

Is There a Duty to Avoid Litigation?

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Over 150 years ago, Abraham Lincoln said "Persuade your neighbors to compromise whenever you can... As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough. A worse man can scarcely be found than one who [creates litigation]."

Conflict and litigation have always been inescapable elements of life in America. Although in the past and in some countries, tribal elders, extended families, neighborhoods, churches, and communities provided some avenues for dispute settlement roles, the United States has always been the land of litigation. With this country's soaring fixation on litigation today, court systems are chronically overburdened with legal disputes, resulting in expensive, time-consuming and stressful litigation that places enormous burdens upon the American economy.

The procedurally complex and dilatory system has become so cumbersome that in some parts of the country,

trials by jury are the exception rather than the rule. In fact, a recent article in *The New York Times* has revealed that trials are increasingly rare and that they may become a relic of the past. While the clogged system has reduced the number of trials, lawsuit filings are as proliferate as ever. The litigation system can be destructive of relationships, and at times, humiliating. At the end of litigation, many times the victory is very hollow.

What then is a lawyer's duty at the onset of a conflict? What is the lawyer's duty throughout the case? Do we have a duty to do whatever we can to avoid litigation, to convince our clients to settle their disputes without filing a lawsuit? We must not forget that our traditional title is that of "counselors at law," and our clients should expect our counsel as well as our zealous representation.

Oviously, an early objective evaluation of the potential litigation must be given to the client. The function of the attorney is to counsel the client not only on his or her chance of final success but also to describe extra-judicial alternative resolutions. A meaningful, extensive discussion of the alternatives to traditional litigation should be made a component of any advice to the client.

Often expressed client sentiments such as "I want blood," or "Make him personally liable," or "I don't care what it costs" should be softened by the attorney. These words should also not be interpreted as a green light to spend hundreds of hours on the file (e.g., in discovery "fishing expeditions") and to bill accordingly. Creatively tailored alternatives to filing a summons and complaint must be explored and explained to the client. More than one unhappy client has discovered that after many years of litigation, the ultimate financial settlement is less than the total amount of legal fees expended.

Alternatives such as mediation, non-binding and binding arbitration, or even a formal in-office meeting of the parties to discuss their dispute and perhaps settle it, must be considered at the initial meeting with the client. Some ADR procedures are mandatory and imposed by contract or statute, others are put in place by persuasive attorneys and sometimes by judges.

Ultimately, however, the client's wishes must prevail. While the lawyer may have a duty to try his or her best to avoid litigation, the real ethical duty is to represent the client faithfully and zealously. After the attorney has made a vigorous, good faith effort to resolve the dispute without filing a lawsuit, and the client still wants to pursue full-blown litigation, the attorney must honor that desire and prepare for traditional litigation, including investigations, depositions, and trial. Once the decision to litigate is reached, the attorney must be aggressive yet cost effective for the client. Don't forget that a citizen's constitutional right to a jury trial is a cherished, inviolable entitlement that should never be abrogated.

Counsel should also be aware, however, that punitive damage awards and runaway jury verdicts can expose their clients personally, over and above any liability coverage. An egregious example is the 1999 verdict in *Cowart v. Johnson Kart Manufacturing, Inc.*, in which a Milwaukee County jury awarded 1.24 billion dollars (of which \$1.00 billion was a punitive award) to the plaintiff in a personal injury case. (The parties in *Cowart* later reached an out-of-court settlement.)

The danger of exposure to punitive awards of this magnitude places all clients at risk. The lawyer must appreciate, and explain to the client, that often the client's best interests are served by resolving the dispute without facing the jury. For instance, a hi-lo agreement that limits potential exposure and bad faith claims may be advisable.

A spirit of innovation must be fostered within the legal community to improve the quality of American justice. Consensual decisions to participate in alternatives to traditional litigation must be encouraged.

As this historical quote admonishes: "Lose no time; settle with your opponent while on your way to court with him. Otherwise, your opponent may hand you over to the judge, who will hand you over to the guard, who will throw you into prison. I warn you, you will not be released until you have paid your last penny" Matthew 5:25-26 (*New American Bible*).



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