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# The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice

Wayne D. Brazil\*

While some of the obvious psychological pressures that attend practice in civil litigation receive at least fitful attention from the professional community (*e.g.* exhausting and uncontrollable work schedules, the constancy of the sense of combat, the fear of losing, unstable bases of income), there are more subtle and perhaps more important psychological costs of work in civil litigation that seem to be assiduously ignored.<sup>1</sup> The failure to acknowledge and to explore the implications of these costs leaves legal education woefully deficient in a crucial arena and renders analysis of the pros and cons of our system of civil dispute resolution superficial and incomplete.

My purpose here is to expand the dialogue about the psychological dimensions of litigation practice. Toward that end I will describe some of the tactical devices litigators commonly employ and the use of which, in my judgment, subjects the personalities of the lawyers (as well as of the other people involved) to unhealthy and socially counterproductive pressures. I also will share some thoughts about my personal reactions to the use of such devices—how using them (or feeling pressure to use them) made me *feel* about myself, about the people who were the targets of my tactics and about our system of civil justice. I have chosen an informal, subjective approach for this first essay because I believe it lends itself better than any other to the kind of candor that is necessary to commence a productive discussion.

As will be obvious from my effort to describe some of the psychological consequences of the strains that accompany a litigator's

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1. Edwin H. Greenebaum, Professor of Law at Indiana University, is one of the few educators, of whom I am aware, who has begun to explore some of the psychological dimensions of litigation practice. His review essay, *Attorneys' Problems in Making Ethical Decisions*, 52 *IND. L.J.* 627 (1977), points to some of the emotional strains attorneys experience in attempting to respond to the conflicting pressures to which they are subjected.

practice, I have not been formally trained in the psychological disciplines. It follows that my discussion of some of the psychic fallout of work in litigation can be little more than a tentative opening statement. I conceive this essay to be an invitation to lawyers, legal educators and social scientists to participate in a dialogue and a series of studies that will not only critically evaluate the suggestions I make in the following pages but also greatly expand our understanding of how certain practices and pressures in litigation impact on the personalities and values of attorneys and clients.

I was a civil litigator with an excellent San Francisco firm for a little more than two years. I do not believe there was anything unusual about my practice.<sup>2</sup> Nor were my responses to litigation unique. Many of my colleagues and friends, including attorneys with substantially greater experience, would acknowledge feelings similar to mine about what they were doing. There were, of course, differences between attorneys in how intensely they reacted to the same phenomena, but virtually every lawyer with whom I discussed the problems I will describe here admitted to some degree of concern about them.

I left practice for teaching in large measure because I felt distorted and scarred by many of the kinds of things I had to do to give our clients competitive representation. It is important to observe, at the outset, that the source of the pressure I felt to use the tactics I will describe here was not the partnership of the firm for which I worked. Rather, that pressure seemed to emanate from my role as a combatant and from my belief that I would be breaching a duty to my clients if I failed to use in their behalf any legally available litigation weapon. It seemed to me that it would be unfair not to employ for our clients' protection the devices I knew other attorneys would use to advance the interests of their clients. Moreover, I knew from experience, observation, and formal instruction that my opponents would not hesitate to adopt any of the methods I will describe here if a tactically appropriate opportunity presented itself.

As a litigator, I was a full-time, professional combatant—a fact which itself causes many attorneys much discomfort. My thesis is that the weapons commonly drawn from the litigator's arsenal may

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2. While a substantial percentage of my time was devoted to defense of other professionals, primarily architects, engineers, and lawyers, I also was involved in some banking litigation and did some plaintiffs' work (securities, tort, and contract actions).

do as much psychic damage to their users as they do adversarial damage to their targets.

For purposes of ordering this discussion I have attempted to identify a few abstract concepts which seem to embrace many of the litigation devices and tactics about which I am concerned. Perhaps the broadest of these concepts is "manipulation." Like some of the other terms I will use, manipulation will have a pejorative connotation to many people and, for that reason, seem misleading and unfair. Permit me to be frank. I concede the pejorative implications of the term. I chose it because it strikes me as the most accurate abstraction for the specific phenomena I will describe, because it has become part of the vocabulary of popular humanistic psychology and because I mean to be pejorative about many of the litigation methods I include within it.

