LINCOLN AND LEGAL ETHICS

Hon. Steven L. Hostetler

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Introduction

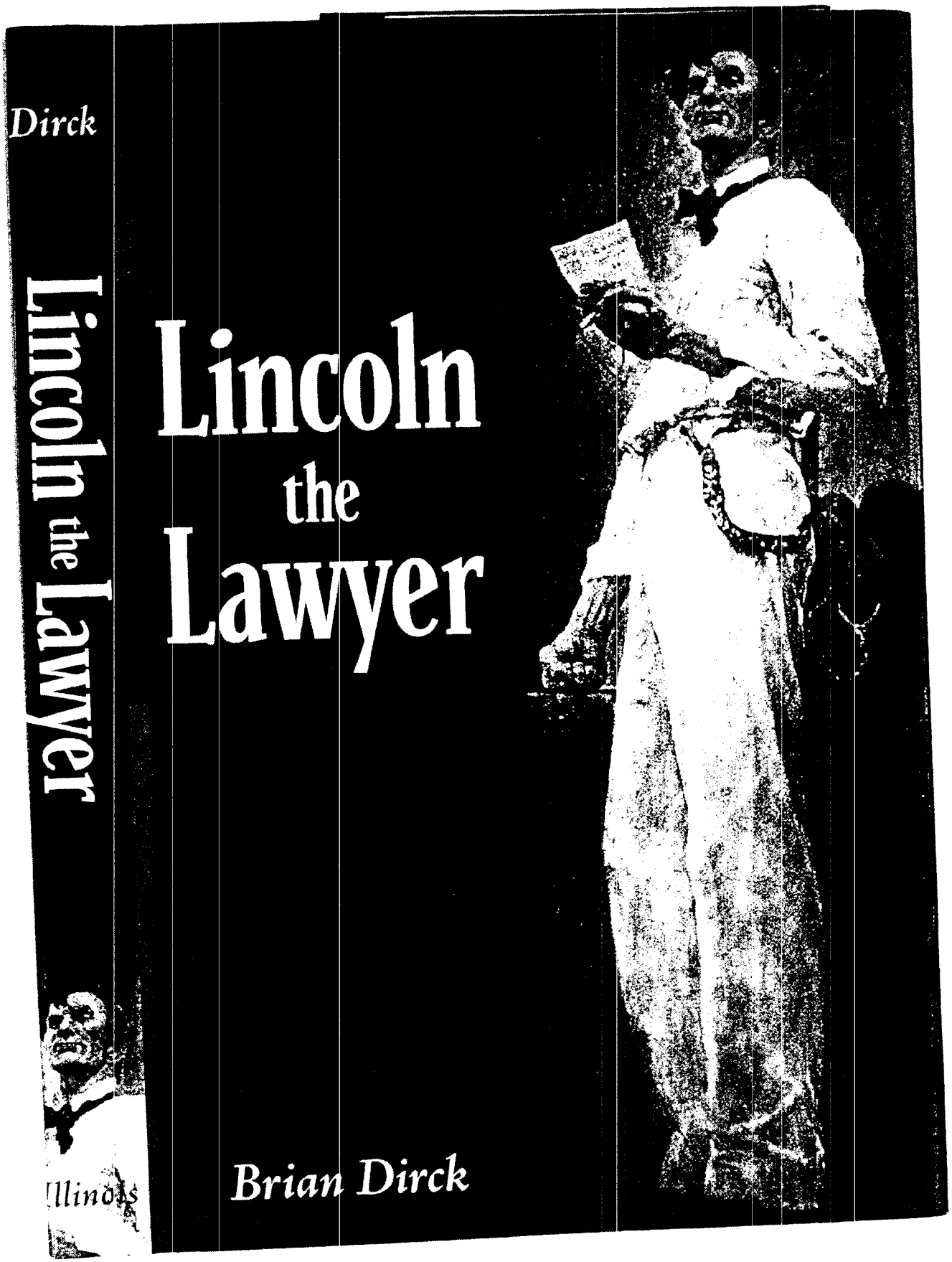
We all know Abraham Lincoln as the 16th President of the United States, the savior of the Union, and the Great Emancipator. As lawyers, we are justifiably proud that he was a working lawyer for most of his adult life. Except for the two years he spent in Congress, from 1836 until the election of 1860, Lincoln earned essentially his entire livelihood from practicing law.

It is particularly interesting to observe how closely Lincoln's law practice mirrors typical general legal practices of today. As it turns out, Lincoln's practice was reasonably successful and quite diverse, but not particularly glamorous. Abraham Lincoln was, in large part, involved in collecting money or in defending collections. He also handled bankruptcies, divorces, petty and serious criminal matters, real estate disputes and railroad litigation.

I believe that Lincoln could walk into any Indiana courthouse today and begin to practice without much of a learning curve. His skills and experience would serve him well in our modern legal world. He would probably find some of our current practices curious, but he could adapt. People and their problems were generally the same then as now. And our basic legal principles haven't really changed all that much.

Ethical issues really aren't all that different either. This presentation will discuss two specific ethical issues, ex parte communications and conflicts of interest, through the lens of Lincoln's own experiences. Then we will discuss some notes Lincoln made about the practice of law. His thoughts on the ethics of lawyering are as relevant now as they were in 1850.

