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Dispute Resolution

Negotiation, Mediation, and Other Processes

ASPEN LAW & BUSINESS

DISPUTE RESOLUTION

Negotiation, Mediation, and Other Processes

1995 Supplement

With Additional Exercises in Negotiation, Mediation, and Other Dispute Resolution Techniques

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Preface

The purpose of this Supplement is twofold. Primarily, we seek to keep *Dispute Resolution* current by including references to important legal developments and to significant publications since the appearance of the second edition three years ago. In addition, we have developed a number of new simulations and other questions and problems that we believe teachers will find useful.

For each new exercise, as in the casebook, there is general information to be shared by all the participants. That information is contained in this Supplement. For most of the exercises, however, there is also confidential information for each side to consider, which is contained only in the Professor's Update to the Teacher's Manual to *Dispute Resolution* (available from Little, Brown). The Professor's Update contains instructions on the use of the confidential information, and Teaching Notes.

The Supplement follows the same format used in the casebook. Footnotes and other references (such as citations in judicial opinions) are generally omitted from the excerpts; footnotes that have not been omitted retain their original numbering. Our own footnotes are indicated by asterisks.

S.B.G.
F.E.A.S.
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Disputing Procedures

Page 12. Add to the References:

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Chapter 2

Negotiation

Page 73. Add the following article before the Questions:

R. MNOOKIN AND R. GILSON, COOPERATION AND CONFLICT BETWEEN LITIGATORS*

12 Alternatives 125 (CPR Institute for Dispute Resolution 1994)

Do lawyers facilitate dispute resolution or do they instead exacerbate conflict and pose a barrier to the efficient resolution of disputes? Today, the popular view is that lawyers magnify the inherent divisiveness of dispute resolution. According to this vision, . . . litigators rarely cooperate to resolve disputes efficiently. Instead, shielded by a professional ideology that is said to require zealous advocacy, they wastefully fight in ways that enrich themselves but rarely advantage their clients.

But purveyor of needless conflict need not be the only vision of the lawyer's role in litigation. More than a century ago, Abraham Lincoln suggested that as peacemakers lawyers might facilitate efficient and fair resolution of conflict when their clients could not do it for themselves. In an article we recently published in the *Columbia Law Review* we offered a conceptual foundation for this perspective. It rests on the idea that lawyers may allow clients to cooperate in circumstances when the clients could not do so on their own. . . .

The central idea should be familiar to most practicing lawyers: a trusting relationship between two opposing lawyers permits them to rely confidently on each other's representations and can substantially improve the efficiency of the dispute resolution process. When opposing

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lawyers value their reputations with each other for trustworthiness and cooperation, they can create an environment for collaborative problem solving even in circumstances where their clients cannot.

Litigation as a Prisoner's Dilemma: Why Cooperation is Difficult

. . . In many disputes, each litigant may want to cooperate but may instead feel compelled to make a contentious move to avoid exploitation by the other side. No one wants to be a "sucker" by cooperating and be taken advantage of by someone who won't cooperate. This combination of contentious moves that neither really wanted to take, results in a less efficient outcome than if the litigants had been able to cooperate.

Consider a highly simplified example. Suppose two disputants have a choice: each must independently decide whether to cooperate by voluntarily disclosing all material information to the other side (including some that is unfavorable) or to defect by withholding information, thereby forcing the other side to engage in expensive discovery to dig out some but not all of the unfavorable information.

The payoff structure in these circumstances may resemble that of the classical prisoner's dilemma. The worse payoff—the "sucker's payoff"—goes to a player who cooperates while the other player defects. The best payoff goes to a defecter whose opponent has cooperated. The other two possible outcomes—mutual cooperation and mutual defection—fall somewhere between these two extremes, with the reward for mutual cooperation being better than the payoff for mutual defection.

Clients may prefer mutual cooperation to mutual defection but be unwilling to cooperate for fear of getting the sucker's payoff, especially if the clients do not expect to have future dealings with each other. If the disputants do not trust each other to resist the temptation to defect, they may lack the credibility to be viewed as bound by their own good intentions. The net result is that both may defect and thus end up with a worse payoff than if both had cooperated.

How Lawyers Can Help

Lawyers, unlike many disputants, are repeat players who have the opportunity to establish reputations for cooperation—reputations that would be lost if they defected. Our central point is that disputing parties can avoid the prisoner's dilemma inherent in much litigation

by selecting cooperative lawyers whose reputations credibly commit each party to a cooperative strategy.

To illustrate, imagine a "pre-litigation game" in which clients disclose their choice of lawyer beforehand. Then imagine a world in which lawyers are clearly divided into two groups: gladiators and cooperative lawyers. Under the assumptions of our pre-litigation game, disputing through lawyers provides an escape from the prisoner's dilemma. If one client chooses a cooperative lawyer and her opponent chooses a gladiator, the client choosing a cooperative lawyer can change her lawyer without cost before the game starts. She has made a commitment, but it is conditional on what the other side does.

With this assumption, each client's dominant strategy is to choose a cooperative lawyer, because the choice of a cooperative lawyer binds each client to a cooperative strategy. If client A chooses a cooperative lawyer and client B also chooses a cooperative lawyer, both clients receive the cooperative payoff.

