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The Lawyer as Peacemaker

Matthew B. Durrant

Thank you, Dean Worthen. It is a great honor and privilege to be asked to speak on this day, one that marks the culmination of years of study and achievement—and of worry—both by you who are members of the Class of 2008 and by those who love you and support you. They sit here proudly—spouses, children, parents, grandparents, and others who have sacrificed to help you reach this moment. They are here to honor you, but I'd like to give you an opportunity to honor them. I ask that the graduates please stand and applaud those who have made this day possible.

The J. Reuben Clark Law School is an extraordinary institution. Measured by median LSAT scores and undergraduate GPAs, it is among the top 10 percent of all the law schools in the country. The Class of 2008 is an extraordinary class, possessing the highest incoming academic credentials of any graduating class in the Law School's history. This school's faculty is superb, and its graduates are highly respected in the legal community, both for their skills and for their integrity. As Elder Dallin H. Oaks has said, this Law School is "an institution superbly effective in strengthening the moral, ethical, and professional foundations that compose the finest heritage in our profession."¹ Your diploma will be a badge of honor that you will wear throughout your professional life.

Now, I have a confession to make. I like lawyers. I know this is not a popular position. But—putting all the jokes and the cultural misconceptions aside—as a group, lawyers are an admirable bunch. There are, of course, exceptions, but in my experience lawyers tend to be honest, thoughtful, hardworking, and interesting. Law is a profession that self-selects conscientious achievers.

With that preface, I'd like to announce my topic: the lawyer as peacemaker. This might strike some as an odd incongruity, an oxymoron. We hear lawyers called many things, but seldom "peacemaker." Indeed, in

our popular culture—whether it be in movies, television shows, or lawyer jokes—the lawyer is often cast as the villain, fanning the flames of conflict, creating disputes, setting neighbor against neighbor. And, sadly, a few lawyers fit this stereotype. But most do not. The best never do.

Lawyers are uniquely positioned in our society to affect lives, whether for good or for ill, in the most profound ways. Often the fact that a person comes to a lawyer means that something has gone terribly wrong in that person's life. People come to lawyers with broken marriages, broken partnerships, broken bodies, broken lives. They come when they have been done an injustice or stand accused of one. They come when their fortune, or even their freedom, is at risk. In short, people will come to you with a problem, often at a time in their lives when they are most vulnerable. It is how you see that problem that will define you as a lawyer. Do you see in it the potential for your own profit, or do you see in it an opportunity to serve?

To be a lawyer is to face an ongoing and inherent conflict of interest. Often what is best for you, in a strict financial sense, is worst for your client. Frequently the shortest path to resolution of a client's problem, whether it be in the negotiation of a business deal or in a lawsuit, is the least profitable path for the lawyer. I'm reminded of my first trip to New York City. A cab driver recognized me for the naive, wide-eyed rube that I was, and he took me for a very long cab drive, which I later found out—as I came to understand the city better—was far longer than it needed to be. My financial interest was in the shortest route possible; his was in the longest.

Lawyers frequently face the same temptation to which that cab driver succumbed. They typically bill their time by the hour. The more hours the lawyer works, the more money he or she makes. By unnecessarily prolonging a business negotiation or a lawsuit, the lawyer can earn additional fees. The more interrogatories that are propounded, the more depositions taken, the more motions filed and hearings held, the fatter the lawyer's wallet. The ugly reality is that, as a lawyer, your personal financial interest will often be in conflict with your client's best interest.

So, what will stand between you and the unfettered pursuit of your personal financial interest? In a word, honor. Usually, only you will know what truly motivates your decisions as a lawyer. Your knowledge of the law and legal procedures will be vastly superior to that of your clients. They will be vulnerable to your manipulation. They have little choice but to trust you. Will you be worthy of that trust or will you twist it to your own ends? Despite what the movies, television shows, and jokes may suggest, the great majority of lawyers are worthy of that trust. They are honorable men and women. You, as a young lawyer, need to know that it is not necessary to choose between honesty and effectiveness. It is not necessary to choose between honor and success. You can be a good person and a good lawyer.

You can be a problem solver, someone dedicated to finding the shortest and least expensive path to resolution of your client's problem. You can be a peacemaker.

How? First and foremost, you must see yourself primarily not as a businessperson but as a problem solver. As salaries have skyrocketed and discovery proliferated, the practice of law has come to be viewed, more and more, as a commercial enterprise. Partners demand higher and higher salaries, so they require that associates bill more and more hours, and it all results in greater and greater fees for clients. There is a ratchet effect. But as a lawyer you cannot be a purely self-interested, profit-maximizing, economic actor. Your fiduciary duty, your ethical obligations to your client, simply preclude it.

Now, I'm not so naive as to suggest that money doesn't matter in the practice of law. It does. You need to keep the doors open, the staff paid, the books in the black, and your family fed. As the entertainer Sophi Tucker once said, "I've been rich and I've been poor. Rich is better." And as NBA basketball player Patrick Ewing once said, in defense of his union's demands for more money, "We make a lot of money, but we spend a lot of money." I'm afraid I have only the latter part of that problem.

