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LITIGATION AS VIOLENCE

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LITIGATION AS VIOLENCE

FEBRUARY 22, 2015 | JOHN LANDE | 5 COMMENTS

I just read a provocative article entitled, “Litigation as Violence,” by Vincent Cardi (West Virginia), 49 Wake Forest L. Rev. 677 (2014).

You may want to assign this nine–page article (and/or this post) in your classes, which may stimulate valuable discussion about the consequences of lawyers’ work for their clients – and themselves.

Professor Cardi notes that, although the word “violence” sometimes implies physical acts causing injury, some definitions refer to nonphysical acts. Synonyms include “words not normally used to describe physical force or damage, including ‘coercion, compulsion, constraint, duress, [and] pressure.’”

Of course, litigation is an important part of the dispute resolution system and it is quite legitimate for people to use it in appropriate cases. [Litigation \(including negotiation and mediation conducted during litigation\)](#) often functions appropriately without causing undue violence or other harm. People usually don’t pay as much attention when things work properly and this may be the case with litigation most of the time.

But too often, unnecessary injury is a by–product.

“Litigation as Violence” discusses adverse consequences from merely being engaged in litigation, referring to “critogenesis” (“litigation–caused emotional injury”) and “litigation response syndrome” (“LRS”).

The psychological damage associated with critogenesis / LRS is apparently best described by the symptoms associated with it. One psychologist lists these symptoms as stress, anxiety, depression, irritability, difficulties in concentration, loss of motivation, loss of social involvement, loss of enjoyment and pleasure in life, aches and pains, low self–esteem, feelings of detachment or estrangement from others, exaggerated startle response, and recurring thoughts relating to litigation. Where the litigation concerns personal injury, this same psychologist adds other symptoms, including problems as–

sociated with post-traumatic stress disorder, insomnia, tension, restlessness, dizziness, appetite disturbances, low energy, lowered self-esteem problems, disruptions of attention and concentration, indecisiveness, agitation, feelings of hopelessness and pessimism, disruptions of sexual functioning, distressing dreams, headaches, numerous other physical complaints, and related problems affecting marriage and family life. (Footnotes omitted.)

Cardi points out that plaintiffs often do not anticipate the emotional stress that they may experience resulting from lawsuits they file. Even plaintiffs whose claims are completely justified may be unnerved when defense counsel impugn their integrity as they aggressively advocate the defendants' interests.

"Litigation as Violence" reminded me of [interviews I did with business executives](#) whose companies usually were defendants in civil suits. Many of the executives felt morally affronted to be entangled in the legal system, which they saw as full of frivolous litigation decided by juries who are biased against businesses. Paradoxically, winning suits can aggravate their reactions as they resent having had to endure attacks on their reputations and pay a lot of legal fees to prove their innocence. Of course, defendants often settle cases to cut off the risk and expense of litigation, which also can be maddening when they believe that they did nothing wrong. To these defendants, litigation is legalized extortion.

Criminal defendants can feel that they are in a Kafka-esque nightmare where the "[process is the punishment](#)," in the words of Malcolm Feeley. They may face the agonizing choice of pleading guilty to a crime they didn't commit or going to trial and risking extra hassle, expense, and punishment for refusing to cop a plea.

The common counteroffer process in civil negotiation and mediation can be very disturbing. In the typical kabuki dance, litigants commit to and then abandon a series of disingenuous offers in rapid succession, "giving away" more and more of what they feel they deserve. They often are outraged when the other side takes positions that are radically divorced from their experience of reality. They may be shocked when they believe they are being reasonable, only to find that the other side is trying to eat them alive.

Lawyers also are harmed by legal practice as well as legal education itself. A particularly well-designed study found that law students often experience serious distress in law school that continues afterward. "Law student symptom levels were elevated significantly when compared with the normal population. These symptoms include obsessive-compulsive behavior, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism (social alienation and isolation)."

Legal practice can cause [lawyers to be full of fears](#) and lawyers frequently experience “psychological problems, substance abuse, depression, anxiety, and job dissatisfaction.” (citation omitted).

If this catalog of problems isn’t depressing enough for you, you might take a look at the one in an [early article](#) of mine.

