children of highly conflict-ridden families feel helpless with regard to the loss of important relations. Such children experience some of the following consequences: (1) Twice the risk of developing a problematic behavior; (2) Low self-love and self-esteem; (3) Development of externalized symptoms such as aggressive acts of violence; (4) Development of internalized symptoms such as sadness and depression; (5) Psychosomatic symptoms such as asthma; (6) Problems of adaption; and (7) Loss of respect for adults."²² Adult children

of divorce who have participated on divorce panel discussions have repeatedly confirmed this. The outcome from the child(ren)'s perspective has nothing to do with the particular parenting plan (assuming there was one), but with how the parents acted.

The words we use tend to impact the way we behave.

In every dispute, regardless of circumstances, there will always be some level of conflict and some level of distrust. Ignoring a conflict does not make the conflict go away. In fact, it tends to exacerbate the conflict. Litigation ignores the actual conflict in order to resolve the dispute. What do you think is powering the litigation train when a person is upset about their spouse having an affair, being out of work for too long, incurring excessive debt, etc.? Interestingly enough, those issues are "irrelevant" as far as the law is concerned. Moreover, those issues are not even addressed in those jurisdictions that still have fault-based divorce. Just because the "fault" must be established, does not mean that the issues themselves are addressed. In litigation, we "ignore" those issues in order to resolve the "dispute," which happens to be a symptom of the "conflict" we are "ignoring."

Exacerbation by Lawyers

At the same time, we place the parties in an adversarial process because litigation is adversarial by definition. By ignoring the conflict and using an adversarial approach, we exponentially exacerbate the conflict and the level of distrust, regardless of what the attorneys do. This does not even take into account the fact that some attorneys do an exceptional job of exacerbating the conflict, above and beyond that which would occur merely due to the process itself.

The fact that many lawyers actually believe the distinction between conflict resolution and dispute resolution is nothing more than semantics is frightening.²³ That is the same as saying that the only difference between war and diplomacy is terminology. In fact, according to Justice Harvey Brownstone, "When you start a court case, you are starting a war."²⁴

If you really think about it, by placing people whose heightened emotions interfere with their clarity of thought into an adversarial process with attorneys who are not equipped to properly address the emotional issues, we have created the perfect storm. The storm victims who are either

killed or wounded include the former spouses, their children, their family, future generations of that family, some innocent bystanders to any resulting violence, and society as a whole.

The way in which people think and rationalize things is fascinating. This is especially true when people make a circular argument, also known as an argument from ignorance. In such cases, "there is no logical connection between the evidence itself and the conclusion. The only logical conclusion between the premise and conclusion is the restatement of the presupposition to the conclusion."²⁵

There is a difference between conflict resolution and dispute resolution. Conflict resolution is a subset of dispute resolution, as is litigation. However, one works through the conflict in order to reduce it and decrease the level of distrust. Unfortunately, the other resolves the dispute with the unfortunate byproduct of exacerbating the level of distrust and conflict. When attorneys add fuel to the fire, it only makes it that much worse.

In Germany, they no longer have adversarial trials on issues pertaining to children. Judges in Germany no longer tolerate lawyers who try to delay hearings and the resolution of issues because continuances are not benign. As noted above, the time of uncertainty is itself stressful and leads to destructive behavior. The role of attorneys in Germany is now de-escalating conflict. "The results seem far superior than when they used to escalate conflict," says Ursula Kodjoe, MA.²⁶

Mentioning ADR

Tobias Desjardins is an expert mediator and therapist who frequently is referred families in the process of a protracted divorce and custody battles, often when a child has become disturbed or even suicidal. He states that by the time he gets such referrals, both parents have worked with a number of attorneys, and yet they have consistently told him that the very first time they learned about mediation or collaborative divorce was from him. In my opinion, this fact is not just unethical, it's plain tragic.

It is a grim reality that those who choose to use the traditional system of litigating divorce through family court will continue to face situations that exacerbate, rather than allay, the great pain and stress of splitting a couple or family. And some of them, tragically, will resort to violence. Even if someone does not resort to violence, does that mean that they were not harmed? Just how long do lawyers and the legal system plan on ignoring this reality?

There is a legal doctrine in tort law that asserts that a pre-existing vulnerability, which causes an individual to be more injured by an action than a less vulnerable individual would be, does not exonerate the wrongdoer from owing full damages for the full injury to the person. Thus, if it is axiomatic that divorcing individuals are psychologically more vulnerable than the average person, then in my opinion, the US legal system should be held accountable for the destruction it causes them—or change.

Language Matters

Ripping families apart just because the marriages are over has severe and lasting consequences to the former spouses, their children, the family, future generations of that family, and society as a whole. It is true that “divorce is the result of a failed marriage, not the cause of it.” Many lawyers actually believe that “the use of such inflammatory expressions as ‘ripped apart by divorce’ and ‘custody battles’ enhance strong reactions to failed marriages.”²⁷ There is no doubt that the words we use or think tend to impact the way in which we behave. However, such an argument begs the question as to what can be done to make the divorce process more civilized and less destructive.

Everything is a matter of perspective. Which came first, the chicken or the egg? Did people start using those terms before such things were occurring or were such things occurring and therefore people started using those terms? Families were being “ripped apart by divorce” long before people began using that term. Lawyers and the legal system, in general, must stop doing things that bring about such a result.

