

COOPERATIVE VERSUS COMPETITIVE STRATEGIES: REWRITING THE UNWRITTEN RULES OF PROCEDURE

by

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Adapted from *Why Lawyers (and the Rest of Us) Lie and Engage in Other Repugnant Behavior*
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Motivated by a desire to reduce litigation costs and unnecessary strife, Texas and at least three other states have reformed their discovery rules.¹ Since January 1999 when the Texas rules went into effect, discovery disputes have subsided, but incivility endures. As a profession, we have not effectively addressed the unspoken rules of engagement that may have a greater impact on lawyer conduct than the Rules of Procedure. I suggest that until we expressly address these unwritten rules, there is little hope of restoring civility to litigation.

First, I'll identify these unwritten rules, illustrate how competitive and cooperative unwritten rules affect the course of litigation, then discuss the conditions necessary for cooperation.

The Unwritten Rules

Lawsuits proceed under what I call “game assumptions”—unspoken rules of engagement governing the particular “game” we are playing with the other lawyer. The game assumption will normally crystallize in response to a specific provocation and will often bring us to mutter indignantly, “Oh, so *that's* the game we're gonna play!”

The various possible game assumptions divide into two categories: competitive and cooperative. The competitive game assumption most lawyers acknowledge playing is:

We shall use every means permitted by the rules to prevail over the other side.

An example of a cooperative game assumption is:

We shall exchange enough information to permit a reasonably accurate evaluation, make good faith efforts to settle, and failing that, afford each other a fair opportunity to present the merits.

Effects on Litigation

The competitive game assumption incites high costs, borderline ethics, and increases the risk of arbitrary results and malpractice suits. Conversely, the cooperative game assumption encourages early settlement, lower costs even following unsuccessful settlement efforts, and reduces unethical conduct and arbitrary results. Such advantages explain why over 80% of

¹ Texas, Illinois, Arizona and Colorado.

lawyers informally polled at CLE seminars during the last five years would prefer to litigate cooperatively if the opposition would do the same.²

This overwhelming majority acknowledges that initiating competition guarantees reciprocity; competitive moves provoke retaliation and one-upmanship. Most lawyers freely admit that an escalating cost spiral is endemic to “win at any cost” or “scorch the earth” strategies.

All-out competition, like all-out war, fosters the violation of legal convention. Just as kidney punches are invariably thrown in the heat of battle by even the most professional boxers, borderline ethics are an inevitable outgrowth of the heat of litigation.

Another outgrowth of competition is *death by technicality*, the game of procedural ensnarement. Given that outcomes driven by procedural traps are arbitrary, death by technicality increases the risk of arbitrary results by definition. Unfortunately, a certain percentage of these traps will be successful—both for us *and* our opponents. After all, none of us is perfect.

I submit that malpractice suits are far more likely in cases where arbitrary results occur than in those in which the parties cooperate to fairly present the merits. Who is more likely to file a malpractice case, a client who feels cheated by a technicality or someone who agreed to cooperate and lost fair-and-square?

In short, even though our system is adversarial in structure, it paradoxically rewards cooperative strategies. The advantages of such strategies have been fully documented, both anecdotally³ and scientifically.⁴ With such obvious advantages, why don't we cooperate more often? What would have to change to make cooperation more likely?

Conditions for Cooperation

Many factors, including our training, the nature of the adversary system, and perhaps even our own dispositions spur competition. Nevertheless, cooperation is not only possible but preferable if cooperative strategies are reciprocated. Again, the overwhelming majority of lawyers will cooperate if they believe opponents will do the same. What, then, are the necessary

² Author's unscientific audience poll of over 2000 CLE participants.

³ See generally, *Why Lawyers (and the rest of us) Lie and Engage in Other Repugnant Behavior*

⁴ See generally, ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1994)

conditions for reciprocity?

Common awareness. The first step is a common awareness of the benefits of cooperation. Some of us may lack awareness because we successfully achieve our expectations by invariably competing. We may have never perceived a need to cooperate and therefore never experienced its benefits. Lawyers may be like fish that spend their lives immersed in water. Having never left the water, they are content with the speed at which they travel, having no awareness of the benefits of supersonic flight. Only with analogous awareness can we “fish” even fathom cooperating.