So you can't ignore the importance of adequate money. But I simply want to say that in resolving to be a little less rich, you might find yourself a whole lot happier. It is not that first dollar but the last that is so insidious. Sometimes as lawyers we need to decide that enough is enough, that squeezing out that last dollar is not worth what it will cost us. There is much freedom that comes from being willing to walk away from that last dollar: freedom in the legal career we choose, in the clients we accept, in the advice we give, in the way in which we solve our clients' problems, and in the way in which we balance our professional and family lives. There is a far deeper satisfaction in practicing law as a problem solver, as a peacemaker, than as a fee generator. There is enormous psychic income to be had in genuinely placing your client's interests ahead of your own. And if you do so, while you may not make as much as you might have on a particular case, over time you'll develop the kind of reputation that will attract more and more clients. So the irony is that your long-term financial well-being will ultimately be better served by a commitment to unerringly subordinate your own financial interests to those of your clients.

Second, to be a peacemaker in your practice of law you must treat others with civility. This will allow you to develop the kind of reputation that *facilitates* problem solving instead of impeding it. Some lawyers are of the view that they can be most effective by being obnoxious, rude, or mean-spirited. They employ personal abuse and name-calling as tools of the trade. In fact, practicing in this style is profoundly counterproductive. Opposing lawyers are typically not cowed or intimidated into concessions; when they are attacked personally they usually attack in return. People are

rarely persuaded by someone who belittles or insults them, and practicing in this way causes other lawyers to be defensive and suspicious. It prolongs business negotiations or litigation. It multiplies discovery and motions. It makes settlement more difficult. It increases the cost to the client.

The most effective problem solvers are those lawyers who consistently treat others with respect and dignity, who are professional even in the face of unprofessionalism, who refuse to mirror the mistreatment they receive. There is nothing more natural than to return slight for slight, insult for insult, and anger for anger. But the best lawyers realize that the case is not about them. It's not about the slights they may have received, the disrespect they may have been shown. It isn't a personal contest with the other lawyer. The best don't make the cases personal. They are focused on resolving the problem in a way beneficial to their client. When cases become personal it only clutters and complicates their resolution.

Third, to be a peacemaker you must have consistency of character. You cannot compartmentalize your ethics. Here again, the reputation you develop is critical. Some lawyers treat the moral code that governs their private lives as inapplicable to their professional lives. Yet every principle by which you lead your life outside the law has equal force within it. If you are a dishonest lawyer, you are a dishonest person. If you are a cruel lawyer, you're a cruel person. If you are a dishonorable lawyer, you are a dishonorable person. No special set of rules excuses conduct by a lawyer that would be unethical or immoral outside the context of legal practice. And as you develop a reputation as someone who is unflinchingly honest, who does not seek to take unfair advantage, who is not out to trick anybody, you develop enormous power as a problem solver, as a peacemaker. Others respect you, believe you, trust you, and there is no more powerful cachet that you can have as a lawyer.

You sit here today with a reputational blank slate. *You* control what you write on it. If you are consistent in your character, if you treat others with respect and dignity, if you are scrupulously honest, if you are fair, if you are the same man or woman in the practice of law that you are in your church, your neighborhood, or your home, you will develop the kind of reputation that will give you enormous power as a peacemaker. And in peacemaking you not only will serve your clients but will find genuine personal and professional satisfaction.

Now, I'd like to share a story about my favorite lawyer, a man who exemplifies each of the traits I've discussed here today and who to me is the paradigmatic example of the lawyer as peacemaker: Abraham Lincoln. In 1855 Lincoln was asked to join the defense team in the McCormick Reaper Case, an enormously important and complex patent infringement case filed in an Illinois federal district court.² Numerous Lincoln biographers have discussed his involvement in the case. In my account I draw primarily from biographies by William Miller and Stephen Oates.³ Both

sides in the reaper case were represented by high-powered and nationally prominent lawyers. The lead defense lawyers, Peter Watson and George Harding, decided, after some pressure from their clients, to retain a junior lawyer from Illinois as local counsel. Their first choice turned them down, and, somewhat reluctantly, they chose Abraham Lincoln. From the start, they did not envision a significant role for Lincoln, and when the case was later transferred to Cincinnati and yet another able and prominent lawyer, Edward M. Stanton, was added to the defense team, Lincoln became even more the odd man out.⁴

But Lincoln was unaware of this status. He labored under the impression that he would be presenting oral argument in the case and immersed himself in intense preparation. Perplexed that his colleagues would not send him key documents or respond to his letters, he dutifully made his way to Cincinnati for the trial. After he arrived it soon became clear that he would not be presenting oral argument. So he sent Harding a written manuscript of the argument he had intended to make, which he had worked for two months preparing. When Lincoln received word that Harding had not even bothered to glance at the manuscript, he asked for it back so that he could destroy it, and it was returned to him unopened.⁵

The indignities did not end there. Though Lincoln stayed in the same hotel as Stanton and Harding, they never sought to discuss the case with him, never asked him to their rooms, never even asked him to dine with them at their table. When the judge in the case invited counsel from both sides to dinner at his home, Lincoln was not invited. Further, William Herndon, his longtime law partner, remembered Lincoln telling him that he—Lincoln—had overheard, through a slightly open door, Stanton saying of him, “Where did that long-armed creature come from, and what can he expect to do in this case?”

