Non-violence and the practice of law

By Marvin E. Krakow

I begin with a story. I was a young lawyer, in my first year of practice, defending a deposition in a products liability case. Experienced defense counsel, a large, burly man of middle years, examined the young mother of a toddler severely burned by flammable pajamas. As my opponent asked his questions, he removed the charred remnants of those pajamas from a plastic bag, and held them up, waiving them slowly as he put his unrelated questions to the grieving woman. Before I understood what was afoot, she collapsed in tears. I wish I could tell you that my response was an effective example of non-violence. Not so. Furious and ashamed that I had permitted the abuse of my client, I called a break, got into the lawyer’s face, and threatened to cause him a world of pain should he ever again try anything similar. And my language was not so genteel. For a long time, I was proud of that response.

There are better ways.

The brutality of the adversary system
The adversary system, long praised as an engine of truth and justice is, in its current form, destructive of human relationships and individual dignity. Our unreflective allegiance to adversarial resolution of most disputes undermines important values. These include respect for our fellow human beings, openness to varying points of view, and cooperation. When we approach disputes as battles to be won, we lose opportunities to solve problems. We abandon caring and kindness. We impose heavy costs on ourselves as lawyers, and on our clients. This article explores the idea that we can do better. It suggests peaceful assertiveness as an alternative to violence.

The invention of the rule of law as a limit to violence
There is irony in challenging the adversary system as brutal and violent. The rule of law is intended to be, and has long been, an alternative to individual violence. Our social compact provides that we will seek a legal decision rather than visiting physical, brutal reprisals on those who cause us harm or who oppose our interests. Lawyers, explaining the irrationality, cost, delay, uncertainty, and the all too common unfair results of courts and trials, often point out that our justice system, however imperfect, is the only available alternative to blood in the streets. That explanation is accurate, at least in part. We notice that widespread corruption of a legal system undermines basic human rights. Failed states are not only unable to provide food, shelter, and security, but they also cannot provide acceptable ways for people to resolve their differences. A community’s agreement to resolve disputes without immediate bloodshed is a first step away from violence. The rule of law is one of humanity’s great inventions. Yet more is required.

What has become of our ideals?
We did not go to law school with the goal of becoming brutal and abusive people. Quite the contrary, most of us chose law as a field which would allow us to pursue a better and fairer world in a civil and thoughtful manner. The same is true of most of our opponents. We might well ask ourselves where did we go wrong.

Consider our behaviors and words as we participate in the adversary system. We tell our clients we will fight for them. We label our opponents as enemies. We prepare to bury them. We accuse them of heinous acts and malevolent intent. We use harsh and dismissive language. We rationalize deceit. We try to embarrass lawyers and their clients. We pry into their lives. In an adversary justice system, both lawyers and parties behave in ways which would be socially unacceptable in any other setting. Our conduct stands in sharp contrast to the very notion of justice we claim to champion. We don’t recognize ourselves. We become hateful.

An expanded understanding of non-violence
When we fail to see and address the violence of our own behaviors within the legal system, our laws fail to deliver non-violent justice. We understand non-violence too narrowly. We think about non-violence as a rejection of physical assault. As participants in a system of laws, we agree not to inflict concrete injury on our adversaries. We will not strike them, we will not cut them, and we will not kill them. That is not enough.

There are many other forms of violence which we ignore. Violence is a failure to accept the humanity and dignity of others. It is a failure of respect. We can hear these...
failures in sharp words, in raised voices, in denigrating and derisive comments. We can see these failures in looks of contempt, in noses turned up in disgust, in refusals to shake a proffered hand or meet another’s eyes. When we use power to deny the concerns of others, we inflict violence upon them, just as surely as we do when we take up arms against them. When we permit our fellow humans, acting under cover of the adversary system, to deny our own humanity or to disregard the interests and dignity of our clients, we permit the corruption of our legal system. We undermine the principles of non-violence which are essential to justice and to genuine cooperation. We use the law to cause injury.

“Aquarrel between lawyers will almost never advance the client’s interest.”

