Assertive Nonviolence and Employment Law

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When we founded our law firm, my partners and I wanted a concise description of the work we hoped to do. We chose "Employee Justice." The term encompasses traditional civil rights work as it applies to employment. It also includes a variety of issues which face working men and women: proper pay, protection from management's overreaching demands, a safe workplace, respect and dignity. We address those concerns as lawyers. We represent clients. We help people speak up for themselves and we speak for them. In pursuing employee justice, we stand in solidarity with those without power, and we confront institutions and individuals who have used their positions and their power to harm our clients.

My partners and I have no monopoly on employee justice. We share our focus and our work with most of our CELA colleagues. We also share a feeling that our chosen work is consistent with our personal values. That sense of moral coherence, in turn, is a source of deep satisfaction. We feel good about the work we do.

We cannot always say the same for how we work. Our ways of working do not provide that consistent moral coherence. Too often, we find ourselves engaged in hostilities. Phone calls end with shouting and hang ups. Depositions are filled with angry colloquy. We speak ill of others, judges, opposing counsel, parties, and witnesses. We are on the receiving end of vituperation from opposing counsel. They attack us and they attack our clients. Less frequently, but all too predictably, we confront motions for disqualification, state bar complaints, requests for sanctions. Sometimes, we file the offending papers. Regardless of who starts the hostilities, we find ourselves at war. We treat others with disrespect, and we suffer their disrespect. We might like to say, "This is not who we are." Too often, unfortunately, it is what we do.

The principles and tactics of assertive nonviolence provide a means to bring our ways of practicing law in line with our values. We can learn to be more effective advocates while behaving in ways which affirm our own humanity and the humanity of those with whom we are in conflict. We can succeed in lawsuits and in trials while nurturing deep contacts with opposing counsel, judges, and jurors. We can build on shared commitments to justice and decency. This article examines the ways in which the principles and the practical techniques of nonviolence can be put to use.

Define nonviolence broadly and assertively. Violence takes many forms. We make a mistake when we limit our understanding to physical violence: instances where people cause harm to others by actual battery, using bombs and guns, fists and weapons or threats of such attacks. A more useful definition would include the broader abuse of power: using control over important aspects of a person's life to coerce behavior. Violence represents an attack on a person's integrity, physical and emotional. It is a direct interference with safety and security, with dignity and respect.

We make a different error when we view nonviolence as a passive approach to the resolution of disputes. During the African American civil rights struggles of the 1960's and in the Indian\South Asian uprising against British colonialism, we became used to the phrase "passive resistance". Unfortunately, we confuse and conflate that single tactic with the broader meaning and methods of nonviolence.

More broadly defined, nonviolence is a principled approach to assert important interests in opposition to the powerful and controlling behaviors of our fellow human beings. A commitment to nonviolence is a commitment to resolve disputes while maintaining our own integrity as well as respect for our adversaries. It allows us and our clients to say "No!" when our critical needs are threatened, while at the same time clearing a path to a positive outcome.

Recognize basic needs and concerns. Disputes begin with threats or damage to important interests, either our own or those of our clients. For example, a man or woman loses a job, and, as a consequence, also loses the capacity to provide for self and family. If the loss feels unfair, it may also represent an attack on an individual's integrity. A woman who is fired when she refuses a boss' sexual advances suffers both economic and emotional injury. At its most basic, she is treated as an object rather than as a whole human being. Similarly, an older worker laid off to make room for a younger replacement is told, explicitly or otherwise, that his or her years of loyalty, contribution, and experience are worthless. Age discrimination may leave the worker facing mortality without the resources to meet basic needs and to assure dignity. When we represent clients, we must be clear about what is at stake for them. If we don't see our clients in full, we cannot be effective advocates.

Acknowledge the humanity and dignity of adversaries. Too often, we treat adversaries as cartoon villains. We only see wrongdoing. We only imagine evil motives. It helps to keep in mind that most employers are people who try to provide goods or services, who work to support themselves and their families, and who, until the dispute which brought our clients to us, were colleagues, co-workers, and friends. They didn't hire our clients to cause them pain. They hired them to work toward shared goals and mutual prosperity. It may be easier to accept that perspective, if we keep in mind that, in operating our law firms, we act as employers. We can acknowledge the humanity of our adversaries by speaking and writing clearly and politely, by avoiding inflammatory language and unnecessary accusations, by seeking their perspectives and their understanding of events.

Identify the adversaries and their actions which compromised our clients' needs. When people come to us for help, their stories share a common thread. An employer has compromised their ability to work. Almost always, the loss of work or the loss of the capacity to work disrupts the lives of our clients, damages their important relationships, severs their ties to community, and undermines their identities. That harm, alone, is not enough. We also look to the conduct which caused the harm. We try to identify the responsible parties. Our inquiry remains incomplete. Ultimately, we look for an abuse of power, an act of violence. Violence causing harm creates the disputes which occupy our working lives.

