



By Daniel J. Canon

## On Kindness in Litigation

**S**omething is bothering me. It has bothered me since I began practicing law. It is a question. Can one be a litigator and still be *kind*?

Maybe you don't care. That's perfectly acceptable. No need to read any further. But to me, it is an important question. I did not get into litigation to harm people. Not opposing counsel, not defendants, not witnesses, not even faceless, soulless corporations.

Chances are, you *do* care. Otherwise, you wouldn't be reading a publication catered to lawyers serving individuals who have been wronged. As Don Keenan wrote in a recent issue of this publication, "within the heart of virtually all plaintiffs' lawyers is compassion and genuine care for other people."<sup>1</sup> I would like to think that most of us got into it to help people, or at least without the express purpose of harming them. It is easier to expect sympathy for this point of view from conscientious lawyers (who are hopefully still reading) as opposed to lawyers who got into it solely for the money. You know the ones.

If you do care about basic human decency, whether because or in spite of your law license, you're in good company. The importance of kindness and compassion is central to just about every metaphysical belief system in the world, and many that are strictly secular. Examples abound:

*You have heard that it was said, 'Love your neighbor and hate your enemy.' But I tell you, love your enemies and pray for those who persecute you, that you may be children of your Father in heaven. He causes his sun to rise on the evil and the good, and sends rain on the righteous and the unrighteous. If you love those who love you, what reward will you get? Are not even the tax collectors doing that?<sup>2</sup>*

*It is easy enough to be friendly to one's friends. But to befriend the one who regards himself as your enemy is the quintessence of true religion. The other is mere business.<sup>3</sup>*

*And not alike are the good and the evil. Repel (evil) with what is best, when lo! he between whom and you was enmity would be as if he were a warm friend. And none are made to receive it but those who are patient, and none are made to receive it but those who have a mighty good fortune.<sup>4</sup>*

*There's something about love that builds up and is creative. There is something about hate that tears down and is destructive. So love your enemies.<sup>5</sup>*

**P**hysicians take an oath to "abstain from doing harm." Lawyers take no comparable vow (though Kentucky lawyers are to refrain from dueling, a very discrete variety of harm). That's because harming is what we do. It's what we are trained to do. It's what we *must* do. We play a zero-sum game where there are winners and losers. If we don't win for our client, we lose. Sometimes we do serious harm, sometimes not so serious. It is not terribly uncomfortable to drag a stingy insurance company through the mud to compensate a client for an accident. It is considerably more uncomfortable to effectively bankrupt an uninsured, small family business in order to make up for the misdeeds of an unruly or careless employee.

In any case, it is almost inevitable that you will cause someone to suffer. The suffering may not be severe but it is suffering all the same. Even if it is something simple like breaking down a witness at a deposition, suffering is a natural result. It is so inevitable; no one really talks about it. Hell, we take it for granted. We enjoy it. How many times have you said, "I really hate that I made that doctor/cop/CEO so uncomfortable on the stand?" Probably never. How many times have you recounted the glory of a Clarence Darrow-style witness barbecue?<sup>6</sup> Probably a lot. It is a natural consequence of the competitiveness inherent in our trade.

Let me be very clear: I do not believe that the net effect of what we do is harmful. It's not even a close call. The harm we do is to offset the greater harm that people would inevitably

do to one another if there were no civil justice system. Plus, we keep people safe from con artists, exploding cars and overly amorous supervisors.

Even if you are a strict utilitarian, and you are not inclined to care about the religious, moral and/or ethical underpinnings of the whole “love thy enemy” thing, kindness and compassion are still important for at least two basic reasons.

First, we already hear a lot about the image of the profession, and most of what we hear is not good news. The American lawyer is portrayed as the worst of the worst; a ruthless, remorseless, amoral robot shark that will stop at nothing until its opponent lies lifeless in a pool of its own blood and excrement. When a study shows that your profession ranks No. 2 on

a list of careers that are attractive to psychopaths, there is a problem.<sup>7</sup> In my view, we should be doing everything we can to reverse this conception. Making people understand that we are here to help, not to breed discord, and not just to make gobs of money, is of paramount importance. It is difficult to convey that sort of positive image when you are reveling in someone else’s misery, no matter how much they might deserve it.

**S**econd, we all need to salvage every last bit of sanity we possibly can. Interpersonal conflict, no matter how much you may convince yourself you love it, has a strongly negative effect on a person’s mental health even when compared to other daily stressors.<sup>8</sup> In contrast, more and more studies show that people

who are able to cultivate compassion are better able to deal with acute psychological stress and maintain overall well being.<sup>9</sup> Of course, conflict cannot be completely avoided, but it can be minimized and managed in a reasonably healthy way. Your humanity is more important than your reputation, your pocketbook or any minor victory over opposing counsel. I need to remind myself of this constantly, and I think it cannot be stated too often or too emphatically.