“Sue the bastards!” This classic litigation war cry reveals the violence we bring to the adversary system of justice. Opponents are no longer full citizens. They are delegitimized. In many areas of ongoing disputes, for example, personal injury, civil rights, employment disputes, environmental protection, and criminal law, the bar breaks into warring camps. Changing from plaintiff’s counsel to defendant’s attorney becomes “going over to the dark side.” Denying our opponents the respect and dignity we afford other members of our community and demonizing the lawyers we face on the opposite sides of our cases signify violence and intolerance.

Violence corrupts the legal system
Consider the ways in which violence corrupts our legal system. Wealthy parties decide they will spend whatever it takes to defend their legal positions. Their plan is to impose such heavy costs that their opponents cannot afford to bring their claims to a neutral resolution. A lawyer verbally abuses, sneers at, and derides a witness whose only “crime” is having seen or heard events or words which the lawyer finds uncomfortable. The lawyer, as an officer of the court with the state-granted power of subpoena, uses his or her office not to seek truth, but to inflict pain. On the other side of the table, the lawyer representing a party who bears the obligation to provide documents and to answer relevant questions provides evasive comments, asserts unnecessary and unsuitable objections, and hides critical evidence.

A counter-example
Are there lawyers who avoid such violence in the practice of their profession? Appellate lawyers provide a counter-example. Appeals require careful research and writing. They demand attention to the details of the court record. They can be expensive. Even with those pressures, appellate lawyers, for the most part, treat one another with respect and dignity. They treat the parties as fellow human beings. They neither rant nor rave. They frown on sarcasm. The appellate courts expect civility and respect from and between litigants, reinforcing the culture of non-violent contention. Appellate lawyers live professional lives which are closely aligned with their human and ethical values, fully consistent with diligence, vigorous advocacy, and zealous representation. The example of the appellate bar provides a model of a better way to practice law.

Opportunity for change
As lawyers, we can use the teachings and principles of non-violence to bring fundamental change to our practice of law. We can put down our swords and choose a path of peace. We can reject hostility. We can insist on our own dignity. We can demand respect for our clients. We can engage the concerns of our opponents while maintaining decent, personal relationships and peaceful behaviors. We can be assertive without being abusive. We can be strong without inflicting pain. We need not be hired guns to be effective counselors, advocates, and representatives.

Active non-violence
Change begins with a critical recognition: Non-violence is an active way of being. It is not passive. Non-violence requires that we first identify our clients’ basic needs, their goals and claims, their core interests. Likewise, we must recognize our own needs, goals, and interests. Next, non-violence demands that we find ways to convey our needs and concerns to people we see as opponents or adversaries, to those who threaten us and who have caused our clients injury. Third, non-violent engagement depends on our willingness to encounter others as our fellow human beings, acknowledging and respecting their concerns and values. Finally, we become problem solvers, searching for ways to resolve disputes. We look for solutions which give our clients control over their own lives, their work, and their businesses and institutions, while remaining true to their values and needs. We become peace-makers. We contribute to our communities by helping people live and work together.

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Non-violence as a fundamental value
We are not strangers to the principles of non-violence. Those principles are central to the values we impart to our children. We teach children to use their words, not their fists. We encourage youngsters to recognize their own feelings and needs and to give them voice. We expect them to treat other people with empathy and understanding. We try to model those behaviors. As a species, we humans are social and most often, non-violent. In our personal interactions we value civility. We condemn vitriol, bullying, verbal and
physical abuse, and the misuse of power or position for personal gain. When Gandhi, King, and the Dalai Lama preached non-violence, they found receptive audiences, not only on account of their eloquence and commitment, but because the principles of non-violence are deeply ingrained in our cultures and in our personalities.

Mediation is not enough
In recent decades, many lawyers who have found the excesses of the adversary system troubling and unacceptable have turned to mediation. It is common to hear mediators tout mediation as an alternative to litigation. It is true that mediation allows both sides to a dispute to communicate in ways which are not easily duplicated in the context of a lawsuit. But the availability of a lawsuit and of a judicial resolution of a dispute may be critical to effective mediation. The availability of a judicial forum is particularly important when negotiation fails, or when one or both parties refuses to accept the principles of non-violence. Mediation provides an alternative process to litigation. The alternative of mediation provides opportunities to limit violent interactions. Seen in that light, we may also recognize that assertive non-violence provides another alternative. In fact, a commitment to assertive non-violence is essential to peaceful dispute resolution.