Martin Luther King, Jr. emphasized that non-violent resistance requires respect for our adversaries. He went further, asking us to love those who would hurt us. His advice is critical to our efforts. To work with our adversaries, to collaborate effectively in the resolution of disputes, we must

find common ground. We must acknowledge a common humanity, even as, especially as, we insist on the recognition of our own and our clients' own humanity.

Love is not an obvious concept. It may feel out of place in the adversary system. We struggle with it. It is easy to call names, to refer to our opponents as "the dark side", to consign them to a special circle of Hell, or at least to an extended stay in Purgatory. When every question we pose, when every request for documents we make, when our every effort to interview a witness draw objections, obstruction and evasions, love evaporates.

We may be too quick to condemn. Our opponents behave in a manner entirely consistent with our own training and experience with the adversary system. We examine every statement and every action by our opponents with an eye towards a counter. We leave few issues uncontested. When opponents behave in like fashion, we ought not be surprised.

Use a different frame. It helps to look at our legal system with the lens provided by academic disciplines like and including anthropology, sociology, and systems engineering. Those disciplines share the common feature of viewing a process as observer rather than as participant. Throughout human history, our species has designed systems to resolve disputes without resort to violence. We call those systems the rule of law. When we invoke the rule of law, we act with an underlying commitment to resolve our disputes in peaceful fashion, in a manner which preserves and strengthens the social, political, and communal ties that hold us together. Common features of our legal systems include mechanisms to find facts, application of commonly accepted principles to the facts, and a willingness to accept the outcome of the process.

We might also think of nonviolence as a religious or spiritual practice. The world's great religions have all emphasized the importance of peace and understanding in our dealings with others. The abuse of power, the demonization of others, and the persecution of our fellow humans are universally condemned. For thousands of years, across the globe, and in almost every culture, we have recognized the values of nonviolence. We might well ask why, in our daily lives, nonviolence seems a naïve exception.

Re-imagine our roles as lawyers. When we focus on the adversary system, we tend to adopt a view of ourselves as gladiatorial champions. We believe we do battle on behalf of our clients. The lawyer, thus imagined, engages in symbolic violence aimed at defeating an enemy. Viewed from a perspective outside the imagined fray, what we actually do is quite different. We help people and organizations to voluntary and peaceful resolution of their disagreements. Well over 90% of all disputes are resolved without trials. Of the small number of disputes which go to trial, most are also settled either during trial or on appeal. Even in the few instances when the parties cannot reach agreement, they almost invariably accept the ultimate rulings of judges and juries without violence. We may pay lip service to that reality, but we refuse to relinquish the lens of violent combat.[1]

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[1] Autobiography, Gandhi, M. (1959) "I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven

An outside observer would describe lawyers as dispute adjusters, as negotiators, as fact finders, and as peacemakers. In those roles, we share common goals with our adversaries. We seek a common understanding of events and of the rules our communities have established. We use the litigation process to advance those efforts, and to bring our clients to a time and a place where they can make peace. At its most basic, our role is to persuade the people who have fired or mistreated our clients to change course, and to compensate our clients for the injuries they have suffered. We persuade those in power to relinquish a measure of control, to acknowledge facts and rules which may not support the termination of employment. We convince them to write a check.

Our opponents have a similar role. They persuade us and our clients to accept less than we might have sought when the dispute was new and the wounds were raw. They provide information with the hope that we will see the events and the dispute differently, that we will acknowledge their reasons and see the facts as they experienced them. They seek common ground.

Consider our clients as whole people. When we see ourselves as trial lawyers, we tend to see our clients as actors playing a role in the courtroom dramas which we script and direct. That approach is often at odds with our clients' experiences and needs. It deprives our clients of the power to act and to make decisions on their own. For the most part, people do not choose litigation as a desired activity. We lawyers are unusual. We not only choose litigation, but devote years of effort to learning how to be effective in the courtroom. If we keep in mind that our obligation to our clients is fiduciary in nature, we explicitly acknowledge that our clients' interests are in a prompt and effective resolution of their current problems, and that our obligation is to help them to find that resolution. Rarely, is extended litigation the best way to meet our clients' needs. When litigation is necessary, the client's interest is best served by working with, rather than fighting with, opposing counsel. Most often, when clients tell us they want to fight, we have not advised them effectively of the costs of that fight, in treasure and in well-being. Providing complete and effective advice is as much a part of our obligations to our clients as is effective courtroom advocacy.

Use the nonviolent playbook. The principles of nonviolence are at once theoretical and practical. When we focus on how to work nonviolently, we discover the tools which allow us to succeed.