Back to the original question: is it possible to cultivate kindness and still be an effective advocate? I think the answer is “yes,” but it takes awareness and a great deal of effort. Compassion is not easy for most of us.<sup>10</sup> And this is not the easy kind of compassion. It is compassion and empathy toward

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one's enemies. Toward an adversary. Toward someone who has already done something very hurtful to another person (i.e., your client). Toward someone who necessarily wants to see you fail. That is not the complicated part; the truly complicated aspect of the relationship is that you necessarily want to see *them* fail as well. Perhaps they *must* fail if your client is to receive some measure of justice.

But is their failure *necessarily* harmful? And is the supposed 'harm' you do to a defendant *necessarily* discompassionate? Buddhist scholar Pema Chödrön, someone who has thought more about compassion than most of us can possibly imagine, says 'no.' Chödrön distinguishes between genuine compassion and "idiot compassion," a distinction that should strike a chord with conscientious advocates. As Chödrön puts it, "idiot compassion" "refers to something we all do a lot of and call it compassion. In some ways, it's what is called 'enabling.' It's the general tendency to give people what they want because you can't bear to see them suffering. Basically, you're not giving them what they need. You're trying to get away from your feeling of 'I can't bear to see them suffering.' In other words, you're doing it for yourself. You're not really doing it for them."<sup>11</sup> The solution is not to attack the person or to enable harmful behavior in others. The solution is to set boundaries and to prevent further abuses.<sup>12</sup> "It's the compassionate thing to do," says Chödrön, but the offending party "will certainly not thank you for it." In other words, correcting the behavior of others is not only morally permissible; it is practically a moral imperative.

This thankless task is precisely what the plaintiffs' bar exists to perform. Perhaps this approach is a

rationalization, but it makes sense to me. If you are actively focused on making the world a safer, fairer, better place, you *are* engaged in compassionate behavior. The collective efforts of you and your colleagues will benefit not only the individuals you represent, but also potentially thousands—if not millions—of consumers, parents, patients, employees, etc. Ultimately, your efforts will even benefit the witness you had to drag across the hot coals. Rest assured, however, they will not thank you for it.

Still, we must all keep in mind that a duty to correct the behavior of others is not tantamount to a license to delight in the harm of other people. If you approach your duty from the standpoint of maximizing overall good, rather than maximizing temporary harm (i.e., determining just how much you can make the other side squirm), you will be improving both the image of the profession and your own well being. And for that, your clients, your friends, your family and most of the rest of the world *will* thank you. As much as possible, be good to yourselves and be good to each other. It is a simple maxim, but one that cannot be repeated often enough.



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- 1 Don Keenan, *Giving Back to the Community and Changing the Image of Trial Lawyers*, *The Advocate*, Vol. 41 No. 2, p.26 (March/April 2013).
  - 2 Matthew 5:43-46 (New International Version).

3 Mohandas Gandhi.

4 The Qur'an, Surah 41:34-35.

5 Martin Luther King, Jr., *A Knock at Midnight: Inspiration from the Great Sermons of Reverend Martin Luther King, Jr.*

6 If you haven't read Clarence Darrow's cross of William Jennings Bryan in the Scopes trial, put this silly article down right now and go read it. <http://law2.umkc.edu/faculty/projects/trials/scopes/day7.htm>

7 See *ABA Journal*, The Legal Field Attracts Psychopaths, Author Says; Not That There Is Anything Wrong with That (available at [http://www.abajournal.com/news/article/the\\_legal\\_field\\_attracts\\_psychopaths\\_author\\_says\\_not\\_that\\_there\\_is\\_anything/](http://www.abajournal.com/news/article/the_legal_field_attracts_psychopaths_author_says_not_that_there_is_anything/)). As noted in the comments, the conclusions reached by this "study" are questionable, to say the least. Nonetheless, the point remains the same; these negative memes contribute to the popular myth of lawyers as monsters.

8 See, e.g., Ilies, et al., *A within-individual study of interpersonal conflict as a work stressor: Dispositional and situational moderators*, *J. Organiz. Behav.* (2010) (available at [http://www.timothy-judge.com/Ilies,%20Johnson,%20Judge,%20&%20Kenney%20\(JOB\).pdf](http://www.timothy-judge.com/Ilies,%20Johnson,%20Judge,%20&%20Kenney%20(JOB).pdf)).

9 See, e.g., PhysOrg.com, *Study Shows that Women's Compassion for Others Benefits the Self*, <http://phys.org/news201365891.html>.

10 This is especially true for lawyers, as demonstrated by the growing body of literature on secondary traumatic stress disorder or "compassion fatigue." See, e.g., ABA Commission on Lawyer Assistance Programs, *Compassion Fatigue*, [http://www.americanbar.org/groups/lawyer\\_assistance/resources/compassion\\_fatigue.html](http://www.americanbar.org/groups/lawyer_assistance/resources/compassion_fatigue.html).

11 <http://www.shambhala.org/teachers/pema/qa5.php>

12 Duff McDuffee, *Can We Love Our Enemies Without Idiot Compassion or Shaming?* <http://beyondgrowth.net/spirituality/can-we-love-our-enemies-without-idiot-compassion-or-shaming/>