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The case for adding empathy to your legal practice

By Jan Frankel Schau

In his 1989 Inaugural Speech, the late President George H.W. Bush famously stated: "America is never wholly herself unless she is engaged in high moral principle. We as a people have such purpose today. It is to make kinder the face of the nation and gentler the face of the world."

Lawyers have traditionally been trained as critical thinkers. With great precision and exacting analysis, we have grabbed onto our view of the facts and carefully fit it into our interpretation of the law to come up with a precise analysis and strategy for winning or dominating the other side in court. We pride ourselves on the sharpness of our analysis and our prediction as to the certainty of the outcome when the strategy for handling the case is developed and when the ultimate decisions are made. Indeed, our decisiveness is viewed as our strength and our sharp analysis as our power.

In a recent New Yorker article, "Michael Bennett's Political Football," by Louisa Thomas, an NFL football player who is working for social change, the comparisons between the locker room and the courtroom became apparent. Bennett, a defensive end for the Philadelphia Eagles, describes his discomfort around the NFL players' decision to protest racial inequality by taking a knee during the national anthem. As he retells it, it was a classic tension between pride and toughness versus empathy and vulnerability. In a sport where the whole point is to dominate the other side with physical tackles and aggressive capture of the football at any cost, he deferred to his respect for the military since the first game of the season happened on September 11, a day where the greater goal was for Americans to come together, not separate themselves from one another. He did not take a knee during the protest of the national anthem on that day.

Bennett notes that the game of football requires two sides who oppose one another with vigor and sometimes violence. Another player told the author, "If you act the way you acted on a football field [on the street] you'd get arrested." Like litigators, players practice and get themselves "hyped for a game" and perhaps conduct themselves in ways that they would not otherwise tolerate

New York Times News Service

Michael Bennett talks with reporters during Super Bowl Media Day at the Prudential Center in Newark, N.J., Jan. 28, 2014.

in social interaction — accusing one another of lying, hiding important facts or other outrageous conduct, which may devolve into name-calling, yelling and terminating discovery to seek punitive sanctions against one another for misconduct in the course of what should be a professional interaction. It is, to many, uncomfortable to dole out or receive these bruising and personal accusations. It is also probably not behavior that we would readily teach our children to emulate in common interactions with co-workers or competitors. Yet that capacity for discomfort may be precisely the path to the social change that Bennett stands for and about which George H.W. Bush spoke.

Athletes have seldom broken down the barriers of emotion in the way that author and professor of social work, Brene Brown, characterizes as "vulnerability." Instead, their sport, like litigation is "obsessed with beating their opponents" not allowing for empathy for others. In order to be truly empathetic, Brown suggests that one needs to become vulnerable, or open in a way which we have traditionally seen as a sign of weakness, not strength. And yet, there is great strength in empathy.

According to Dan DeFoe in a blog called "Psholawlogy", researchers have found that clients very often feel that their lawyers don't care about their feelings or don't understand them. Indeed, client satisfaction surveys spanning over three decades have consistently demonstrated that client's dissatisfaction stems from their perception that lawyers care more about the facts and the legal principles than the emotional drivers their clients hold. Lawyers are typically problem-centered, not person centered.

We also know from our many decades of studying lawyer's emotional health and well-being, that our profession tends to be among the most unhealthy, perhaps as the result of being closed off emotionally, anxious, depressed and sometimes incapable of experiencing or expressing emotions. Our resilience is worn down by our vigilance to remain single focused upon facts, arguments and the law, instead of allowing ourselves to be vulnerable to feelings of our clients and our adversaries.

One of the key components taught in trainings for mediators is the "listening" phase of the mediation. Listening is not a skill that is typically honed in law school or during the development of a highpaced, outcome-oriented career in law. Lawyers are trained to be critical thinkers who are well trained to parse every word in the analysis of rules, regulations and case law in order to fit it within a particular set of facts for the "win."

Mediators, on the other hand, are retrained to focus on the issues "below the surface", to ask probing questions that are open-ended, not designed to get to "truth and justice" so much as to understand what lies beneath the conflict for each of the parties. Without the intention to demonstrate expertise or to act decisively (as would a Judge or an advocate), mediators make an attempt to slow down the trains, which have been barreling towards one another on opposite tracks and to get the full picture as to what is motivating the clients in order to begin to uncover the solution to the problem at hand.

Cardiologist and Nobel Peace Prize winner Bernard Lown emphasizes the importance of taking a patient's history in his book, "The Lost Art of Healing." He describes how even scientists can best serve their patients by looking beyond the obvious, presenting physical symptoms to a genuine effort to understand the person behind those symptoms. In gently but persistently probing, there is, according to Dr. Lown, an extraordinary opportunity to gain a holistic view of the patient before him. Treating the heart goes beyond stents and medication.

For mediators, in many instances, the key to listening is simple: stop talking. As Anna Howard, Associate Editor of the Kluwer Mediation Blog observed in her blog "Don't just do something. Sit there", the skill of saying nothing is both difficult and powerful in mediation. By allowing for some silence during the opening phases of mediation, the mediator gives the process back to the parties and their advocates to communicate and reflect and to ultimately take responsibility for both the dispute and its resolution. She quotes the poet, Rumi, who wrote: "There is a voice that doesn't use words. Listen."

In representing clients in legal disputes, there is also an opportunity to listen beyond the facts and to create space for empathy with our clients. If we, as the legal representatives, can begin to understand our client's "pain points", we can also begin to develop solutions to address them, rather than going for the "win at all costs" in the court room. Alexander C. Gavis and Mark E. Young, co-authors of a blog with "Corporate Counsel", argue that not only will empathy better serve client's needs, but "this additional insight and perspective can fuel innovation and more productive and efficient service delivery, which will in turn strengthen and deepen existing client relationships. Lawyers who can empathize and identify the underlying problems give their clients an extraordinary advantage."

In the New Yorker article, Michael Bennett observed that "It's not the athlete who's going to change police brutality … But pro athletes are invited to the table. They can try to speak to, and for, those who aren't in the room."

As lawyers, by taking the time to listen and developing empathy for our clients and the others involved in the dispute, we, too, can more responsibly speak for those who otherwise remain voiceless. Perhaps then we can honor President Bush's vision of making the face of the nation kinder and gentler in the world.

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