Some form of manipulation is a very real component of the professional lives of most litigators every day. The targets of the litigator's manipulatory efforts include people, data, documents, precedents, institutions—virtually everything that can be moved to serve some purpose. The potential human subjects of the litigator's manipulations are almost countless: clients, witnesses, opposing counsel, judges, clerks, jurors, expert consultants, court reporters, even colleagues. A few examples of lawyers manipulating other people will help flesh out this abstraction.

An experienced California attorney had become a close friend of one of his long-standing clients. That client had a problem which resulted in a bitterly contested trial. In preparation for the trial, the attorney had warned his client-friend that expressing certain sentiments at trial would decrease the chances of a favorable judgment. The client accepted the advice, but when he got on the stand his desire to publicly air his feelings was so strong that he began saying the things that he had been warned could hurt his case. A noon recess intervened before much damage had been done. At lunch, his attorney-friend was silent and cold for a few minutes, then threw a tantrum over the testimony the client was giving. The lawyer shouted that while the rules of professional responsibility forced him to continue as counsel in the case, he had no obligation to spend any social time with his client. The attorney then threw his napkin on the table and stormed out of the room. He neither spoke to nor saw his client again until that afternoon, when the badly shaken client followed the attorney's pretrial instructions to the letter and suppressed all the feelings he wanted to air.

The tantrum by the lawyer had been completely contrived.

Having failed to control his client's conduct through reason and appeals to self-interest, the lawyer had drawn on all the emotional power accessible to him because of his friendship with his client and his role as "counselor." Thus the lawyer had subconsciously distorted his own feelings in order to manipulate emotionally his client and to accomplish a goal the profession sanctions: getting the best possible result at trial for the client without violating the letter of any ethical proscription.

Another example of manipulation of other people by litigators arises in the use of expert witnesses. It is commonly believed by many litigators that to simply turn over all the relevant data to a consultant expert is to flirt with disaster: namely, the possibility that your expert will reach a negative conclusion about the role of your client. To reduce the chances of such an eventuality, many litigators carefully control the flow of information to their consultants. They first forward the data that would support a positive conclusion. Their hope is that the expert will form a positive opinion, will identify with the attorney's client, and will develop an ego investment in the positive conclusion that the attorney wants reached. Thereafter, the attorney may feed the expert some negative data about the client's conduct in order to prepare the expert to withstand cross-examination. By the time the expert receives the bulk of the negative information (at least so goes the litigator's theory of manipulation), he has so heavily identified with the client's position and has invested so much of his own professional ego in his positive opinion that all his impulses are in the direction of defending rather than reevaluating that opinion. Thus the lawyer hopes to capitalize on the expert's relatively predictable reactions to cognitive dissonance.

It is arguable that these examples are unusual, that the kinds of manipulation they involve are rare. Perhaps. There can be no doubt, however, that some forms of manipulation of people and information are constant ingredients in the everyday fare of most litigators.

Trial attorneys regularly attempt to manipulate the minds and emotions of judges and jurors in order to encourage them to take positions favorable to their clients. Many litigators try to manipulate opposing counsel through various forms of intimidation, distraction, or ingratiation.

More obviously, the everyday professional fare of most litigators involves some form of manipulation of information. A litigator doing legal research, for example, generally is not engaged in a

dispassionate effort to discover what the law is. She is much more likely to be searching selectively for precedents and arguments that can be used to support her position or to attack that of her opponent. When she finds something helpful to her client, she pounces on it with vigor and cites it with delight. When she finds something inconsistent with or damaging to her position, her impulses are to distinguish or to ignore it and hope her opponent does not find it. There is virtually no professional premium on disclosure.

For example, if the litigating attorney finds, during the course of her legal research, a case from some remote, uncontrolling jurisdiction that is directly on point and very deeply and persuasively reasoned, but is hostile to her client's position, she will feel tremendous pressure not to cite it or in any other way bring it to the attention of the court or of opposing counsel. By concealing this important information she is distorting the intellectual context within which the dispute will be resolved. Nonetheless, any other course of conduct probably would be considered professionally unethical: a breach of her duty to her client.

