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How Plaintiffs And Defense Counsel Misperceive Each Other

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September 25, 2017, 11:05 AM EDT

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What part of our job makes us most miserable? What part makes us want to quit? Here's a hint. It has to do with lawyers.

Tell your friends that lawyers are required to take continuing education classes not only on the law but also on alcoholism and substance abuse. Most other jobs — cashiers, secretaries, computer-repair techs, furniture salespeople, gas station attendants — don't require classes like ours. Add that our divorce rate is sky high and that, according to CNN, of all jobs, lawyers rank fourth in suicide.

Sure, law has its stressors. What job doesn't? But what is it that uniquely qualifies our profession for heightened misery? Misery to the point that lawyers who've left the practice jokingly (yet seriously) brand themselves "recovering"?

Our nonscientific thesis posits that our unhappiness comes from being terrible to each other. We believe this terribleness derives from a mutual demonization, objectification and vilification that, these days, seems baked into the art of advocacy.

Civility, as state bar associations call it, is a topic we frequently discuss within ranks but never with our opposition. These discussions, therefore, tend to stoke their own fire since when a group of lawyers agrees with itself (especially when centering on castigating its opponent) nothing understanding or conciliatory tends to emerge.

Why do opposing lawyers have such a dreadful time getting along? We think it stems from a shared misconnection, sowing a reciprocal misunderstanding, that leads to communal meanness.

It's not a fundamental or anthropological misconception, of course, because we're all just people. People who have families and mortgages. Who work hard to send our kids to school and to save for retirement. Who want to achieve these things by creating our vision and performing our version of the right thing.

We perceive our professional misconnection as centering on the previous paragraph's last point — our vision and version of the right thing. To unpack our thesis — that lawyers don't understand, appreciate

or consider their opponents' vision or version of the right thing — we looked inward. We did this because we believe much of our misconnection derives from misperceiving (or outright ignoring) each other's goals, purposes and motivations.

To validate our theory, we chose not to consider what we thought of ourselves. We conduct that exercise all the time. These opinions tend to be gratuitously high.

We also chose not to consider what we thought of each other. That approach, we felt, was fraught with peril. It held too much judgment and was a good way to ruin our friendship.

So we crafted a more imaginative approach. We — a plaintiffs class action lawyer and a defense class action lawyer — examined ourselves. We asked what we believed our opposition thought about us and how our opposition judged us. Afterward, we presented this self-portrait to each other for assessment. We wanted to see how accurate we were about what we believed our opposition thought.

From this exercise, we hoped an understanding might emerge about what plaintiffs and defense lawyers think of each other. From this understanding, we hoped to draw comparisons and to recognize contrasts. We hoped to reveal an understanding that would demonstrate how similar we are and why, based on these similarities, there exists no basis for the professional consternation that infects our profession.

How Dan Believes the Defense Bar Perceives the Plaintiffs Bar

The defense bar thinks plaintiffs lawyers fall into two principal camps: serious lawyers and shakedown lawyers.

Serious lawyers file cases like VW diesel emissions, Enron and Exxon Valdez. They are technically competent, ceaselessly committed and creative.

Shakedown lawyers file cases like Subway footlong, Starbucks iced coffee and the Ford truck coupon case. They walk the aisles at CVS looking for lawsuits concerning products whose labels, in their expert pharmacological opinion, don't hold up. They file a dozen alleged food-mislabeling cases, hoping one will stick since one settlement will pay their yearly nut.

Serious lawyers politick cases in ways that would dazzle Congress and make John Grisham wince, blithely horse-trading inventories and bargaining leadership. After all, there's a reason the bestselling novels and Hollywood blockbusters are about us.

Despite our never-ending list complaints about how the deck is stacked against us, defense lawyers think our work is rather easy, never mind the array of defenses available to dash even our best cases.

And, of course, we're all rich, only flying commercial when our private jets are down for repair. (I was at a hearing recently where defense counsel asked whether I'd flown my jet. I told her I hadn't; that I'd flown Southwest. Middle seat. Boarding group C.)

Finally, despite serious lawyers' serious acumen, the defense bar is convinced that we're largely, if not exclusively, profit-driven. Never mind that the cause is existentially valid; that's not why we filed the case. Any true purpose is pure pretext. It's the money that drives us. Period.

