

The Law Can Be Hazardous to Your Clients' Health – And Yours Too

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McKercher Lecture

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23 September 2019

Thanks for Inviting Me

- I have been working with Professor Keet and Associate Dean Heavin on a book for more than a year
- The book is *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*
- Today's talk is based on that book and research of mine

Today's Agenda

- Discuss benefits and risks of conflict and litigation
- Identify risks to litigants
- Identify risks to lawyers
- Identify risks of law school to students
- Suggest ways to manage these risks
- Really important – hear your experiences

Caveat

- Some of my presentation is based on work in the US.
- The situation may be different in Canada.
- We can discuss similarities and differences between the two countries.

Stone Soup Process Today

- We will use Stone Soup process to elicit and disseminate knowledge from this program
- Notetaker take notes without names
- I will post summary on Indisputably blog – including this powerpoint
- If you don't want your statements to be included, let notetaker know
- Questions?

About Me

- Graduated from law school in 1980
- Practiced law and mediation in SF Bay Area
- Got PhD in sociology of law in 1995
- Taught at University of Missouri since 2000
- Retired, but still active
- Regularly blog on Indisputably.org

About You

By show of hands:

- Are you a first-year law student?
- Are you an upper-class law student?
- Are you a law school instructor?
- Do you represent clients?
- Do you mediate cases?
- Any one not mentioned above?

Conflict and Litigation

By show of hands:

- Have you been in any kind of conflict?
- What was good about it?
- What was troublesome about it?
- Have you or someone you know been a party in litigation?
- What was good about it?
- What was troublesome about it?

Litigation Has Benefits

Litigation is extremely important. It can:

- **Resolve disputes directly, and**
 - **Provide structure promoting settlement**
 - **Create BATNAs**
- **Promote justice**
 - **Deter potential lawbreakers**
 - **Hold individuals and entities accountable**
 - **Provide legal remedies**
- **Help develop legal doctrine**

... And Risks

- May lose in court – great uncertainty
- Incur tangible costs – legal fees and expenses
- Incur intangible costs, e.g., stress, delay, harm to reputation, opportunity costs

I will focus on parties' intangible costs – often ignored or given short shrift, especially in appellate opinions.

Litigation Stress

Litigation can:

- **Interfere with parties' mental, emotional, and physical lives**
- **Produce flashbacks, nightmares, and physical symptoms**
- **Degrad cognitive functioning and increase cognitive biases**
- **Focus parties on past, prevent moving forward**
- **Disrupt physical and emotional treatment**

Damaged Relationships

Litigation stress can:

- **Make parties obsess**
- **Make parties “shut down” and disengage**
- **Interfere with lawyer-client relationships**
 - **Increase clients’ sensitivity to lawyers communication**
 - **Create suspicion if lawyers are on their side**
 - **Cause “decision fatigue”**

Organizational Dysfunction

Litigation can create organizational problems:

- Cause board members, executives, employees to fear for their future
- Damage employee morale
- Harm health, productivity, and decision-making
- Lead employees to focus on personal interests not organization's interests
- Cause internal conflict about handling of case
- Create groupthink bunker mentality

Opportunity Costs and Reputational Damage

Litigation can:

- **Divert time and energy away from organization's goals**
- **Impose opportunity costs**
- **Impede innovation**
- **Damage brand and reputation**
- **Require repair of brand and reputation**

Risks for Lawyers

- Research has shown that lawyers have more mental health and substance abuse problems than people in the general population
- One researcher found that 70% of lawyers in a study were likely to develop alcohol problems over their lifetime

Causes of Lawyers' Problems

Some problems may be related to:

- Frequent deadline pressures
- Heavy workload
- Financial pressures
- Interpersonal and political conflicts
- Competitive nature of adversary practice
- Ambivalence about obligation of loyalty to clients regardless of effect on others

Risks for Law Students

- Research suggests that many lawyers' problems start during law school
- Symptoms may include:
 - Obsessive-compulsive behavior
 - Over-sensitivity
 - Depression, fear, and anxiety
 - Hostility
 - Social alienation
- Do you recognize anyone with these symptoms (including yourself)?

Causes of Law Students' Problems

Possible causes include:

- Schools' over-emphasis on scholarship and under-emphasis on teaching
- Schools' over-emphasis on abstract theory and under-emphasis on practical training
- Poor teaching and testing methods
- Training students to ignore their values and make arguments they don't believe

Causes - Continued

Possible causes include:

- Novelty of subject matter
- Ambiguity of the law
- Heavy work load
- Competition
- No feedback in many courses until end of semester
- De-emphasis on personal relationships
- Ignoring emotional reactions
- Reluctance to get help



What Can Lawyers and Law Students Do to Avoid or Manage These Problems?

Things You Can Do – Self-Care

- Pay attention to your reactions – don’t “stuff” them
- Don’t use alcohol or drugs to “solve” your problems
- Eat a healthy diet, exercise, get enough sleep
- Maintain good relationships
- If you are having problems, ask for help
- Pay attention to colleagues who may have problems and ask if they need help

Take Advantage of US Resources

- I understand that you have an incredible wellness program at your school.
- If you need help, take advantage of the resources here.
- People really want to help.

Things You Can Do for Clients

Help clients identify interests and risks as soon as appropriate, asking questions such as:

- What are your most important goals?
- What are some of your fears or concerns?
- How do you think litigation would affect your relationships and reputation?
- Litigation can be stressful. How do you generally respond to stress?
- [Describe trial, negotiation, mediation, arbitration.] Which might be best for you? Which would you want to avoid? Why?

Bottom Line Qs for Individuals

- How much less would you accept [or more would you pay] to:
 - Resolve case in, say, 3 months instead of a year
 - Avoid risk of losing at trial
- Would you prefer to:
 - Have trial to present case publicly and get court decision, or
 - Settle to avoid publicity and risk of losing

For Organizations

- How much time will case require of officers, executives, and other employees?
- How would case affect goals & opportunities?
- How would case affect growth & innovation?
- How would case affect internal dynamics, eg, morale, absenteeism, conflict?
- How would case affect brand and reputation?

Bottom Line Qs for Orgs

- How much would it cost to counteract problems you identified?
- [For plaintiffs:] How much would it be worth to avoid these problems?
- [For defendants:] In addition to payments for liability, how much more would it be worth to avoid these problems?

For More Information

- Blog post “[Legal Stress](#)”
- [Escaping from Lawyers' Prison of Fear](#)
- [My Last Lecture: More Unsolicited Advice for Future and Current Lawyers](#)
- *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions* (2020) by Michaela Keet, Heather Heavin & John Lande
- [My webpage](#)



Thank you very much!