The litigator will respond similarly during discovery. A common example arises in document productions. It is well known that all doubts about whether or not a damaging document falls within the scope of a production demand or is privileged must be resolved in favor of nondisclosure. The critical arena for maneuvering by the lawyer, however, is in *defining* what constitutes a *doubt*. Many litigators will greatly expand the scope of their definition of the attorney-client privilege, for example, in order to avoid producing or even acknowledging the existence of a critical document. Such lawyers hope that their bluff will not be called by opposing counsel and that their expansive concept of privilege will not be subjected to judicial review. Here again the attorney has responded to the great pressure she feels to manipulate words, doctrines, and concepts so that they best serve the ends of her record-building enterprise rather than of justice. Her goal is to build the best possible argument for her side, and, unless some unusual tactical consideration or the letter of some ethical rule compels some other course of behavior, she will build that argument by manipulating the law and the facts to the fullest extent possible.

One other common form of data manipulation (and deception) is the so-called record-building deposition. If the lawyer assumes either that the case will settle or that the deponent will not testify at trial, *e.g.*, because the deponent is far beyond subpoena range and is in poor health, her deposition tactics frequently change radi-

cally. She no longer wants to hear everything relevant the deponent has to say. Instead, she carefully conducts a predeposition investigation that is calculated to identify all the positive and all the negative information the witness may have about her client and the law suit. Then, in the deposition itself, her goal is to build a record that is as positive as possible for her client. She poses the questions she hopes will elicit favorable responses and assiduously avoids inquiries that would result in adverse testimony. She hopes throughout that opposing counsel will not discover whatever damaging information the deponent may possess. If opposing counsel does not uncover the adverse information, she leaves her favorable record intact and uses it for leverage during settlement negotiations. If opposing counsel happens upon the negative testimony, she attempts to undermine its credibility and persuasiveness by carefully plotted cross-examination.

Some of the most exaggerated and obvious abuses of the litigator's manipulative and deceptive tools take place during settlement negotiations. Occasional melodramatic performances only highlight the somewhat more subtle acts of subterfuge, concealment, and emotional posturing that seem to be the perennial attendants of settlement negotiations. The goal is to manipulate your opponent, through whatever emotional pressures or rational arguments will have the desired effect, into giving your client the best "deal" possible. If that deal happens to coincide with what is fair, fine; but the goal all too frequently is that best "deal," not fairness. Short of bald lying, many attorneys will resort to almost any device that "works" in the settlement process, *e.g.*, appealing to feelings of guilt, pandering to vanities, exploiting fears, generating confusions, and, above all, hiding as many of the damaging balls of evidence as possible.

Even the structure of the simplest settlement negotiation is premised on an assumption of dishonesty. Each side assumes that the other side will intentionally and substantially understate (or overstate) the settlement value of the case—that the ensuing dialectic of posturing and argumentation will move the valuation figures somewhere close to what they really ought to be. Given this set of assumptions, most attorneys seem to feel that it is tactically suicidal to open negotiations with an honest disclosure of their judgment about the true value of the case. Moreover, most litigators I know would feel "ethically" bound to capitalize on any error of judgment or calculation their opponent might make in valuing the case. Thus, if opposing counsel unexpectedly acquiesced in a highly

inflated opening demand, most lawyers would take the money and run.

My concern here, to reemphasize a point upon which I will elaborate below, is not only about the ethics of such behavior, but also about how the *attorneys* who engage in it *feel* about themselves, their opponents, and the system in which they function. A system that virtually compels this kind of behavior invites disrespect for itself and promotes the development of undesirable psychological characteristics in the human beings who run it.

One additional dimension of litigation that provokes similar problems warrants mention here. As professional combatants, litigators are expected to exploit to the maximum extent possible whatever weaknesses or vulnerabilities their opponents have. Before she can capitalize on weaknesses, a litigator must discover what those weaknesses are. One of her primary professional tasks is to identify and to expose the vulnerabilities of both the opposing attorney and his client. She is constantly probing, searching for the jugular. Then, when she finds it, she must use it to her client's full advantage. If the opposing party is a highly visible, politically unpopular entity (as a public utility might be immediately after a series of controversial rate increases), the source of weakness is obvious and the challenge lies in devising ways to exploit it.

