

## Compromise

As I write this month's column, we are in the first weeks of the partial shutdown of state government. Obviously, our leaders in the Legislative and Executive branches of state government were unable to follow the advice of Edmund Burke set out below. In today's polarized political climate, compromise has been reduced to a four-letter word.

The concept that a politician strives to accomplish as much of her stated platform as possible, all the while recognizing that some proposals will need to be forsaken or held over for another day in the spirit of compromise, appears to have been lost. Now, politicians are expected to sign pledges to the effect that they will never compromise. The lack of willingness to compromise has been generating several articles lately, a trend to which I am now adding. Here's hoping that by the time you are reading this, both sides in the budget battle will have achieved a resolution ... in other words, compromised.

Although many people have suffered from the state government shutdown, fortunately the judicial branch was spared from the worst of the shutdown problems, but only following a court ruling.<sup>3</sup> The Office of Lawyers Professional Responsibility could have remained open in any event, as it is funded by lawyer registration fees and not by legislative appropriation, but it was not initially clear what other government services upon which we rely would be interrupted—such as the ability to issue payments to our vendors or to issue paychecks, or whether we'd have technical backup for our computer networks.



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### Compromise for Lawyers

So what of Lincoln's quotation above? Has compromise become an equally distasteful premise in today's legal world? Certainly "litigation" has changed significantly since Lincoln's days, especially as to procedure. The responses we get from attorneys to client complaints indicate that client expectations also have become more difficult to manage than in the past. Perhaps. But like our politicians, are we as lawyers too often staking out extreme positions on behalf of clients and then refusing to consider recommending anything less? Aren't

we supposedly trained to see and be able to argue both sides of legal issues? Shouldn't such persuasive skills allow us to convince our clients that compromise frequently is in everyone's best interests?

I seem to recall as a young lawyer being told that having to go to court was a failure, not a victory. I understood that statement to be akin to Lincoln's advice. Litigation is costly for the client; it is stressful for the client and the lawyer; it usually produces unhappiness in one side or maybe both. But is resorting to litigation still considered a failure in some situations? Have we encouraged a belief that there must be a clear winner and loser in disputes, rather than helping clients find and accept common ground?

In civil disputes, the extensive use of alternative dispute resolution (ADR) procedures has created a relatively efficient way to resolve contested matters, but it still depends on parties who have not reached a compromise voluntarily. Has it become too easy for us as lawyers to never advise voluntary compromise to our clients? Is it now easier to agree to take a hard line on every issue, refuse to budge until some third party (the courts, an arbitrator or other neutral) ultimately rules, and then, if an adverse ruling is issued (and then upheld on another level of appeal), allow the client to feel aggrieved by the process and the adverse party, all without seriously having examined the reasonableness of the client's position?

### Guidance from the Rules?

Do the Minnesota Rules of Professional Conduct (MRPC) provide any guidance? Surprisingly, maybe disappointingly, little. The MRPC deal far more with defining a lawyer's role as a zealous advocate than urging a lawyer to be a peacemaker. Of course, it's not unethical to zealously represent a client's interests or use legal procedure for the fullest benefit of the client's cause within the bounds of the law.<sup>4</sup>

Several rules place restrictions on zealous advocacy, based upon a lawyer's duty to the courts, the administration of justice, and fairness to opposing parties and neutral persons. Rules on meritorious claims (Rule 3.1, MRPC), candor to the tribunal (3.3), fairness to opposing party and counsel (3.4), and respect for the rights of third persons (4.4) are among these limitations. They place limits on just how extreme a position a client or lawyer may take, or by what means those positions may be pursued. Sometimes these rules will require the lawyer to explain to the client why a particular action cannot be taken, or to decline to take a position. For example, we cannot counsel or assist a client in conduct that

All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter.

—Edmund Burke<sup>1</sup>

Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.

—Abraham Lincoln<sup>2</sup>

is criminal or fraudulent (Rule 1.2(d)).<sup>5</sup>

Limitations on zealous advocacy do not require clients to accept, or lawyers to advise their clients to accept, any compromise short of these bounds of the law, however. Indeed, another part of Rule 1.2 requires that a lawyer “abide by the client’s decision whether to settle a matter” (i.e., compromise).<sup>6</sup>

One of the few places in the ethics rules that at least allows, if not exactly urges, lawyers to encourage reasonable compromise, is Rule 2.1, MRPC, which is entitled “Advisor.” It provides that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.” Two portions of the unofficial Comment to the rule are particularly useful: that a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client, and that when a matter is likely to involve litigation, it may be necessary to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

### Conclusion

In the end, reasonable compromise ought to be a tool in every good lawyer’s toolbox, not just an aspirational goal, even if it’s not part of the toolbox of many of our politicians. As we know, compromise is not always attainable, but it should always be an option and a part of the discussion with a client. Requiring a third person to reach a resolution for

us, especially the courts but ADR processes as well, may do a disservice to our clients and ourselves. As Abraham Lincoln understood, there will be business enough and it may make us better persons. ▲

### Notes

- <sup>1</sup> 18th Century Irish political philosopher Burke was also trained as a lawyer and served in the British Parliament.
- <sup>2</sup> It’s easy to forget that Lincoln was a practicing attorney for over 20 years in Illinois before becoming President of the United States.
- <sup>3</sup> *In re Temporary Funding of Core Functions of the Judicial Branch of the State of Minnesota*, 62-VC-11-5361, Order of Judge Bruce W. Christopherson (Ramsey County, 06/28/11).
- <sup>4</sup> Rule 3.1, MRPC, Comment [1]. The concept of representing a client zealously within the bounds of the law was formerly written into the Code of Professional Responsibility DR 7-101 and 7-102. This phrase was carried forward by the drafters of the successor Rules of Professional Conduct only in the Preamble.
- <sup>5</sup> If the client insists upon pursuing such a criminal or fraudulent course of conduct, the lawyer may withdraw. Rule 1.16(b)(2) and (3), MRPC.
- <sup>6</sup> Rule 1.2(a), MRPC. In a criminal matter, this expands to mean that a lawyer shall “abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify.”

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\* American Bar Association Standing Committee on Lawyers’ Professional Liability. (2008). *Profile of Legal Malpractice Claims, 2004-2007*. Chicago, IL: Haskins, Paul and Ewins, Kathleen Marie.



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