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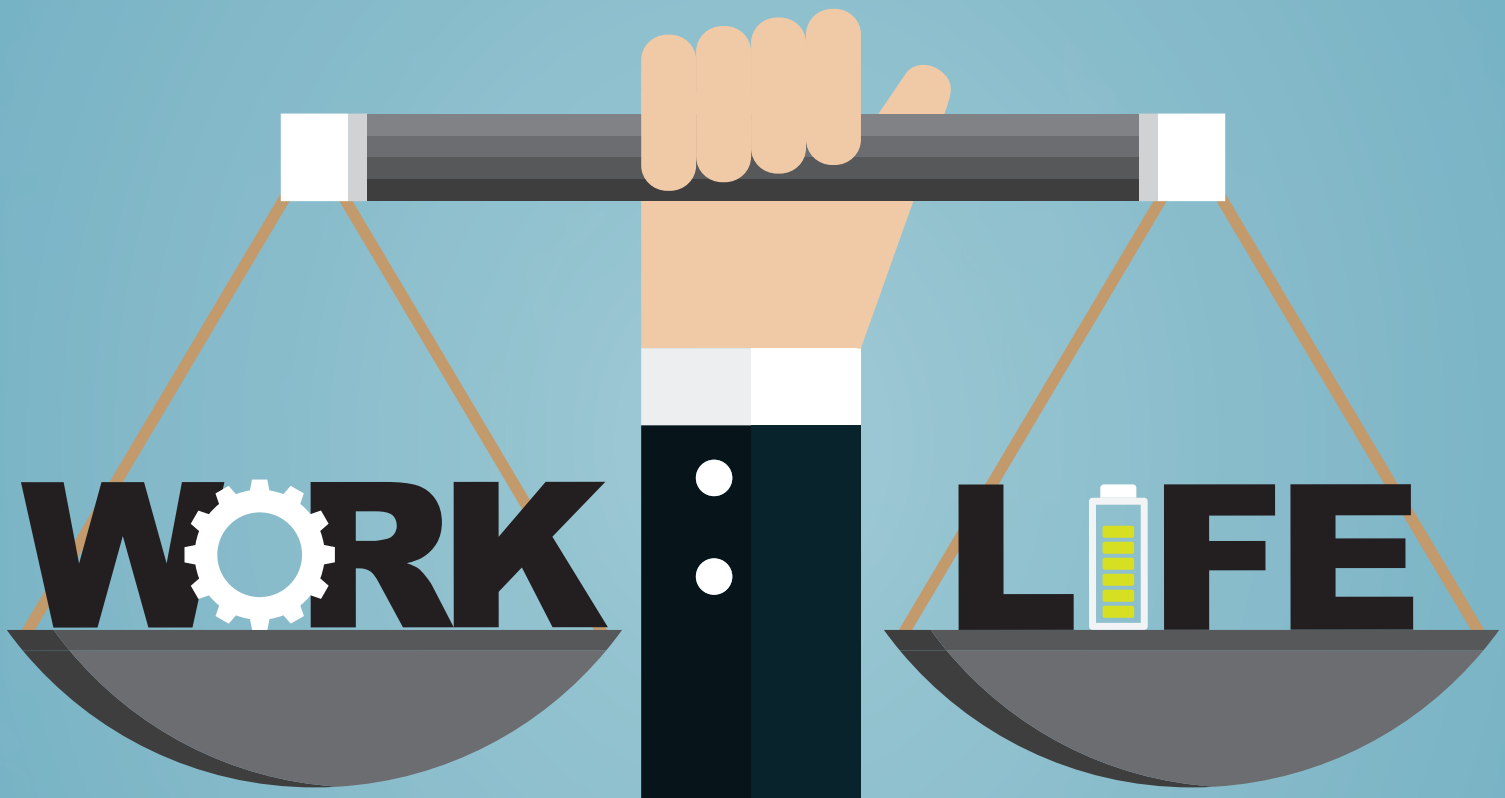

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BARGAINING

BY DR. ERIC Y. DROGIN

IS THIS REALLY WHAT WE DO?

"Bargaining" may not fit the popular image of attorneys living their best and most productive professional lives. This is perhaps brought home most vividly in the form of the oft-stated convictions—no pun intended—of those indigent criminal defendants who bemoan their fate at having been assigned a public defender instead of that perceived apotheosis of advocacy: the "paid lawyer."

When seen forensically, this particular subset of examinees will often explain, with the studied patience of those faced with a doctor clearly in need of a pervasive reality check, that there are two things that set the paid lawyer apart from mere public servants. These first of these is an obligation to do whatever the client tells them to do, because not only does money talk, but in fact it decrees. The second of these is a driven, demented combativeness directed toward any and all courtroom obstacles—such as judges, prosecutors, adverse witnesses, and inconveniently placed chairs—at every turn.