More often, however, the search for the vulnerability is the more difficult part of the process. I recall vividly watching such a search shortly after I began practicing. Several older defense attorneys and I were arrayed in a civil action against a young, overworked county attorney. After a hearing on a discovery motion the other defense counsel gathered around the county attorney to informally "discuss" the case. Something struck me as odd about the conversation. Gradually I began to understand what was taking place. The older defense attorneys had sensed that their opponent was neither as thick-skinned as they were nor as savvy about the legal and factual nuances of the case. The "discussion," which was carefully disguised as a casual and friendly chat, had several predatory purposes: to identify with greater precision the areas in which the county attorney was psychologically manipulable and those in which his grasp of the relevant law and facts was weakest, to further confuse and mislead him, and to exploit his vulnerabilities by securing concessions with regard to both discovery and substantive issues. As a neophyte in the legal community, I was shocked by my discovery of this kind of behavior. I was shocked much more, however, by my own response to the situation. Instead of leaving or



protesting in some way, I jumped in, joining the other defense attorneys in the effort to exploit every weakness we could uncover or create. It was only later, in detached circumstances and with the benefit of hindsight, that I realized what I had done, what professional pressures had encouraged me to do it, and that there might be something unethical and unhealthy in such behavior.

While some of the examples of manipulation and exploitation I have described above are unusual, many occur far too frequently to be ignored. Moreover, while there probably would be substantial disagreement among litigators and psychologists about what terminology best describes the phenomena I have discussed, there can be little doubt that, to varying extents and in varying degrees of subtlety, most active litigators feel some pressure to adopt at least some of the practices to which I have alluded. The competitive and adversarial pressures that prompt such practices are so inherent in our system of dispute resolution that some forms of predatory, deceitful, and manipulative behavior seem inevitable. If that is true, there is a great need to be candid about the nature and extent of such behavior and to explore openly its psychological consequences.

Before examining directly some of the psychological consequences of what I have described, I would like to discuss another set of symptoms which I believe suggests that something is psychologically askew in the world of litigation. I believe that "money" and "winning" are the primary motivations of a high percentage of the litigators who are most comfortable with their work and the current system of dispute resolution. The people who seem least disturbed by litigation and best adapted to its pressures are not people to whom justice and esthetics are the paramount values, but are people who thrive on competition and doing battle, who are thoroughly engaged by gamesmanship, who love the taste of victory, and to whom the power and status that accompany wealth in our culture are very important. If there is an esthetic in most litigators' practices, it is narrowly professional and self-serving, not a measure of beauty or excellence but of competitive advantage.

I find some support for these generalizations in the ways many litigators measure their professional success. For too many attorneys, success is not primarily seen as a function of how close to a just result was achieved for their clients. Indeed, some attorneys have retreated so far back into mystical (and self-serving) veneration for the adversary process that they insist that justice is whatever result the system produces and that they would violate their role if they even tried to determine what a "fair" result would be.

Instead of measuring success by fairness of result, the adversary system encourages its participants to estimate their achievements by determining how much *more* they got for their client than his just deserts, by how much better they did for their client than other attorneys might have done and than opposing counsel did for her client, and by how much money they made. The system, in short, is seen as rewarding competitors and winners, not humanists, esthetes or moralists. And the pressures the system imposes track the rewards it offers. Since rewards go to the competitors and the winners, the pressures are to compete and to win. Woe to the peaceful. Woe to those to whom constant competition is not comfortable and to whom victory is less important than justice. They are the ones who will be most distorted and strained by a litigation practice.

Most of my suggestions about the psychic implications of the manipulative and exploitative behavior of litigators originate in my own experiences. As a litigator, I used or felt pressure to use most of the tactics described above. I also was the target of such tactics.

