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## ETHICAL COMPASS

# Settlement Fever: Lawyers, Have You Updated Your Philosophical Map?

By Elayne E. Greenberg

This column is the second in my three-part series about settlement fever. The focus of this column is on how settlement fever is incentivizing you, an ethical lawyer, to expand your legal mindset when you engage with your clients to help resolve their disputes. Have you updated your philosophical map lately?

In her March 2, 2021 State of Our Judiciary, Chief Judge Janet DiFiore reaffirmed the New York State Court's commitment to "presumptive early ADR in order to transform the old culture of 'litigate first,' to the new culture of 'mediate first' in all appropriate cases."<sup>1</sup> Yes, settlement fever is sweeping across New York state, and it's highly contagious. Arbitration in all its variants—mediation, negotiation, settlement conferences, neutral evaluation, online dispute resolution processes and hybrid processes—are just among the current list of dispute resolution processes that may be appropriate to help resolve your client's dispute. No one process is appropriate to resolve every dispute. And, the menu of dispute resolution options is growing. Lawyers, have you updated your standard philosophical map to respond to this change?

Our esteemed and prescient colleague, Professor Len Riskin, first talked about the lawyer's standard philosophical map and its potential clash with a party-directed practice like mediation in 1982.<sup>2</sup> According to Professor Riskin, many lawyers approach conflict with a pre-conceived mindset about legal conflict that Professor Riskin refers to as a lawyer's standard philosophical map. According to this now outdated mindset, lawyers view disputants solely as adversaries, not as collaborative problem-solvers.<sup>3</sup> The touted "win-win" philosophy is just a fantasy. Rather, if one party wins, the other must lose.<sup>4</sup> Second, this mindset holds fast to the belief that the resolution of a dispute can only take place when a third-party, applying the rule of law, decides how the dispute will be resolved.<sup>5</sup>

Dean Chris Guthrie observed that lawyers who have held on to the standard philosophical map tend to be speakers, thinkers and advisors more suitable for a litigation-dominated legal culture rather than listeners, feelers and counselors, with the skills that are needed to consider, advise and advocate in a settlement-dominated legal culture.<sup>6</sup> When lawyers with a standard philosophical map dominate legal practice, disputants are likely to view their lawyers more as a source of legal knowledge,

and less as a resource for emotional connectedness.<sup>7</sup>

In a litigation-dominated legal culture, lawyers with their standard philosophical map rely on *convergent thinking*, lining up the facts to find the one "right" answer.<sup>8</sup> When adjudication to determination is the legal norm, effective lawyers boast about thinking like a lawyer and relying on the lawyer's standard philosophical map and skills in convergent thinking. Objective analysis, theoretically devoid of emotion, is viewed as *de rigueur* to succeed at trial. If settlement was even considered, it was deferred until right before trial and took place at the courthouse steps. However, in today's settlement-focused legal culture, lawyers also need to be competent in *divergent thinking* to approach the legal disputes that face them with a problem-solving mindset and to consider a range of appropriate processes and possible solutions that are likely to satisfy the client's prioritized goals.<sup>9</sup>

As our chief judge has reminded us, legal practice has now changed from a litigation focus to a settlement focus. To remain effective practitioners, lawyers must update their standard philosophical map to accommodate this change. What will this update look like? Part Two will provide a checklist of 21 tune-up considerations for each lawyer to consider when engaging with clients and selecting appropriate processes to help resolve the client's dispute. How many of these considerations have you already adopted? In Part Three, I will highlight how the ethical underpinnings of the corresponding ethical rules about client advising in the New York Rules of Professional Conduct support and reinforce this update. Might the ethical rules about lawyer competence, however,



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need updating, too? The article will conclude by opining how legal practice in this settlement-focused culture will become even more thought-provoking, because it will require lawyers to have both legal knowledge and the emotional intelligence to skillfully initiate settlement discussions and choose and advocate in an expanded menu of dispute processes.

## Part Two: The Philosophical Map Tune-up Checklist Includes . . .

This 21-point tune-up provides a further check on your philosophical map and invites you to consider what additional alignment you may need. Many readers of this column and supporters of the Dispute Resolution Section have already tuned-up their philosophical map and re-aligned their lawyering skills to effectively practice in this settlement-focused legal culture. As you review this tune-up considerations, are there others you would include?

### Engaging With My Clients

- For my client's perspective, I appreciate that they do not view their conflicts as solely about the law.
- As a lawyer, I am aware of my 'isms such as race, age, gender, and I manage these biases so they don't compromise the attorney/client relationship and potential justice outcomes.
- In my role as a lawyer, I see the individuality of each client and respect the humanity in every client.
- I understand that empathy is a conflict-resolution resource, and I empathize with my clients, adversaries and their clients.
- When interviewing my client, I recognize that my client is the expert about how they want to resolve their conflict. For me to provide effective representation for my client, I must first understand what's important to my client, including the client's values, risk preferences, real-life priorities and the range of desired optimal resolutions.
- When counseling my client, I examine and suggest multiple processes that might help resolve the client's dispute and that are aligned with the client's values, risk preferences, real-life priorities and possible optimal resolution.
- I spend adequate time to ensure that my client understands how each dispute resolution process works and what each dispute resolution process offers.
- I appreciate that my client may value non-monetary remedies, such as an apology. In some cases, my client may even value non-monetary remedies more than monetary remedies.
- I recognize that my client may be as concerned with *how* they are treated in a dispute resolution process as with the outcome of the process. My

client's core concerns—appreciation, status, role, affiliation and autonomy—must be respected.