Common language. As lawyers, we are all too familiar with the specialized language of litigation: Daubert challenges, 12b6 motions, motions in limine, etc. But imagine if every time we asked opposing counsel to agree to a hearing date or argued a matter to the court, that we had to begin by explaining what these concepts meant. We’d never get anywhere! We would be where we were when mediation was in its infancy and lawyers were clueless as to its meaning and its advantages. Just as mediation was foreign to our vernacular then, concepts such as relationship agreements, process agreements, (both discussed below) and trust repair,⁵ all integral to cooperation, are foreign now. And as was the case when mediation was first introduced, lawyers are still averse to processes they don’t understand.

Common objectives. Cooperation will not exist unless all parties perceive it will further their objectives. If a party intends to continually breach legal duties and avoid accountability on one hand, or to scam the system on the other, cooperation may not be in its interest. Neither will cooperation be viable to a party who must always be right, dominant, or feel vindicated, regardless of the fairness of its position.

In some cases, the objectives of both parties may be to find the truth and accept appropriate consequences. When I say “find the truth” I’m not suggesting that we can always know the ultimate truth of “what happened” or who may be right in the great scheme of things. But we can often know the “truth” of the value of the case. Competent opponents who resist posturing evaluate cases similarly. If they both desire to exchange sufficient information to make such an evaluation and settle accordingly or, in the event of honest differences in

⁵ “Trust repair” refers to eliminating barriers to cooperation arising from breaches of trust. The distrusting party may follow these steps: 1. Assume the other person is acting in good faith; 2. Express feelings (i.e. “I have to confess I got a little irritated when I received your set of 200 requests for admission.”) 3. Ask for what you want. (i.e. “I’d like to wait to answer those until we’ve had a chance to exchange enough information to see if we can put a value on the case and settle it.”) The party whose conduct has triggered the upset may respond as follows: 1. Acknowledge responsibility and let go of temptation to justify your own conduct and blame the opponent. (i.e. don’t say “I have every right under the rules to send these requests.” Instead say, “I can see why sending these requests might have ticked you off.”) 2. Express regret. (i.e. “Sorry. I guess I don’t really need that information to fairly evaluate the case.”) 3. Ask how to repair trust. (i.e. “If I give you an extension for 60 days, will that give us enough time to try to work this out?”) 4. Recommit to the relationship. (i.e. “It’s real important to me to maintain a cooperative relationship with you.”)

evaluation, afford each other a full and fair hearing, these common objectives will be conducive to cooperation.

Common understandings: relationship and process agreements. We have already established that reciprocity is essential to cooperation. A relationship agreement explicitly sets forth the terms of that reciprocity. It embodies the understandings of how we will relate to each other throughout our dealings. It may be as simple as, “we’ll cooperate to exchange enough information to evaluate the case, make good faith efforts to settle, and failing that, cost effectively afford each other a fair opportunity to present the merits.” Or it may also contain certain process agreements such as a formula for repairing breaches of trust.⁶ In any event, an explicit relationship agreement is an essential ingredient of cooperation. Otherwise, we tend to default to competitive unwritten rules.

System support. In any human system, there are restraining forces and driving forces.⁷ Restraining forces maintain the status quo and driving forces produce change. The driving forces toward more cooperation in the legal system include the innate desires of most of us to have cooperative interactions. Immediate restraining forces potentially include client attitudes, the rules themselves, the financial incentives of hourly billing, and judicial attitudes. Although there are infinite remote or indirect restraining forces such as societal attitudes, our forms of government and commerce, just to name a couple, I focus here on those most critical forces over which lawyers have the most immediate control.

Sometimes “scorch the earth” works: an opponent may have to settle disadvantageously to avoid the cost or aggravation of litigation; or, given enough opportunities, the adversary may suffer a fatal technical blunder. When a party has a weak case on the merits, such tactics may be the only viable weapon. In short, client thirst for belligerence or its fruits may provide a barrier to lawyers behaving otherwise.