Every time I manipulated a person or a precedent, tried to exploit an opponent's weakness, or failed to disclose some clearly important information (case, argument, or evidence), I felt not only dishonest, but also in some measure distorted, alienated from the kind of human being our culture has taught me to respect and to strive to be. When I wanted to be open, candid, and cooperative I felt pressure to be closed, self-conscious, and contrived. I emerged from encounters with other lawyers where I had hidden some weakness in my own case or postured for some tactical advantage feeling lessened, cheapened, degraded, and shaken. Even when my tactics were completely "successful," I felt discomfort, dissatisfaction, and unhappiness. I did not like myself in this role and did not respect the product of my professional endeavors. I hope there were at least two major reasons that doing the things litigators do left me feeling hurt. One must have been the obvious conflict between the way I was behaving and the way I was acculturated to believe "good" people behave. The other source of pain may have been a violation of some sense that precedes acculturation, that is inherent in the fact of humanness, about what kinds of conduct and relations with others are right or appropriate.

My manipulations and concealments not only eroded my self-respect, but also subtly discolored my feelings about others. The human subjects of my manipulatory tactics were converted in my eyes, by the process of manipulation itself, into something different from me, something less complex and sacred, something more like

the inanimate objects in my environment that I move around more or less at will to satisfy myself. Manipulation, in short, bred objectification. If the people I manipulated were not fully reduced to inanimacy, they at least tended to become children in my clouded psychological vision—children in the old pejorative sense of only partial people, people not to be related to as equals. This kind of objectification of others probably leads to objectification of self and, thus, to the final closing of the circle of alienation. It must be very difficult to regularly view others as incomplete and manipulable without gradually coming to view oneself that way.

Engaging in and being the target of manipulatory and deceptive tactics had another important psychic consequence for me: it deepened and extended my sense of suspicion, my distrust of other people. An illustration will suffice to make the point. In one particularly gray moment I let slip, in the presence of a much older and more experienced opponent, a feeling that I might abandon the practice of law. About a week later, after some discovery negotiations, the attorney who had heard this remark took me out for a drink. After asking if I was thinking seriously about leaving practice, and learning that I was, my adversary spent about an hour trying to persuade me that the profession badly needed people with concerns like mine. My point is this: from the moment he began talking, my dominant feeling was suspicion. What did he want from me? Was this conversation part of some scheme to curry favor and to encourage me to drop my litigator's guard? I will never know. What I do know is that the tenacious presence of suspicion made it impossible for me even to comprehend fully what he was saying, let alone to relate to him as anything but an adversary.

This example of the infectiousness of some of the psychological viruses of litigation practice may be, unfortunately, only the tip of the iceberg of personal cost that attends this kind of lawyering.

What assurance can an attorney who lives in a manipulation-oriented world for eight to ten hours a day have that she will be able to shift to another interpersonal gear in the evenings and on weekends? My experiences and my observations of other attorneys suggest that there is a very real danger that the modes of behavior that begin as adaptations to a special professional setting will gradually expand to fill virtually all of the lawyer's interpersonal space. Subtly, we may come to view all people as proper subjects for manipulation and become suspicious that all people will manipulate us if the opportunity and need arises. If manipulation and suspicion extend into our personal lives, they inevitably will bring with them

their psychological baggage: a tendency to objectify and devalue others which invites a general cynicism and sense of alienation from the entire social fabric. The product of all this is hardly attractive: a person distorted and alone, unhappy with himself, suspicious of and separated from others.

Most litigators, of course, do not become as dramatically and obviously alienated and unhappy as this description of my experience suggests. Moreover, some exaggeration of both the pressures that attend litigation and their consequences is inevitable in the process of describing them: the process of abstraction itself necessarily works some distortion on its subject matter. Obviously, it also is true that I have thinner professional skin than many attorneys. My fear, however, is that the professional community will use whatever exaggeration accompanies my abstractions and the fact that my sensitivities are on the rawer end of the spectrum as sufficient reasons to continue to ignore the psychological implications of the tactics, devices, and pressures I have described.

My hope is that practitioners, legal educators, and professionals in the fields of mental and social health will share enough of my concern to commit some resources at least to determining whether or not a problem exists that warrants further study. Making such a determination presents an excellent opportunity for cooperative research efforts by lawyers and social scientists. Finally, legal education should draw on the results of such efforts to help prepare young lawyers to cope with the pressures they will experience in practice and to think creatively about the possibility of changing those parts of our adversarial system which result in the greatest distortions of the personalities of the people who operate and are serviced by that system.