Lincoln's legal career is the subject of a book published in 2007, entitled, Lincoln the Lawyer, by Professor Brian Dirck, from Anderson University. Professor Dirck is an accomplished and highly regarded Lincoln scholar. His book is a principal source for much of this presentation. Lincoln the Lawyer is an important resource and a thoroughly enjoyable reading experience.


Dirck
Lincoln the Lawyer
Lincoln
the
Lawyer
Brian Dirck
Illinois

QUESTION 1
Improper Ex Parte Communication?

Lincoln was having dinner one evening while traveling on the 8th Judicial Circuit in Illinois. At his table were several other lawyers practicing on the Circuit, as well as the judge before whom Lincoln was scheduled to appear the next day. "Lincoln suddenly asked a novel question of court practice, addressed to no one particularly." The judge replied to the question, "stating what he understood the practice to be."

Lincoln laughed and said, "I asked that question, hoping that you would answer. I have that very question to present to the court in the morning, and I am glad to find out that the court is on my side."

Source: Dirck, Brian, Lincoln the Lawyer, © University of Illinois (2007), pages 51-52; quoting William Herndon, Lincoln's law partner.

Rule 2.9. Ex Parte Communications.

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Rule 3.5. Impartiality and Decorum of the Tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment.

(d) engage in conduct intended to disrupt a tribunal.

[Amended September 30, 2004, effective January 1, 2005.]

TWO RECENT INDIANA SUPREME COURT DECISIONS INVOLVING EX PARTE COMMUNICATIONS

I **In the Matter of Kinnard, 2 N.E. 3d 1267 (Ind. 2014)**

Lawyer received six-month suspension for conduct that included failing to serve the opposing party with a motion to correct error. The sanction was more severe because the lawyer also made false statements in a subsequent motion, and then wrongfully filed a defamation lawsuit against the complainant after the disciplinary complaint was filed. There were other aggravating and mitigating circumstances.

II **In the Matter of Anonymous, 43 N.E. 3d 568 (Ind. 2015)**

Lawyer received private reprimand for presenting an emergency petition seeking a temporary guardianship of a child with no advance notice to the child's mother. Further, the lawyer did not certify to the court pursuant to Trial Rule 65(B) the efforts made to give notice to adverse parties or a statement of the reasons supporting a contention that notice should not be required.

Question 1 Considerations

1. Opposing counsel was probably in attendance.
2. There were no written ethical rules in effect, including no rule prohibiting such a communication.
3. Considering Lincoln's well known sense of humor, it could very well have been in said in jest and there really wasn't such a question to be presented in court the next morning.
4. In the 8th Illinois Judicial Circuit in the 1840's and 1850's, the attorneys and judges traveled together for several months of the year. The ate essentially all of their meals together and even slept together. Your opposing counsel one day might be the judge of your case the next day. Lincoln would unlikely try something underhanded.
5. Every indication is that Lincoln was in fact extremely honest and above board in his dealings as a lawyer. "Honest Abe" is no myth when it comes to Lincoln's legal career.

QUESTION 2

Conflict of Interest?

Lincoln had a long-standing and extremely close personal relationship with Joshua Speed. Lincoln and Speed were roommates for some time right after Lincoln moved to Springfield and before Lincoln began practicing law. They remained very close friends throughout their lives. As is often the case with such close friends, Lincoln wound up representing Speed "in a variety of business matters."

Later Speed was a party to a "complicated debt/foreclosure case." Lincoln appeared in the case on behalf of several persons who sued Speed in that matter. The source of this story gives no indication that Lincoln asked for or received a written waiver of conflict of interest from either Speed or Speed's adversaries.

Source: Dirck, Brian, Lincoln the Lawyer, © University of Illinois (2007), page 73.

Rule 1.7. Conflict of interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[Amended September 30, 2004, effective January 1, 2005.]

Rule 1.9. Duties to Former Clients.

(a) a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client.

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[Amended September 30, 2004, effective January 1, 2005.]

Question 2 Considerations

1. The incident occurred approximately 160 years ago and it is impossible to know whether Lincoln did or did not receive consents. There is no indication that Speed ever held Lincoln's adverse representation against him.

2. There were no written ethical rules in effect.

3. In a community as small and close knit as Springfield at the time, the relationship between Speed and Lincoln would hardly have been a secret.

4. Every indication is that Lincoln was in fact extremely honest and above board in his dealings as a lawyer. "Honest Abe" is no myth when it comes to Lincoln's legal career.

Abraham Lincoln's Notes for a Law Lecture

Abraham Lincoln's White House secretaries, John Nicolay and John Hay, attributed to these notes a date of July 1, 1850. However, scholars are not really sure of the date or even whether Lincoln ever actually gave the lecture.

Source: *Collected Works of Abraham Lincoln*, edited by Roy P. Basler et al., found at www.abrahamlincolnonline.org.

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 man. There will still be business enough.

Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.

The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client. An exorbitant fee should never be claimed. As a general rule never take your whole fee in advance, nor any more than a small retainer. When fully paid beforehand, you are more than a common mortal if you can feel the same interest in the case, as if something was still in prospect for you, as well as for your client. And when you lack interest in the case the job will very likely lack skill and diligence in the performance. Settle the amount of fee and take a note in advance. Then you will feel that you are working for something, and you are sure to do your work faithfully and well.

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief -- resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

Rule 22. Oath of attorneys.

I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God.