Non-violent litigation
In order to bring non-violent principles and methods to most disputes, we need to be ready to use non-violent or peaceful litigation. To do that, we must find ways to remove violence from our litigation behaviors. Rather than treating litigation as a form of armed conflict, we must find ways to use litigation to uncover facts and evidence and to present as complete a factual picture as possible to judge and jury. As we understand litigation to encompass fact-finding and storytelling, as we minimize the battles in trial preparation, we create room for non-violence. At the same time, we engage our professional skills in pursuing justice and in vindicating our clients’ critical interests.

Identifying and advocating a client’s core concerns
When we engage our opponents as fellow human beings, as members of a community which values peace and which insists that we treat one another with respect and with dignity, we experience two significant changes. First, we are able to be more precise and effective in developing evidence through discovery. The principles of non-violence require us to identify and articulate our clients’ most important interests and concerns. By doing that, we are able to craft discovery requests and deposition questions with specificity and clarity. Also, when asking for judicial assistance to require responses, we are better able to explain the importance of the evidence we seek.

Second, our work and our values become coherent. When we understand litigation as a process which uncovers evidence and which allows us to help our clients tell their stories, when we reject the idea of litigation as an opportunity to express hostility and to inflict pain, our engagement feels good and true. When we are mean spirited, a natural consequence of warring litigation, we must live with selves at odds with our own values.

Confronting violent opponents
“All well and good,” you say, “but what about opposing counsel? How should we respond to violence?” We all have encountered opposing lawyers who withhold relevant documents, asserting claims of privilege which are obviously without merit. We have suffered verbal abuse. We have listened as our clients are called names and worse. We have seen our adversaries misstate holdings in reported cases, mischaracterize evidence, and make arguments at odds with clear statutory language. They have disrupted depositions with an endless stream of improper objections and instructions not to answer.

I do understand the depth of concern behind the question of how to handle opponents who refuse to act with basic decency, who intentionally and strategically employ violence. We all do. I understand the ways in which violent litigation tactics threaten the emotional and physical integrity of my clients and my own well being. We all understand. We know that when we respond in kind, with disrespect, with verbal abuse, and with hostility, we undermine our clients’ interests, and we become the person we cannot abide. We all know that. How can we do better?

Engaging without succumbing to hostility
A common question or comment: “I just don’t see turning the other cheek as a realistic option?” Well, neither do I. Non-violence is not non-engagement. It does not require abandoning principle or obligation. In acting with non-violence, we do best when we identify the fundamental concerns which motivate our clients and us, and when we firmly assert those concerns. But we need not respond to abuse and hostility in kind.

Our initial response to anger, accusation, threats, derision, and disrespect, that is, our initial response to violence, most often consists of a “back at you.” If they yell, we yell. If they insult us, we insult them. We all know the steps. We all have danced that dance. And, when and if we think about it, we may come to acknowledge that responding to violence with violence usually does not work. Our measuring stick should be whether our behaviors move our clients closer to a successful resolution of their disputes. Using that measure, turning the other cheek is an unrealistic option. But striking the other guy’s cheek is also unrealistic.

Observing our own reactions
So what do we do? What can we do? First we need to recognize when our opponents, intentionally or not, would provoke us to violence. Anger and fear have physical manifestations which we can learn to identify. Increased heart rate, clenched teeth, eyes tightening, all may be noticed. Have we stopped taking notes, no longer able to focus on our immediate task? So our first step toward assertive non-violence is to become careful, present, and mindful observers. We must notice what the other side is doing, and we must take a moment to consider how it affects us. What are we feeling? What do we want to do? Further, we must notice when our opponents direct abuse and hostility at our clients.

Using non-violence to respond to violence
The next step requires that we figure out why we are angry or afraid or prepared to attack. We should identify our clients’ needs and concerns in the particular moment of conflict. We, and our immediate fight or flight feelings, are subordinate to the client’s interest. A quarrel between
lawyers will almost never advance the client’s interest. By identifying and observing our own immediate responses, and by recognizing that it is “not about us,” we can plan a careful response which furthers the client’s cause.

In planning a response, we can turn to the non-violence toolkit. If we have paid attention to non-violence from the first days of our representation, we will have tools at the ready. We may even have taken steps to forestall hostile conflict. At the very least, we will have resources to respond to hostility and abuse.