The paid lawyer, one learns, wants to "fight," after reveling in having fought earlier, and in gleeful anticipation of the unequalled thrill of getting to fight again. If counsel doesn't periodically draw threats of sanction from bench, like the baseball manager who deliberately seeks ejection in order to fire up the team, then perhaps the time has come to represent oneself. This option involves other broadly ranging fantasies in which defendants are enabled both to castigate their accusers and to deliver seemingly endless narrative testimony, unhampered by the sustained objections that trim the sails of those of us who do this sort of work for a living.

Defense counsel cannot, of course, apply a scorched earth approach to every contested legal matter, any more than prosecutors can insist upon bringing each case to trial—and even if they could, they wouldn't. This doesn't solely reflect a paucity of time and other resources. Instead, it tacitly acknowledges the many advantages to the client and to the legal system itself that bargaining affords. There's no percentage in needlessly antagonizing the other side. Prosecutors often have a considerable amount of latitude in settling cases. It may eventually emerge from ongoing discussion that a defendant has been overcharged. The more time that is spent in seeking creative, mutually acceptable solutions, the more likely it may be that both parties arrive at a more sophisticated, more appropriately nuanced sense of what is truly fair and just.

Once proper attention has been paid to litigants and to others affected by the incidents in question, attorneys would do well to consider the personal as well as professional wellness benefits of not transforming every legal encounter into a hyperthyroid duel to the death. For one thing, and perhaps most obviously, the stress and strain occasioned by unrelenting argument can lead to significant health problems, which can both include and be exacerbated by "burnout," defined by experts at the Mayo Clinic (https://tinyurl.com/mayobargaining) as a work-related stress condition with such warning signs as questioning the value of our efforts, doubting our skills and abilities, and overusing food and drink to numb our feelings.

Doctors at Oregon State University contend, for example, that resolving chronically argumentative behavior can reduce difficulties that run the gamut "from mental health problems such as depression and anxiety to physical problems including heart disease, a weakened immune system, reproductive difficulties and gastrointestinal issues," in addition to which, from an emotional standpoint, "people who felt their encounter was resolved reported roughly half the reactivity of those whose encounters were not resolved" (https://tinyurl.com/oregonbargaining).

On the positive side, the collaborative nature of bargaining has a palpable wellness dimension as well. Medical researchers have often opined on the beneficial effects of this approach when dealing with their own care recipients in primary treatment settings. According to researchers at the University of Regina, doctor-patient collaboration significantly promotes adherence, for example, to all manner of medical service initiatives (https://tinyurl.com/reginabargaining).

Expanding this consideration to the "creativity" factor that can be associated with bargaining, doctors affiliated with MemorialCare, an integrated health system of California hospitals, have propounded a number of additional of mental and other wellbeing advantages that include "sharpens your mind," "improves your mood," "relieves anxiety and stress," "combats depression," "helps you get active," "boosts your immune system," and "improves motor skills" (https://tinyurl.com/memorialbargaining).

The benefits of bargaining also dovetail in particular with guidance proffered by the "National Task Force on Lawyer Well-Being" (the "Task Force"), an entity "conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL)" and made up of several other "participating entities" from within and without the American Bar Association (https://tinyurl.com/ntflwb).

The Task Force has identified six pillars or "dimensions" that combine to "make up full well-being for lawyers," one of which is the "Intellectual" dimension, described as "engaging in continuous learning and the pursuit of creative or intellectually challenging activities that foster ongoing development" and "monitoring cognitive wellness" (https://tinyurl.com/ntflwb-report).

In most jurisdictions, of course, attorneys are hardly in a position to avoid "engaging in continuous learning" if we wish to maintain our licenses at all. Beyond such structured exercises, however, we continue to find welcome challenges in the intellectual exercises that day to day practice provides. The bargaining process—consisting, according to the National Education Association (https://tinyurl.com/neabargaining) of "preparing for bargaining," "conducting negotiations," "ratifying the contract," "resolving a contract dispute," and "changing or clarifying the contract"—offers more than ample opportunity to obtain intellectual stimulation while sidestepping the stressful byproducts of open warfare.

Bargaining is indeed "what we do." It's not the only thing we do. We do it very well, and we do it when it serves the client's interests, not because we can't summon the necessary biliousness and rancor to rise to the occasion. In addition to how it empowers us to practice at the well-chosen limits of our professional abilities, it potentiates ancillary health benefits that help us live to fight another day.

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DR. ERIC Y. DROGIN is a Norton Healthcare Louisville Hospitals Medical Staff member with clinical privileges in adult psychology. He teaches on the faculty of the Harvard Medical School, where he serves as the Affiliated Lead of Psycholegal Studies for the Psychiatry, Law, and Society Program at Brigham and Women's Hospital and participates in the Program in Psychiatry and the Law at the Massachusetts Mental Health Center and the Forensic Psychiatry Service at Beth Israel Deaconess Medical Center. Proud to be a Kentucky lawyer for over 30 years, Dr. Drogin is a former chair of the ABA Science & Technology Law Section and a former president of the American Board of Forensic Psychology. Please contact him at eyd@drogin.net with your suggestions for lawyer mental health and wellness topics.