What the Real Plaintiffs Bar Looks Like

That's what I believe the defense bar largely (though, I'm certain, not entirely) thinks of my practice. Phil has read my remarks and has largely confirmed them.

Now, here's the truth. I'm not a shakedown lawyer, so I can't speak to how they perceive themselves or think anyone else does. I can only agree with defense counsel's perception of them.

As for serious lawyers, only a smattering of us fit the defense bar's stereotype. Serious lawyers are not viciously entrepreneurial, we do not place politics over our plaintiffs and we are not purely profit-driven. We are not uniformly rich, we don't all fly private and we are not fodder for the next Grisham novel.

Instead, we put everything on the line for what we believe in. We risk our families' comfort and security, often, these days, for the same wages as we could make doing hourly work, that is, if we won. We teach, we lecture and we write because we think our message of fairness, accountability and responsibility is important and worth sending — now more than ever.

We read Law360 every morning, dreading the possibility that the House has proposed another bill that will put us (and you) out of business. So we lobby Congress and testify on the Hill, doing our part (typically as one witness of four) to save the ever-dwindling bucket rights that remain for consumers, which consumers, of course, include defense lawyers and the real people who work at corporations.

We've made a life choice not to stand idle while the next defective product kills someone or the next Ponzi scheme guts a retired couple's savings. That's why we resent when someone paints us with the same ugly, entrepreneurial, profit-driven brush as they do shakedown lawyers. Indeed, we work to discourage shakedown lawyers from filing cases that would advance congressional efforts to eviscerate consumers' rights and our shared practice.

We do all this on our own time and our own dime because we care about protecting access to justice, keeping the marketplace fair and ensuring that everyone — including defendants — retains the rights that our Constitution guarantees.

We're comfortable with the notion that risk deserves reward and that getting paid for doing good work is not an illicit concept. We know that without risk-taking plaintiffs lawyers — lawyers who put everything on the line for what they believe in — not only would corporate cheaters would run amuck, ravaging consumers and victimizing well-behaving corporations, but also there would be no defense lawyers. After all, our practice is essential to yours. Yours is not essential to ours.

At bottom, we believe it's the shakedown lawyers that spur defense counsel's misperception of our practice. Shakedown lawyers are so brash, shameless and visible that it's easy for the defense bar, the Chamber of Commerce and social media to graft their ugliness onto the better, more important and more virtuous aspects and people of the plaintiffs bar. If ever a few bad apples ...

The plaintiffs bar is necessary. Consider how things would look without us. We'd be left with an uncomfortable choice between governmental regulation and an unenforced wasteland where companies steal and products kill. Just like corporations are people, the plaintiffs bar is people. People who work hard and risk everything to do something that they believe is right and that matters.

How Phil Believes the Plaintiffs Bar Perceives the Defense Bar

The plaintiffs bar thinks defense lawyers have it easy. We have clients who pay us monthly, allowing us to have lucrative practices and extravagant (or at least comfortable) lifestyles with little risk.

We command vast resources that includes legions of associates, paralegals and secretaries, around-the-clock docket clerks and word-processing departments, and Lexis, Westlaw and the latest software, industry resources and online tools — all enshrined in lavish offices bedecked in weekly floral arrangements and rotating artwork.

According to the plaintiffs bar, our clients leverage these resources to mount a vigorous, but largely frivolous, defense to generally meritorious claims. We fight for every scrap of ground — removal, standing, dismissal, Twombly, ascertainability (is that even in Rule 23?), interlocutory appeals and more.

We have never seen an unobjectionable discovery request, we rarely produce all relevant discovery, we feign mistake when we intentionally fail to produce relevant documents, we move to disqualify every expert under Daubert and we file an endless series of motions, whether on discovery issues, Rule 23 or summary judgment. Our game is one of delay and driving up costs, hoping to break plaintiffs counsel's will and spirit and to outlast their resources.

On the merits, we know the Federal Rules of Civil Procedure better than we know our own children, and we deploy these rules to distract from the real and substantial harm that our clients have done.

When it comes to taking a deposition or arguing a motion, maybe a few of us have decent (but not great) stand-up skills. Even fewer of us have any meaningful trial experience. But our focus on procedure and discovery distracts from these weaknesses and the largely indefensible merits of every plaintiff's case.

