
Kluwer Mediation Blog

Did They Teach You This In Law School?

John Sturrock (Core Solutions Group) · Saturday, April 29th, 2017

I recently attended the annual American Bar Association Dispute Resolution conference in San Francisco. Several themes emerged (for me) as fairly critical for modern lawyers. Here's a top ten.

Problem-Solving and Risk Analysis is more than learning about the law or what a court might do. Most issues which clients bring to lawyers are resolved without going to court. Those which do get into the court system are rarely decided by a judge. Client interests and needs are usually much broader than the legal issues on which rights and remedies are based, and lawyers need to be able to identify and analyse these, understanding personal, professional and/or commercial factors.

Diagnosing underlying symptoms and exploring all options for early resolution generally benefits from *Non-Binary Thinking*. But how much of a lawyers' training tends to be located in the right/wrong, black/white context of case law and judicial decisions? Adaptability and flexibility are key attributes of modern lawyering. Most learning comes from mistakes; most solutions from creative thinking. How can lawyers help clients adopt preventative strategies to avoid repetition of disputes?

Systems Thinking promotes ways to address deeper issues, by examining the linkages and interactions between component parts of a defined system over time and within a broader context. With the pace of change and complexity of problems increasing unpredictably these days, while resources are declining, standing "outside" and looking more holistically at an issue may be in a client's best interests.

Increasing understanding of *Implicit Bias* reminds us of preferences over which we have no conscious control and about which we may be wholly unaware, gender and race being two of the most significant. But there are many more. These affect our responses and decisions in many situations, whether as advisers or clients, leading to errors, not least making wrong assumptions, jumping to conclusions and being blind to obvious facts. In turn, our relationships with others are influenced.

This links with *Neuro-Science*. Our understanding of the human brain has grown exponentially in recent years. For example, we now appreciate how much we seem to be at the mercy of the reptilian part of our minds, which developed in pre-historic times as our essential protection against external physical threats, enabling an instinctive, intuitive response to danger. That default reaction still kicks in today when we experience danger or pressure in a social situation. But fight, flight or freeze is not helpful in circumstances in which we need considered, reasoned and measured responses.

This takes us inextricably to *Emotion*. Nearly all decisions are made, at least in part, for emotional reasons. We need to be aware of the effect of our own, and others', emotions in any given situation. Awareness will reduce the risk of ill-thought through and apparently irrational responses, while enhancing the quality of advice given and decisions made.

Use of Language is part of this. Legal language can be opaque and exclusive. When communicating with another client or lawyer about alleged losses or seeking to vindicate or defend clients' rights, some lawyers can be aggressive and adversarial in tone and word choice. Paradoxically, that approach can be detrimental to one's own client's interests. Communicating effectively in tough situations is a skill we all need to learn.

A lawyers' job should be to achieve the best possible outcome for a client. If so, essential to any lawyers' toolkit should be an understanding of *Behavioural Economics* and how outcomes can be optimised, complementing a better understanding of how parties actually act in real negotiations. This is big picture, "macro" stuff, not mathematical modelling.

Clients' interests are best served by skilled professionals who understand and can deploy interest-based or "integrative" *Negotiation and Mediation* strategies. Cooperative bargaining can produce a better overall outcome for parties working together than either could achieve on his own or adversarially. This is most effective when parties wish to establish or continue a business or personal relationship. Mediation enables this kind of negotiation to be conducted even when there seems to be deadlock or unwillingness to progress.

Finally, how about *Purpose and Ethics*? What is the point of being a lawyer? How well do we understand law's role in modern society? In what ways does law converge with other disciplines? If public opinion about lawyers is low, what can we do? How do we learn about clients' real needs? How might we reduce reliance on lawyers and the amount of legal costs? In complex, uncertain, volatile times, what changes might we need to consider?

[Last month I blogged about our "Pop Up" Brexit mediation event. If of interest, here is a [fuller report](#).]

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