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Even if You Think Your Client Will Win, You May Have the Responsibility to Urge Settlement Anyway

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EVEN IF YOU THINK YOUR CLIENT WILL WIN, YOU MAY HAVE THE RESPONSIBILITY TO URGE SETTLEMENT ANYWAY

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All too often participants in civil litigation use the courts to satisfy personal animosities. When the opportunity to settle a case presents itself, the client may well insist on his full measure of vengeance and instruct the lawyer to proceed with the action. At this point, the lawyer's professional responsibility to his client is often put to the test—particularly where the lawyer feels that he will ultimately prevail. In such a circumstance, should he blindly press forward, feeding his client's desire for the pound of flesh, or should he attempt to bring objective counsel into the proceeding by urging settlement?

As a practicing attorney advocating a client's cause, I often found that the cases in point fell nicely in line. The law was perfectly clear, or so I thought, and it was comforting to represent the side where right makes right. Advocates are, by nature or training, frequently myopic.

Now, after nearly ten years on the bench, five on the New York State Court of Appeals, I am not nearly so sure of the law as I once was. Cases which could not have been lost have been. Judgments which had to be affirmed have been reversed, and matters in which the law was perfectly clear have been decided by the perfectly clear vote of four-to-three.

Self-preservation aside, it is too glib to conclude that the judiciary suffers from a collective mental disease or defect. Perhaps, more often than we like to admit, the law is not always perfectly clear. Perhaps, when conflicting rights are nicely balanced, cases are decided by what Justice Cardozo called "a stream of tendency . . . which gives coherence and direction to thought and action."[1] Or perhaps, in the words of the immortal Mr. Dooley: "When the case is all in, the jury will look at the defendant and

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1. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12 (1921) (footnote omitted).

ask: did Lootgert kill his wife, did his wife deserve to be kilt, and ain't it time we had dinner?"

No matter the cause of uncertainty, my hypothesis in a word is this: The predictable outcome of a litigation, when tried to conclusion, is invariably less certain than it initially appeared to even the most experienced advocate. And the rhetorical inquiry which naturally follows is: Can the competent advocate, consistent with his professional responsibility, properly counsel settlement in a greater number of the cases now being litigated?

I will admit, readily, that a small percentage of cases do not lend themselves to settlement. For the most part, these are cases involving a constitutional principle or personal freedom. Other cases of principle or critical issue undoubtedly exist; they do not come readily to mind. The remainder, for the most part, involve money, and while money is undoubtedly important, it ought not to be confused with principle. The acid test is this: If the case can be settled for a sum of money, any sum, the case involves money, not principle, and it ought to be dealt with on that basis.

The source of the advocate's reluctance to settle is much the same as the gladiator's. Victory is distinguishable from compromise. The lawyer's training, moreover, concerns itself with judgments. A controversy results in litigation, which results in a judgment, whereby one party wins and one party loses. Judgments seldom leave both sides satisfied.

A part of the problem, at the least, lies in confusing the judicial system with justice. To be sure, the judicial resolution of society's disputes is far preferable to armed combat, but the arbitrary nature of much law has relatively little to do with justice. The rules governing commercial transactions, for example, may commend themselves by their certainty, but they are for the most part arbitrary. They may tell us who wins and who loses, but seldom who is right and who is wrong. Statutes of frauds, or of limitations, fall into much the same category. They are arbitrary, and, in a moral sense, they may result in injustice more often than not.

Legal right and moral right frequently fail to coalesce. This is a schism from which litigation is born, but it offers the advocate the greatest opportunities to bring about amicable settlement.

As our society grows more complex and less personal, the sources and likelihood of disputes increase. At the same time, we have now reached the point where the cost of litigation often puts the lawsuit beyond the pale of a practical remedy. In the lawsuit involving a nominal sum, both sides lose, whichever side wins.

Small claims courts, arbitration, and the like, contribute somewhat to a solution, but they are insufficient. Yet the advocate, in his role as a counselor, can be a mighty force for slowing the march to unnecessary litigation, and in the process his service to his client and society will be maximized. President Lincoln put it best when he wrote: "Discourage litigation. 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."[2]

2. A. LINCOLN, *Notes for a Law Lecture*, in II THE COLLECTED WORKS OF ABRAHAM LINCOLN 81, 81 (1953).