Sometimes lawyers and law professors treat litigation as if was just a game, insensitive to the pain it causes to litigants and others swept up in it, possibly including the lawyers themselves.

Cardi argues that before proceeding in litigation, lawyers and litigants should be prepared for the toll it may take.

These concerns prompted my work on [lawyering with planned early negotiation](#). This approach is designed to be responsible, flexible, efficient, and do-able in the real world. It is intended to enable lawyers to manage legal matters so that they get good results for clients, minimize unnecessary harm, and get compensated fairly for creating value for their clients (and, when possible, for counterparts too). Of course, people using these techniques won’t always get these results, but they should improve their process and results overall if they use them as appropriate.

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5 THOUGHTS ON “LITIGATION AS VIOLENCE”

Victoria McDowell

APRIL 21, 2015 AT 12:58 AM

Unnecessary injury is a by-product of litigation, especially in family law and child custody disputes where children are immersed in turmoil between two parents involved in the legal process. Some people I know have been involved in a child custody dispute for nearly ten years. Sadly, this has taken an emotional toll on the child. This child said he never wants to attend law school and become an attorney as a result of this situation. The psychological damage children from “broken homes” experience are different from children whose parents never got divorced. It is unfortunate when one parent focuses on trying to “win” a final hearing rather than settling and focusing on their child’s emotional state and needs.

I agree that law students can experience serious emotional distress that continues into one's life. If a person has OCD, anxiety, depression, and paranoia prior to law school, then attending law school will likely make those disorders and symptoms more severe than before.

I think the most effective way for attorneys and law students to cope with stress and "fears" is to find a hobby you really enjoy instead of releasing stress through substance abuse and bad habits. During the summer after my 1L year I started taking circus/aerial silks classes to alleviate stress. I am much happier as a result.

John Lande

MARCH 11, 2015 AT 12:59 PM

Thanks for your thoughtful response, Adam. I think that you appropriately point out that "violence" often occurs before litigation begins and that litigation aggravates the problems. It is not designed to heal the problems. So if the parties need and want healing, other processes generally are better suited for that. People sometimes have other legitimate goals for which litigation is the best process, even if it does result in some violence. Hopefully, lawyers can do their work in a way that helps minimize any unnecessary violence from litigation.

Adam Nicholson

MARCH 10, 2015 AT 2:10 PM

If violence is to be used as it is used here, synonymously with "coercion, compulsion, constraint, duress, [and] pressure," then it is also true that much litigation arises out of pre-litigation episodes of violence experienced by one or more of the litigants.

Litigants bring with them expectations for how legal remedies will make them whole. Included in these expectations are that litigation can provide (1) healing from their violence-inflicted wounds and (2) retribution upon those who caused them harm. But these expectations are problematic.

First, courts are ill-equipped to provide the healing litigants need. Courts are designed to provide a limited range of remedies, and litigation is unlikely to result in anything more than pecuniary awards and injunctions designed to prevent future harm. Neither of these are likely to help the person cope with the trauma inflicted by the violence that caused the litigation in the first place.

Second, vengeance is counterproductive. Gandhi said, "An eye for an eye only makes the whole world blind," yet traditional litigation ultimately seeks eye-for-an-eye remedies. If

litigation inflicts violence upon all parties to a suit, then both parties exit litigation even more wounded.

Attorneys' responsibilities should include both providing clients with vigorous representation and seeking justice. Part of both of these responsibilities must include helping clients seek remedies through channels that are more capable of providing the types of relief they want and need.

As a law student being formally introduced to ADR methods for the first time this semester, I am coming to appreciate how some ADR methods can provide resolutions that can help wounded people heal in ways that traditional litigation cannot.

Jen Reynolds

FEBRUARY 23, 2015 AT 4:26 PM

We in ADR should not undervalue, when analyzing the dispute resolution landscape, the regulatory function of litigation in the United States. A business executive may feel morally affronted by litigation, but that doesn't mean that the litigation (and its attendant ADR processes) isn't warranted or socially beneficial. Our system has externalized many of the responsibilities and costs of regulation/oversight to private litigants. Perhaps the "violence" problem that Cardi notices comes not only from process or personality issues, but also from these larger system attributes exacerbating conflict and disputes.

Pingback: John Lande discussing Litigation as Violence | The Australian Dispute Resolution Research Network

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