There are several ways to eradicate the forces that incite client belligerence. The first is client education. Although “scorch the earth” may occasionally intimidate a weak opponent, more often than not it provokes an equal and opposite reaction, merely increasing the costs and risks in litigation. Clients can be educated to the advantages of cooperation.

A second approach is to structure the written rules so that they encourage cooperation. The recent discovery rule reforms seek to promote cooperation,⁸ make it more difficult to engage in “scorch the earth” tactics,⁹ and reduce the likelihood of success of “trial by technicality.”¹⁰ In so doing, the proponents have substantially ameliorated this formidable restraining force.

⁶ Infra. note 6.

⁷ Y. Agazarian, *Systems Centered Therapy for Groups* (New York, The Guilford Press 1997) pp.30-31

⁸ See for example TEX. RUL. CIV. PROC. 191.2, 199.5(d), 199.5(h) (1999) and ILL. RUL. CIV. PROC. 201 (k).

⁹ See, for example, TEX. RUL. CIV. PROC. 190.2(c)(2), 190.3(b)(2), 199.5(c); ILL. RUL. CIV. PROC. 206 (d); ARIZ. RUL. CIV. PROC. 30 (d), providing for limits on length of depositions; TEX. RUL. CIV. PROC. 191 and COL. RUL. CIV. PROC. 26 (b)(2), placing the burden on the party seeking extensive discovery to seek court approval, and TEX. RUL. CIV. PROC. 190.2(c), 192.4

A third approach is to remove the incentives of hourly billing. When we bill by the hour, the more we do, the more money we make—assuming someone can and will pay the bill. Clients have attempted to reduce these incentives by controlling billing practices. Unfortunately, their efforts tend to be penny-wise and pound-foolish. Many institutional clients pay pitiful hourly rates, prompting lawyers to exaggerate their time. The clients then hire time slip auditors to nit-pick the bills resulting in satellite disputes over the bills. If instead such clients required their lawyers to enter into cost effective relationship agreements whenever possible, they could realize huge cost savings. In addition, such clients might eschew the adversarial relationships they are developing with their lawyers in favor of relationship agreements that encourage cooperation between *them*.

Finally, conscious judicial efforts to support relationship agreements will discourage client belligerence. For example, if early in the case lawyers reach cooperative relationship agreements, then judges should allow those lawyers to control the case. Since most lawyers dislike being controlled, this policy would encourage self-regulation. When such relationship agreements are in place and honest disagreements arise, judges should rule in ways that support the spirit of the relationship agreements. For instance, if a relationship agreement calls for “cost effective representation of clients” and a disagreement arises over how long each side should have to depose the other’s client, courts should allow a “cost effective” deposition length even if each side then might not be able to be as thorough as it would like.

If the lawyers can’t reach a relationship agreement, then judges should pro-actively and intensely supervise the lawyers to prevent the abuses of competition. This is particularly important because parties who oppose cooperation are often those who seek to overreach. Courts would need to get a sense of the merits early on and manage the discovery to produce a fair and efficient resolution.

Such a judicial approach is efficient. It enables judges to focus more time to supervise the relatively few difficult cases with confidence that the others will handle themselves.

Conclusion

The opportunities presented by cooperative litigation are enormous. In addition to making our clients happy, securing our livelihood and improving the quality of our lives, we may also be able to improve the sinking image of our profession. For most of the traits that the public finds repugnant in lawyers are exhibited in the heat of competition.

and ILL. RUL. CIV. PROC. 222 (a), limiting discovery in small cases and giving the court discretion to promote cost effective representation.

¹⁰ See, for example, TEX. RUL. CIV. PROC. 191.3(d), 193.6 and ILL. RUL. CIV. PROC. 211 providing for the least restrictive remedy for failing to meet technical discovery requirements, and TEX. RUL. CIV. PROC. 193.7; ILL. RUL. CIV. PROC. 216 (c); COL. RUL. CIV. PROC. 36 (a); ARIZ. RUL. CIV. PROC. 36 (a), establishing self-authentication of opponents’ documents by their producing them.