### Advocating in a Dispute Resolution Process

- I remain up to date about the menu of dispute resolution processes available and regularly check for new dispute resolution process innovations.
- I know how each process works, including the remedies available, cost, time involved and how to access the process.
- I am aware of the amount of risk inherent in each process and will also examine the risk of not engaging in any dispute resolution process.
- Given the impasse(s) in my client's presenting problem, I am able to distinguish which process(es) will help overcome that impasse(s): a third-party directed process, a party-directed process, an advisory process or a combination of processes.
- I can distinguish the appropriateness of individual dispute resolution processes or combination of processes for certain types of disputes and examine which dispute resolution process or combination of processes may likely be appropriate and advantageous in addressing my client's dispute.
- For each case, I am able to customize a dispute resolution strategy that focuses on one process, combines process(es) or creates hybrid processes as needed.
- As my client and I learn additional information about the presenting dispute, I have the flexibility to work with my client to re-prioritize settlement goals, re-think my advocacy strategy and choose additional or more appropriate dispute resolution processes to achieve these newly emerging goals.
- I appreciate that sharing information in a party-directed process expands opportunities for creating value.
- I understand that taking a collaborative and problem-solving approach expands the possible options for resolution.
- When advocating in a dispute resolution process, I help shape the process and titrate my advocacy based on the process's purpose.
- I prepare my client for their distinguishable roles in each dispute resolution process we are using.

### Rethinking Justice

- Winning is not a zero-sum game. I appreciate that winning a case does not exclude the possibility that the other side could win, too.
- I recognize that justice has a different meaning for each client.

### Section Three: The New York Rules of Professional Conduct and an Updated Philosophical Map

In large part, the New York Rules of Professional Conduct, as written, have the elasticity to ethically support updating a lawyer's standard philosophical map to be effective in this settlement-focused legal practice. For example, Rule 2.1 Advisor allows lawyers to have a broader scope beyond the law of the legal dispute at hand. The rule explicitly states in advising clients lawyers may consider such factors as "moral, economic, social, psychological and political factors that may be relevant to the client's situation."<sup>10</sup> Reinforcing the value of expanding the lawyer's standard philosophical map, Rule 2.1 Scope of Advice, Comment 2, recognizes that "purely technical advice . . . can be inadequate."<sup>11</sup>

Yet, this columnist's reading of Rule 1.1 Competence suggests that this rule warrants an updating of what is considered a competent lawyer. Rule 1.1(a) Competence provides:

A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.<sup>12</sup>

Then Comment 8 to the rule explains:

To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.<sup>13</sup>

As we have been discussing in this column, a lawyer's updated philosophical map is a broader concept than just legal knowledge and technical legal expertise. Competence in settlement-focused legal practice also requires an emotional intelligence and facility that has yet to be captured in the Professional Rules of Conduct's Rule 1.1 on Lawyer's competence. An update of this ethical statement about lawyer's competence, like an update of a lawyer's standard philosophical map, warrants consideration.

### Conclusion: What an Exciting Time To Practice Law

Settlement fever has taken hold in New York state. How different legal practice is today. Settlement fever has expanded the range of dispute resolution processes

effective lawyers may consider to resolve their client's dispute. In this changing legal culture, practice-competent lawyers now need to have a broadened understanding of the etiology of conflict, an expanded knowledge of the menu of appropriate dispute resolution processes, and the nimbleness to titrate their advocacy in the different dispute resolution processes. Clients, too, are changing their expectations of lawyers and expanding their ideas of justice. And, I expect that with this changing focus and emerging dispute resolution processes, the practice of law will keep changing.

Now in 2021, where settlement dominates the legal landscape, lawyers are appreciating that the lawyer's traditional philosophical map has expanded. Emotional intelligence, truly listening, and "feeling" are essential for lawyers to relate to clients and to help select appropriate dispute resolution process(es) for the case at hand. Lawyers need both the legal rigor to apply the law to the facts and the emotional facility to titrate their advocacy into different processes, both party-directed and third-party directed to get the full value of the remedies these processes offer. Your updated lawyer's philosophical map will help you pivot and become a more effective practitioner in this overdue legal culture change. What updates have you made to your lawyer's philosophic map? I look forward to hearing from you.

### Endnotes

1. <https://www.nycourts.gov/whatsnew/pdf/SOJ-2021-transcript.pdf> at p. 16.
2. Leonard L Riskin, *Mediation and Lawyers*, 43 Ohio S.L. J. 43 (1982).
3. *Id.* at 44.
4. *Id.*
5. *Id.*
6. Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 Harvard Negotiation Law Rev. 145 (2001).
7. *Id.*
8. Beth Rieken, Shauna Shapiro, Shannon Gilmartin & Sheri D. Sheppard, *How Mindfulness Can Help Engineers Solve Problems*, Harv. Bus. Rev. (Jan. 4 2019).
9. *Id.*
10. RULE 2.1 ADVISOR explicitly provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation," at <https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf> at p.129.
11. RULE 2.1 COMMENT 2 SCOPE OF ADVICE explicitly provides: "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate..."
12. <https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf> at p. 12.
13. <https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf> at p. 14.