Supporting and enabling all of this are our well-heeled clients, whose wealth is only exceeded by their depth of personnel and resources available to educate us about the lawsuit's factual and legal background that we'll never disclose to the extent it damages our client's case.

At bottom, our clients seek to make a buck by selling shoddy products, marketing deceptively or engaging in other behavior so egregious that its illegality is patently obvious to anyone who is not a defense lawyer.

What the Real Defense Bar Looks Like

I have shared these perceptions with Dan, and he tells me I'm right. He tells me large swaths of his bar (not him, of course) perceive my practice largely along these lines.

Like most generalizations, this portrait has some kernels of truth but largely misses the mark. The businesses we represent employ many people. These businesses and their people make significant positive contributions to society. They make the products we love and use every day. They build our cars, they produce our food and they make our country the wealthiest the world has ever seen.

They do all this at great cost, with great risk and in the face of myriad challenges and obstacles. In many cases, class actions challenge (usually with the benefit of hindsight) a product or practice at the core of a company's success. This makes the case personal for the real people whose product or practice is targeted.

Do some companies engage in shady or illegal practices? Of course. But these companies — these people — are the exception. The problem is too many cases have too little merit and do little more than impose cost with little benefit to customers or society. In these circumstances, litigation feels more like legalized extortion than the administration of justice.

As for our litigiousness, the burdens of discovery are generally asymmetrical. Most plaintiffs have few, if any, worthwhile documents. Plaintiffs counsel often lack any idea how difficult and costly harvesting documents or identifying custodians can be, particularly in large, sprawling organizations with high turnover and frequent acquisitions, and where plaintiffs allegations often span decades.

In many cases, plaintiffs counsel has had months or years to investigate their claims before filing suit, so it should not surprise them that defense counsel and its clients need time too. Moreover, the motions that plaintiffs lawyers complain about protect rights and interests important not only to defendants but also to plaintiffs. Though plaintiffs counsel might prefer that defendants confess judgment and pay a fee, there is nothing wrong with insisting that plaintiffs carry their burden of proof.

Plaintiffs counsel also has little visibility into the broad and diverse range of company stakeholders, even on small matters. So when a case should settle, stakeholders need to reach that conclusion. That takes time and effort.

Every time plaintiffs lawyers talk about the risk they face when filing suit, we and our clients hear two things. First, plaintiffs counsel doesn't appreciate the risks and costs to defendants. To the contrary, we often perceive plaintiffs counsel as part of a calculated strategy to force settlement of a defensible claim.

Second, plaintiffs counsel has little appreciation for how much the economics facing law firms have changed in the past ten years. Even meritless claims can net plaintiffs counsel more fees than defense counsel, to say nothing of the increased risk of fee disputes and malpractice claims that accompany unfavorable results.

The defense bar is not a band of soulless mercenaries who defend the indefensible for the right price. It's a group of thoughtful lawyers doing their jobs, protecting people and businesses who deserve it and encouraging accountability where necessary and appropriate.

Owning and Deconstructing Our Stereotypes

So we thought we had each other figured out? Apparently not. Because of this, is it any surprise that we treat each other so poorly? Given our misperceptions, what could we expect?

But now we know our professional stereotypes aren't true. We've seen how essential it is to deconstruct these stereotypes — stereotypes that discourage good behavior and encourage the ugliness that makes us unhappy.

Given the professional and personal overlap we've exposed, we hope everyone can begin to appreciate that plaintiffs and defense lawyers are just people who have committed their professional lives to helping people solve their problems.

And these problems are shared in that their solution requires the involvement of plaintiffs and defense

attorneys. It's just that we approach these shared problems from different entry points and from different perspectives. But this doesn't make one approach right and the other wrong. It just makes them different.

Lawyers are lawyers. There's no need for misery, particularly when considering what lies at the nub of our professional charge — helping people. Every day should invigorate us because every day carries the prospect of doing something great for another person.

Sure, our process is an adversarial one. We don't mean to suggest it isn't. But adversarial needn't mean personal. If we keep in mind that we're the same person, just on the other side of the v., we believe our profession can go a long way toward recapturing the civility and consideration that once defined the art of advocacy and the practice of law.

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