



ADR and the Image of Lawyers

Lawyer-warrior or lawyer-peacemaker –
what's the better public image for our profession?

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good [person]. There will still be business enough.”

– Abraham Lincoln,
Notes for a Law Lecture

“I was never ruined but twice: once when I lost a lawsuit and once when I won one.”

– Voltaire

Much of the popular perception of lawyers revolves around their role as advocates. That popular image is the basis for most TV shows, movies, and other media portrayals. It provides the most drama. It is the one that people are most familiar with.

The trial lawyer who fights doggedly for the rights of her client; the criminal defense attorney who does everything possible within ethical bounds to obtain an acquittal for his client; the criminal prosecutor who aggressively vindicates the rights of victims and their families; the personal injury and class-action lawyers, who fight to vindicate the rights of those injured by the negligence or wrongdoing of others. It was this image that drew many of us into the profession in the first place.

Unfortunately, this image of lawyers as advocates and warriors has also contributed to many of the negative portrayals of our profession. Pitting litigants against each other through their respective attorneys naturally creates resentment and antagonisms – and winners and losers.

To make matters worse, the party that “wins” can be as unhappy as the loser at the end of the process, as Abe Lincoln observed over 150 years ago.

And since then, the process of “getting to trial” has become even more complex, expensive, and time consuming. Pre-trial litigation, the discovery process, and the proliferation of claims have made the process lengthier, more complex, and more expensive. To many litigants, the cost in time and money of going to trial is prohibitive.

Now, don't get me wrong. I love being a trial lawyer, and I love our egalitarian system of justice structured to find the truth through contest in the form of trial. That system can and does work effectively. There is nothing like a good cross-examination to get at the truth – or at least as close to the truth as we can get.

But based on over 30 years in the practice, I have to admit the truth of the following syllogism:

(1) Litigation is generally not “good business.” As Lincoln and Voltaire recognized, it is expensive and time consuming, and the result is uncertain. It uses time, energy, and resources that could be better spent by the litigants in pursuing new opportunities instead of arguing over past disputes.

(2) Most civil cases settle before trial.

(3) If items 1 and 2 are true, the inescapable conclusion is that the litigants are well served by attempting to settle their civil disputes as soon as possible.

The idea that we must continue to put effective alternative dispute resolution systems in place to help lawyers and litigants resolve disputes through compromise is hardly new. And it has steadily gained steam during the time I have practiced. Court rules have been established to empower a judge to order litigants to mediation. Collaborative law is growing, particularly in matrimonial law. Restorative justice programs are also becoming more common, especially

in certain types of criminal cases.

Many trial lawyers resist ADR, and for some good reasons. I must confess that early in my career I was not a big proponent of ADR. It was not the first thing that came to mind when meeting a new client or embarking on a new case.

There was and is a widely held view that you get the best result for your cli-

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ent by showing strength. Many times that is exactly what the client wants, and the client would find a better “warrior” if you suggested otherwise. In cases where money damages are the real issue, there are not many incentives for a defendant to seriously explore early settlement. It may be difficult to assess what a reasonable settlement is without at least some discovery.

And some disputes simply cannot be settled, at least not at an early stage, no matter how much the lawyers or a mediator may try. Sometimes the parties need a catharsis and time to heal the pain (economic, emotional, or otherwise) that lies at the heart of the dispute. Sometimes litigants are simply unrealistic, unreasonable, vindictive, and unwilling to compromise at any cost, particularly at an early stage. And sometimes people simply and honestly want to prove a point for the greater good. For those and other reasons, the formal adversarial process is necessary and will remain a mainstay of our sys-

tem of justice for the foreseeable future.

But the practice of law is a particularly human endeavor. At bottom, we are problem solvers. Many times the best solution to a client's problem is not the immediate pursuit of a lawsuit. Not every case is meant to prove a principle, teach a lesson, or even seek the truth. Even in those cases where a principle could be upheld, or a lesson taught, the particular litigant might not have the economic or emotional wherewithal to

see it through.

There is great satisfaction in resolving a client's problem as quickly and efficiently as possible, even if it involves compromise. The satisfaction of accomplishing that can be as rewarding as obtaining a favorable jury verdict. There is no inherent weakness in compromise. In fact, some would say it indicates greater wisdom and intelligence. And those same attributes are hardly inconsistent with being a great trial lawyer, if that is

what it comes down to.

So do the right thing. Embrace the growing use of alternative methods of dispute resolution at every opportunity. It is here to stay. In the process, our image as lawyers – as problem solvers – is enhanced.

As Lincoln said, there will still be business enough. And if your reputation for finding the best solution precedes you, you will have a greater share of that business over the long run. ■