

# Psychology and Family Law

## The Importance of Empathy in the Legal Profession

### Part I of a Series

By Mark Baer, Esq.



Recently, I was invited to speak at the first official meeting of Bruin Professionals Lawyers Affinity Group. The group comprises lawyers from a variety of fields, and I was asked to present on a topic which would be relevant across various specialty areas of law.

I immediately decided to talk about *empathy*, because it is a central concept for me, which I believe is much needed in the legal profession. I named my talk, The Importance of Empathy in Our Work as Lawyers, and defined it like this: "Empathy involves understanding another person's situation from their perspective. The more we are able to understand and identify with each other's emotions, attitudes, and needs, the better able we are at resolving conflicts and disputes."

There was a relatively small group of twenty at the meeting, including myself, which facilitated the kind of spontaneity I prize in making presentations of this kind. I began by posing the question, "Why do you believe that people call lawyers?"

After some discussion, the consensus was that people call lawyers to help them to solve a problem. I then asked, "Why do you believe an increasing number of potential clients are trying to handle such things on their own, without the help of attorneys?" Discussion ensued, and the audience concluded that the common perception is that lawyers are *conflict creators*, and that they're too expensive.

Putting aside for the moment the notion that attorneys are, indeed, often viewed as argumentative warriors, rather than conflict resolvers, I turned to the cost factor. I stated the following: The four main variables in determining how much a case will cost in legal fees are: (1) complexity of issues involved; (2) difficulties managing client expectations and needs; (3) level of conflict; and (4) choice of counsel. I explained that the choice of counsel (4) greatly impacts variables (2) and (3), and determines the process and approach used to address the complexity of the issues, variable (1). I asked if anyone disagreed with that assessment, and not a single attorney did.

Since I'm writing this piece for a psychological association, rather than a legal one, I'd like to explain those factors a bit further, before going on to elaborate on them in Part II.

*Complexity of Issues* may be understood by taking the example of a very short marriage in which both spouses receive all their income from employers, in situations where they have no ownership interest, and they are W-2 employees. There are no minor children or adult children with special needs, no

retirement accounts, and the spouses live in an apartment that they rent. As we add more factors to the mix, the issues become more complex. Importantly, situations with the exact same "complexities" can be handled in either a combative approach (litigation); or by negotiation, mediation, or the collaborative law process. Whichever approach is taken is going to be a huge factor in the ultimate cost of the case, inasmuch as litigation is the most costly way to proceed, in good part because it exacerbates the conflict.

With regard to *Management of Client Expectations*, the example I like to use is the following: Let's say a person involved in a car accident believes they will receive \$1 million from their personal injury case, but the recent jury verdicts in that particular courthouse at that particular time for similar injuries is approximately \$30,000. If the lawyer cannot adequately manage their client's expectations—meaning, persuade him that his expectation of \$1 million is unrealistic—then that case will have to be litigated in court. (In family law, since lawyers work on an hourly basis, it's ironically true that the less skilled or less willing they are at managing their clients' expectations, the more legal fees they'll generate.)

As far as *Level of Conflict* is concerned, it's up to the professional or professionals involved to either de-escalate the conflict, or, alternatively, to *escalate* it. Attorneys inclined to prefer litigation tend to escalate conflict, since litigation is a combative process. On the other hand, professionals who provide facilitative and transformative mediations, or collaborative law services definitionally work to de-escalate the conflict.

Then, there is *Choice of Counsel*, which impacts all the other variables. The chosen lawyer is involved in the selection of process and approach, management of client expectations, and the level of conflict.

It is important to note that all four variables are determined by "the lowest common denominator." Thus, if one spouse hires a mediation-minded attorney, and the other hires a litigator, the latter will pretty much determine how the case progresses in terms of process, approach, level of conflict, management of client expectations, etc. The more aggressive attorney sets the tone, and hence the likelihood of costs rising. Significantly, the average cost of a litigated divorce in California is \$45,000 per side, or \$90,000 total. The average cost of a mediated or collaborative divorce is a bare fraction of that.

In Part II, I hope to demonstrate how the cultivation of empathy among attorneys can yield huge benefits in financial as well as human terms.

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