
Psychology and Family Law

Why Today's Lawyers Are Better At War Than Peace

By Mark Baer, Esq.



Law schools train attorneys to spot problems, but not how to resolve them. 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.

When I took the LSAT for admission to law school in 1986, part of the test involved problem-solving. Such a section is still part of the Bar examination and had been part of the examination long before I took the test, because problem-solving is a traditional hallmark of a good lawyer. Once in law school, we are taught the law, and to separate emotions from the issues, and then to analyze whether or not a particular case or statute applies to a specific set of circumstances. Unfortunately, we are not taught to problem-solve.

Problem-solving 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. 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. The ABA further suggests that lawyers take the initiative to learn analytic and problem-solving skills, and a basic understanding of human behavior and social interactions, as well as good listening skills. However, since it is not mandated that anyone learn these skills to receive a law degree, most lawyers do not learn such skills. Consequently, a lower standard of lawyering has been created, where rather than focusing on solving the original problem, lawyers instead create more problems and rack up billable hours doing so. 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.

In a recent case, the parents of a newborn were unable to agree upon a parenting plan and litigated that issue, even though both parents were unemployed and used all of their savings to do so. At the hearing, the court made orders regarding child custody, visitation and child support. Thereafter, the father secured employment. Since his job required him to travel out of town, he was unable to exercise all of his court-ordered visitation. Rather than agreeing to a more flexible schedule that would accommodate his changing work schedule, the mother filed a motion with the court, wherein she requested that the father's visitation simply be terminated. At the hearing, the judge ordered that unless the father comply fully with the original visitation schedule--that was made while he was unemployed--his visitation rights would be duly terminated. Since the father did not want to risk losing his visitation rights, he advised his employer that he would no longer be able to travel for work. He was terminated as a result. Had the judge been trained in problem-solving, the result in this case may well have been better for all involved.

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 problem-solving skills. The fact is, many attorneys obtain outside problem-solving training through mediation programs, or through other means. For example, in my last article I described the collaborative law movement, which has become increasingly effective in developing lawyers' abilities to problem-solve effectively and wisely in family proceedings.

However, please note that mediation is unregulated in most places, including California. Thus, a person can practice as a "mediator" without ever having received any formal training. On the other hand, collaborative law organizations typically have requirements for membership, which tend to include significant training in collaborative divorce, mediation, and conflict resolution. Thus, when selecting professionals from such organizations, a person can be confident that the members have received at least the minimum level of training required for membership. Those who find such an individual to handle their legal matter can be sure that at least their lawyer will be interested in resolving their problem with the most reasonable and positive outcome, rather than simply defining the problem and litigating it in court.

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