The power of words has long been recognized in adages such as, “The pen is mightier than the sword.” Whether spoken or written, language is tremendously forceful, whether for building up or tearing down. In the course of any divorce litigation, words are employed to craft correspondence, declarations, and pleadings, designed to coerce a settlement, or otherwise persuade a judge to the client’s favor. Outcomes are often determined by the way in which the “game” is designed. As the Bible says, “Reckless words pierce like a sword, but the tongue of the wise brings healing.”²⁸

Some Biases

Are our biases somehow interfering with our perceptions? One is confirmation bias.

“Confirmation bias is a phenomenon wherein decisionmakers have been shown to actively seek out and assign more weight to evidence that confirms their hypothesis, and ignore or underweigh evidence that could disconfirm their hypothesis.”²⁹ Another is status quo bias. “Most real decisions have a status quo alternative—that is doing nothing or maintaining one’s current or previous decision. A series of decision-making experiments shows that individuals disproportionately stick with the status quo.”³⁰

A mental health expert acting as a divorce coach is not doing therapy.

Warren Buffett, responding to a question about what makes a successful investor, said, “Once you have ordinary intelligence, what you need is the temperament to control the urges that get other people into trouble in investing. These urges are known as behavioral biases to psychologists and behavioral economists. Behavioral biases are traits or tendencies that influence us to think and act in certain ways. All people have some combination of behavioral biases—they contribute to our individuality, and when it comes to investing, our irrationality.”³¹ We can say the same thing when it comes to working with individuals dealing with legal matters.

Another commentator on investments said that, “Worldwide, we humans share a curious, common, and overlooked propensity to automatically perceive many risks as greater or less than they actually are. These deep-rooted risk misperceptions make it easy to unknowingly set ourselves up for misjudgments, lost opportunities, and unpleasant surprises, particularly when investing.

Without realizing it, these and other ingrained perception errors can cause us to undermine our own best interests.”³² This same issue arises within the legal realm.

LISTENING

As one writer has said:

one of the ways that you learn to adapt to change, to develop more appropriate behaviors, is through the feedback of

others.... Learning to listen (or, perhaps relearning, as you listened well as a child) is not easy. But it is critical. First, to function effectively and efficiently, you must know what is going on. Listening is an exploration. It can lead to meaningful change and adaptation. It can make your life better. Second, by not listening you are cutting yourself off from relationships that could serve you well, facilitating your growth, exposing you to new perspectives and allowing for creative problem solving.... You need to learn how to listen without your filter or belief. So, how can you keep your beliefs from screening your listening? Could you entertain the notion that you might be entirely wrong? Is it possible that the impression that you hold is shaping how and what this person is communicating? Could it be that if you held yourself open to discovery and withheld judgment, you might learn something new that changes your perspective?³³

COLLABORATIVE LAW

In 1990, Stuart G. Webb invented collaborative law, a process within which to resolve family law issues in a fair and respectful manner, without going to court. It is much like a mediation in which the spouses each have separate legal representatives, but without the mediator. Both mediation and collaborative divorce involve interest-based negotiation. However, in a collaborative divorce, an interdisciplinary team is assembled of attorneys, mental health professionals, and financial professionals working interactively with the clients as equals. The attorneys guide the clients through the legal process to reach a negotiated settlement. The coaches assist them in managing their anxiety, improving the way in which they communicate with each other, creating an effective parenting plan, and restructuring their family. The child specialist is a neutral third party whose job is to understand the situation from the perspective of the child(ren) and to advocate for their interests. The financial professionals help to educate the clients regarding the best ways to divide their assets, and to plan for the financing of two households.³⁴

It is important to note that when mental health professionals are acting as divorce coaches, they

are not doing therapy. "Fundamentally, therapy is about fixing people or systems that are broken, mostly from the inside out. Governance is about decision making and developing the frameworks and skills to make productive collective choices.... The coach's role is not to 'fix' the family system or to help 'cure' individual or collective dysfunction.... The goal is to help the family gain the skills to make effective decisions that work for the collective good in productive ways."³⁵

DIVORCE COACHES

"Divorce coaches have the skills and training needed to assist people in reducing or otherwise managing stress. They work with people to dilute the intensity of their emotions. They help individuals to apply their existing coping strategies to the situation at hand. In addition, they can work with individuals in creating new ways of coping. Mental health professionals are especially trained to assist people in separating highly volatile emotions from the ability to make sound decisions."³⁶ "When a person learns to recognize and understand what is triggering their emotions, they are in a better position to cope with their symptoms."³⁷

Collaborative divorce incorporates all the skills needed to increase the likelihood of a successful outcome for the client through its interdisciplinary team approach to divorce. In other words, the spirit of collaborative divorce is its interdisciplinary team approach. The result is that we are able to support clients through their transition in a knowledgeable, compassionate, and nonadversarial way so that they are able to make the best decisions for their family.

Lawyers need to recognize their limitations and begin involving professionals who can help them better assist their clients in obtaining the best possible result and at a lower overall cost. It would be a mistake to restrict the involvement of divorce coaches to the collaborative divorce process. All of the benefits of employing divorce coaches apply equally well to any and every family law case, regardless of process. Of course, all of this is based upon the assumption that the divorce coach is an appropriate fit for the particular client and case. The same can be said for the suitability of the attorney retained as well.

In the family law arena, the collaboration between attorneys and mental health professionals is the perfect symbiotic relationship.³⁸

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