Listen with patience. Perhaps most important, and certainly first in time, we begin by approaching the people we encounter open to their experience. We provide space for others -- most often clients, and later adversaries and witnesses and judges and jurors – to share their stories and to explain their perspectives. We withhold judgment and we listen intently. We ask questions with the goal of better understanding. Our minds may have evolved to recognize patterns and to evaluate new information and experiences by placing them in the patterns we already know. The work of nonviolence

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asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul."

requires that we deliberately postpone our pattern recognition processes, and that we allow enough time to look at events from the point of view of another.[2]

Identify core concerns. Closely related to listening is the need to identify the most basic concerns which motivate the other. I often ask new clients what their situation would look like if they could wave a magic wand. That rarely leads directly to a course of action. It does lead me, and often leads my clients, to a clearer understanding of what is most critical to them. Ultimately, I look for those concerns which are so important that we cannot give them up. We will have to find ways to convey the fundamental nature of those concerns to our adversaries and fellow peacemakers.

The practice of listening for fundamental concerns applies equally to all of the actors in a dispute. Just as we need to know our clients' needs and experiences, we also need to pay attention to the experiences of angry supervisors, of aggressive lawyers, and of hesitant witnesses. When we ask a judge for a ruling, we need to be aware of his or her needs, the calendar demands, the availability or lack of availability of research support, and, to the extent possible, the personal and professional history which may influence the outcome. How often do we make an effort to get to know opposing counsel before we must discuss the scope and timing of information exchanges, the scheduling of witness depositions, or the ultimate resolution of our clients' disputes?

Plan the negotiation. Even when we choose litigation as a tactic, we remain engaged in negotiation. It is our most common activity. For that reason, we should begin, almost always, with a plan. That plan requires that we identify our clients' core concerns. We begin with the limited number of issues which we do not wish to compromise. We must also clearly identify what we want and how we will ask for it. We should consider potential allies in our negotiations. At the same time that we need to find a way to firmly say "no" to circumstances which threaten our clients' core concerns, we must also find ways to move from direct conflict to demands which can resolve the dispute.

Share information. Meaningful negotiation requires shared information. Although total transparency may prove elusive, we cannot expect to reach agreements without a shared understanding of the facts which contribute to a dispute. When we think about a dispute, we most often begin with our clients' versions of events. We usually do not know how other actors experienced those events. The rules of evidence and the tools of discovery during litigation tell us what disclosures we might be able to compel. We are ultimately entitled to considerable information from our adversaries. We can also learn a great deal from "informal discovery", including talking to witnesses, online research, and visiting the places where events occurred. As we put together a plan for negotiation, we need to think carefully about what information to provide to the other side, the form of those communications, and the timing of our disclosures. Our goal is to persuade a reluctant adversary to change course.

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[2] "We can make our minds so like still water that beings gather about us that they may see, it may be, their own images, and so live for a moment with a clearer, perhaps even with a fiercer life because of our quiet." W.B. Yeats, The Celtic Twilight: Faerie and Folklore.

At the same time, we usually need information from our opponents. We almost always need to hear their reasons for the actions they took. Also, we need to know whether and to what extent they agree and disagree with our clients' stories. Just as we need to provide information to our opponents in order to allow them to respond to our clients' core concerns, we need to hear the stories of our opponents. We need their information if we hope to find a mutually acceptable resolution of a dispute.

Be meticulous about damages. We cannot address the harms our clients have suffered, unless we first understand and describe those injuries. Often, we generalize. For example, we might say that our clients have suffered emotional injury. That is not enough. We must talk to our clients about the specifics of their injuries. We must learn enough to understand how they have experienced those injuries, and to appreciate how they will feel in the days, weeks, months, and years ahead. We must think about how to tell their stories and about how to quantify their suffering. Our clients' damages, and the actions and money it will take to repair them, are central to assertive nonviolent responses to wrongdoing and wrongdoers.

Embrace conflict. Most people, most of the time, avoid conflict. Assertive nonviolence demands that we choose our battles with care. Having chosen, we must not shy away from conflict. We can find ways to clearly describe our clients' injuries and to present our demands. We can persist in the face of disagreement. Only if we are willing to stand firmly on the issues we know are most important, are we able to work with our adversaries to find a solution.

In order to stand firm, we need to be comfortable with various, available methods of confrontation. Those methods include lawsuits and trials. Our legal system, with its commitment to nonviolent resolution of disputes, provides an established and culturally acceptable way to embrace conflict. If we develop the skills to prevail at trial or if we partner with skilled trial lawyers, we enhance our capacities to be assertive and nonviolent. Our confidence and capacity at trial and appeal carries over into less formal confrontations and negotiation.

Keep eyes on the prize. In the midst of a dispute, it is easy to lose our way. We are distracted by insults, real and imagined. We are confused by technical legal arguments. We react emotionally to the way people speak, to the language they choose, to the political ideas they express. Regardless of the emotions of the moment, we need to focus on the road to resolution, on the needs of our clients, on the resources which may lead to peace.

Concluding thoughts. There is a better way to practice law. We should become nonviolent advocates. The principles and tactics of assertive nonviolence allow us to engage constructively with other human beings, clients, adversaries, mediators, judges, and juries. We can become peacemakers. We can do all that without compromise to our clients' core concerns. We can feel better about the work we do and we can become more effective advocates.