Respect and dignity
Perhaps the most powerful and effective non-violent tool we have can be found in treating our adversaries with respect and dignity. Throughout any dispute, and at any point in time, we can acknowledge that our opponents are human beings with needs and concerns of their own. We can do that by listening, by asking questions, by expressing gratitude, and by respectful disagreement. Just as we tend to respond to hostility with hostility, we often find that respect is met with returned respect.

Litigation as a non-violent response
A set of important tools is located in the litigation process itself. Both the Federal Rules of Civil Procedure and the California Code of Civil Procedure, together with the Federal Rules of Evidence and the California Code of Evidence, provide a detailed series of steps to resolve disputes which come up in the course of a lawsuit. Resort to those procedures can be an affirmation of non-violence. If we recognize the importance and utility of the applicable rules, and if we make a professional commitment to know and understand the specifics of those rules, we can employ them to resolve disputes without acrimony and without hostility. We can use the rules to narrow disputes before asking a court to resolve an issue.

Finding and affirming our clients’ humanity
We can find another set of tools in our relationships with our clients. As we interview prospective clients and as we work with existing clients, we must get to know them well enough to appreciate their circumstances, to understand the ways in which they have been hurt, and to articulate their needs and goals. What a wonderful opportunity: We get to know another human being. With that knowledge, we can prepare to speak on our client’s behalf. We are prepared to help our client’s find ways to take back their own lives.

Non-violent language and editing
Our choice of words provides another set of non-violent tools. How many times have we crafted briefs which savage opposing counsel? Who among us has used adjectives or adverbs which denigrate the integrity of a witness or party? Who has suggested that the other side has engaged in criminal or unethical conduct? And assuming you recognize yourself in response to those questions, ask one more: “So how is that working for you?”

Eyes on the prize
If you suspect that harsh language and pointed accusations don’t lead to the resolutions you would like, try focusing on what you want to accomplish and who you need to persuade. Ultimately, we need to persuade opposing counsel to recommend that his or her client pay money. People tend to tighten their grips on their wallets when confronted with personal attacks. Also, we need to persuade a judge to rule in our client’s favor. We should acknowledge that overheated language does not further that goal. Judges want a clear factual statement. They do not enjoy being asked to monitor a playground fight. The most effective briefs provide judges with a clear, unadorned statement of relevant facts and procedural history, followed by an equally clear and straightforward citation of the legal rules which govern the dispute. With that, we put the judge in the position to make a fair, and, one hopes, obvious ruling.

Asking questions
When we ask questions we have another opportunity to use the principles of non-violence. Most often, lawyers ask questions from a position of relative power. Our clients answer our questions because they need our help. Witnesses answer our questions because we have the power of the subpoena and, with it, the power of the state to compel responses. We shouldn’t be surprised, then, to see people respond to our questions with a measure of resistance. All too often, we answer that resistance with a show of force. We may lecture a witness. We may assert an angry motion to strike as non-responsive. We may raise our voice to repeat the question.

The principles of non-violence require us to temper our relative power with an acknowledgement of the limitations of that power and of the need to respect the integrity and dignity of other human beings. Most of our questions can be put politely and respectfully. Evasions can be met with calm insistence on a proper response. We can drill down without hitting the witness on the head with a hammer. Notice that, when we put questions without violence, we do not forgo the answers we need or the information that the witness controls. We can be insistent without being abusive. We can persevere without being hostile.

Concluding thoughts
We can use the principles and methods of non-violence in our legal work without pledging unyielding allegiance to those principles and methods. We may feel that there are times when non-violence is ineffective. We may feel that opponents take advantage of our efforts. Non-violence need not be the perfect solution to all disputes. We may have concerns about the philosophy and religious expression of the best known advocates of non-violence. We can, however, consider non-violence as a powerful and effective tool for most disputes and for the vast majority of the legal work we do. With that caveat, we have an opportunity to be more effective and more satisfied in our work and lives. Why not give it a try?

Suggested reading
I commend the following texts to you in your search for a non-violent practice: Kurlansky, Mark, _Non-Violence: The History of a Dangerous Idea_, Random House, 2006
Merton, Thomas, (Ed.), _Gandhi on Non-Violence_, New Directions Paperbooks, 1965
The King Center, _The King Philosophy_, (http://www.thekingcenter.org/king-philosophy)