By this time Lincoln was painfully aware that he was to have no role in the case. Yet he did not return home. He stayed in Cincinnati and attended the trial every day, sitting in the back of the courtroom determined to listen and learn from these legal masters. What he learned proved invaluable to him in his subsequent and very distinguished legal career. Finally, when the trial concluded and Harding and Stanton left Cincinnati without a farewell, or even so much as a word to him, Lincoln’s humiliation was complete. When Watson sent him the agreed-upon fee of one thousand dollars, a huge sum at the time, Lincoln sent it back, saying he didn’t deserve it because he had made no argument at the trial. Only when Watson sent the check again, insisting that Lincoln was entitled to it because he had prepared the argument, did Lincoln keep it.⁶

How flabbergasted must Harding, Stanton, and Watson have been when, just five years later, Lincoln became the Republican nominee for president? But even then their disdain for him continued unabated. In a letter to a friend shortly into Lincoln’s presidency, Stanton referred to “the

painful imbecility of Lincoln.” One source indicates that Stanton said he “had met [Lincoln] at the bar, and found him a low, cunning clown.” In conversations with General George McClellan, Stanton referred to Lincoln as “the original gorilla.” As Frederick Douglas said of Stanton, “Politeness was not one of his weaknesses.”⁷

So, once he achieved power, what revenge did Lincoln exact on these three public men who had so humiliated him? How did he get even? Well, he didn’t. In fact, remarkably, he offered each of them a role in his administration, with Stanton accepting the position of secretary of war, the most powerful and significant position in Lincoln’s cabinet. Lincoln simply refused to let the personal offenses he had endured cloud his assessment of what was best for the country. However much Stanton may have belittled Lincoln personally, the fact remained that Stanton was extraordinarily capable. He was a superb advocate, as Lincoln had witnessed from the back of the Cincinnati courtroom, and was renowned as a competent leader, a master of detail, and an “incorruptibly honest” man. Stanton had precisely those abilities necessary to remedy what had become a deeply dysfunctional war department. Lincoln’s soul was simply too big and his commitment to the best interests of his country too great to allow his pride to stand in the way of the Union’s preservation.⁸

Edward M. Stanton made an invaluable contribution to the Union war effort. He and Lincoln developed an extremely close working relationship in conducting the war, with Lincoln “cross[ing] the street to the war department almost every day” to confer with Stanton. Their relationship and the mutual trust and respect they developed proved to be crucial to the preservation of the Union and the abolition of slavery. Indeed, it could be said to be one of the most important relationships in our nation’s history, and, for that matter, the world’s history—all because Lincoln’s commitment to his country transcended his personal interest in protecting his pride.⁹

Stanton came to know, quite personally, Lincoln’s remarkable qualities and became a committed and vigorous defender of him, telling Harding that “no men were ever so deceived as we at Cincinnati” and that “never afterwards, would any disparagement of Lincoln be tolerated by [him] or members of his family.” Lincoln’s son Robert Todd said that Stanton called upon him for more than 10 days after his father’s death “and spent the first few minutes of his visits weeping without saying a word.” And it was Stanton who said over Lincoln’s dead body: “Now he belongs to the ages.”¹⁰

Lincoln exemplified what a lawyer should be, what a human being should be. He was driven not by money or by his emotions, but by principle. He subordinated his own interests first to those of his clients as a lawyer and then to those of his country as president. He refused to let personal slights deter him from his more important objectives. He did not let how he was treated by others dictate how he treated them. A man of

towering integrity, his character was consistent in every context of his life. I will close by quoting to you the advice that he once gave law students: “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 wasted time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

Thank you.

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Matthew B. Durrant received his JD from Harvard University in 1984 and clerked for Judge Monroe G. McKay of the U.S. Court of Appeals for the Tenth Circuit 1984–1985. He served as a trial judge in Utah’s Third Judicial District 1997–2000 and as an associate justice on the Supreme Court of Utah 2000–2012. The founding chair of the Utah Supreme Court’s Advisory Committee on Professionalism, he is currently serving as chief justice of the Supreme Court of Utah.

Notes

1. Dallin H. Oaks, *Ethics, Morality, and Professional Responsibility*, 1975 *BYU L. REV.* 591, 599.

2. I wish to thank Douglas G. Mortensen for sharing his research on Abraham Lincoln.

3. STEPHEN B. OATES, *WITH MALICE TOWARD NONE: A LIFE OF ABRAHAM LINCOLN*, pt. 3 at 103 and pt. 7 at 278 (HarperPerennial ed. 1994); WILLIAM LEE MILLER, *LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY*, ch. 16 at 410–26 (2002).

4. WILLIAM LEE MILLER, *LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY*, 410–11.

5. *Id.* at 416.

6. *Id.* at 416–18.

7. *Id.* at 415, 421–23.

8. *Id.* at 422–24.

9. *Id.* at 424–25.

10. *Id.* at 426.