This suggests that there might be a market for cooperative lawyers. Both parties to a lawsuit with a prisoner's dilemma payoff structure would like to hire cooperative lawyers, because that allows them to commit to a cooperative strategy. Clients should therefore be willing to pay cooperative lawyers a premium, reflecting a portion of the amount by which the cooperative payoff exceeds the noncooperative payoff. Cooperative lawyers would not later defect, even at their clients' urging, because that would cost them their valuable reputations.

Of course the real world of litigation is much more complicated than the abstract models of game theory. Not all litigation has a payoff structure like that of a prisoner's dilemma. And in litigation it often may be difficult to assess whether the other side is in fact cooperating or not. Nevertheless, we believe the prisoner's dilemma provides a powerful metaphor for understanding the barriers to cooperative behavior inherent in many legal disputes. Indeed, we found that our analysis helped us understand more fully why there appears to be more cooperating in some practice settings than in others.

Commercial Litigation

The general public holds the view that in recent years the conduct of commercial litigation has deteriorated, and cooperation has diminished. The amount of commercial litigation has increased dramatically. A concomitant increase in uncivil conduct has been marked most noticeably by discovery abuse.

The prisoner's dilemma heuristic suggests a reason: Some commer-

cial litigation has payoffs in which one party does not gain from mutual cooperation. In that case the dominant strategy for both parties is conflict, not cooperation. For example, as the spread between the statutory and market interest rates increases as it did in the 1970s, it becomes more likely that the defendant's dominant strategy will be noncooperation. The gains from the spread as a result of delay outweigh the transaction costs of the conflict. . . .

[T]he 1980s . . . brought an increase in strategic litigation—using litigation to gain a business advantage by imposing costs on the opposing party. Trade secret cases against startup companies and suits against the bidder in hostile takeovers are examples. In strategic litigation, the dominant strategy for one party is noncooperation, and the other party responds in kind. . . .

Moreover, large case commercial litigation is quite "noisy." Clearly identifying whether the other side has cooperated or defected in a competitive environment where cooperation is defined as being not *too* conflictual, is often difficult. For a reputation market to work, defections by cooperative lawyers must be observable.

Family Law

In contrast to commercial litigation, family law practice shows persistent pockets of cooperation between opposing counsel. When we interviewed elite family lawyers in Northern California who are members of the American Academy of Matrimonial Lawyers, we found a surprising amount of cooperation. Lawyers knew who were the gladiators and who were the cooperative lawyers. With the exception of cases involving known gladiators, these lawyers routinely exchanged information and documents informally. Because opposing counsel knew and trusted each other, they rarely insisted on interrogatories or depositions or engaged in protracted formal discovery.

In applying the heuristic of the prisoner's dilemma to family law, it is obvious that the payoff structure must contain gains for cooperation and the risk of loss if the other party defects. Put in context, divorce litigation must be seen as more than a distributive (zero-sum) game in which the couple's property and children are divided.

Sometimes divorcing parents can devise arrangements that benefit both themselves and their children, but a number of potential barriers to cooperation make the divorce lawyer's role critical. When inexperience, inability or a soured relationship prevent divorcing spouses from cooperating, the cooperating divorce lawyers may provide an escape: by credibly committing their clients to cooperate, the lawyers as intermediaries may be able to create gains that the spouses could not realize alone.

The institutional structure of family law practice, which tends to be both localized and specialized, allows lawyers to create and sustain reputations as either cooperative problem-solvers or as more adversarial gladiators. Clients tend to seek lawyers with a particular orientation.

Institutional Features That Can Make a Difference

What institutional features make cooperation more or less likely? The comparison of commercial litigation and family law suggests that the following institutional features can influence how easily lawyers can facilitate cooperation between their clients: the size of the legal community, the incentives in the lawyers' practice setting, and the complexity of the legal environment.

- The larger the size of the legal community, the longer it will take to develop a reputation and to acquire sufficient information about the reputation of other lawyers. The size of the legal community also has a direct effect on lawyer conduct. When lawyers know each other, we can expect less tactical jockeying, harassment, evasion and other forms of resistance to disclosure.
- The organization of practice can influence the level of cooperation within the legal community, and that influence can run in either direction. Are lawyers paid by the hour or by outcome? In firms, on what basis are partnership profits divided—seniority or productivity? On what basis are associates promoted? Economic incentives for individual lawyers can influence the level of cooperation.
- Working against cooperation is the increasing complexity of litigation. As it increases, so do the opportunities for misunderstandings and unnecessary conflict. The more complicated the litigation, the more likely that innocent behavior may mistakenly be seen as defection, resulting in a pattern of responsive defections. From this perspective, the pre-litigation game takes on special significance. Not only does a party's choice of lawyer signal whether a party wishes to cooperate; it also signals the lawyer's evaluation of the lawsuit. A cooperative lawyer will not resort to being drawn into strategic litigation. . . .

How Can Cooperation Be Facilitated?

Some institutional reforms could reduce the barriers to lawyers facilitating cooperation between their clients.

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