ASSOCIATION OF BUSINESS TRIAL LAWYERS

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WINNING THROUGH COOPERATION

Judge Carolyn B. Kuhl

"Winning through intimidation" became a catchphrase in the 1970s after a book by that title caught on and eventually became a New York Times bestseller. It was written by a formerly disgruntled real estate agent who eventually became successful enough to buy a Lear Jet. It includes such insights as, it isn't what a person says or does that matters but what his "posture" is when he says or does it. Not exactly the kind of attitude a judge appreciates in a lawyer.

Not everything about the digital age has been an improvement, but computer simulation has given us some evidence-based approaches to problems that previously had been left to self-proclaimed motivational experts. We now know that in many realms of human endeavor, cooperation yields better success for both parties even when they operate in an adversary setting. That is, adversaries each may be able to achieve a better result through cooperation than either could obtain by trying to win at the expense of the other. This conclusion is demonstrated in the work of Professor Robert Axelrod, Professor of Political Science and Public Policy at the University of Michigan, and a recipient of the National Medal of Science.

In his book, *The Evolution of Cooperation*, Professor Axelrod sets up a game based on the "Prisoner's Dilemma," a classic game theory exercise. In Axelrod's variation of the game, a player obtains: (1) the biggest payoff for winning at the expense of the other player, meaning that one player takes an aggressive position and wins when the other adopts a cooperative strategy; (2) an intermediate payoff when both sides choose to cooperate; and (3) the lowest payoff when both players attempt to win at the expense of the other player, meaning that both are made worse off by mutual combat. Axelrod announced an online tournament in which participants were challenged to develop a strategy to obtain the highest score when the game was played over and over indefinitely. Participants in the tournament included computer scientists, mathematicians, economists, psychologists, sociologists and political scientists.

The winning strategy was surprisingly simple. The best strategy was to cooperate with the other player and thereafter to attempt to win at the other's expense only when the other player had refused cooperation in the previous move. Professor Axelrod discerned four properties that tended to make a game strategy successful: (1) avoiding unnecessary conflict by cooperating as long as the other player does; (2) responding in kind to an uncalled-for provocative act by the other; (3) "forgiveness" (returning to cooperation) after responding to a provocation; and (4) clarity of behavior so that the other player can adapt to your pattern of action. "Nice" strategies—those that started with cooperation and responded to conflict without perpetual punishment—achieved higher scores.

Axelrod's findings do not suggest that we abandon the adversary system of litigation. Nothing is more conducive to finding the truth than cross-examination. Nothing is more helpful to a correct determination of a legal issue than briefing by opposing, well-informed advocates.

However, the choices available to litigation adversaries

in their use of pretrial procedures fit the circumstances described by Axelrod in his game. Litigation adversaries are likely to have an indefinite number of interactions in the course of litigation. The rules of civil procedure should be directed toward allowing presentation of legal and factual issues to the decisionmaker (judge or jury) in a fair manner. But we all know that those rules also can be used as a tool for one party to attempt to obtain an advantage at the expense of the other r*egardless of the underlying merits*.

In the "game" of pretrial litigation, a provocative act might be use of the rules by one side to attempt to achieve an advantage without reference to the merits or the substance of the case. Think of propounding overbroad discovery for the sole purpose of burdening the other side. The proponent of the discovery might attempt to achieve a "high score" by increasing the other side's litigation costs. But if the other side responds in kind, both sides lose; that is, both sides get the low score in the "game." If the overbroad discovery yields only objections, both sides' litigation costs are increased with no countervailing benefit to either. Each side could do better by cooperating (i.e., propounding and responding to discovery in accordance with a fair understanding of the rules.)

To take another example, counsel for a party might refuse an extension of time to respond to discovery in an attempt to force the other side to lose all of its objections. The counsel who refuses the extension hopes for an advantage that is not warranted by the merits of the case—a "high score." However, the other side may convince the judge to forgive the late objections. In that case, both sides have incurred expense to no good end—a "low score" for both (and the counsel that refused the extension likely will incur an additional penalty by annoying the judge). If the refusal to grant an extension leads to a "tit-for-tat" response, neither side gains an advantage.

In litigation, procedure should be the servant of substance. That is, the goal of the rules of civil procedure is not for one side or the other to "win." Rather, procedural rules are intended to create an even playing field so that each side can obtain the facts underlying the dispute and present those facts and applicable law effectively to a decisionmaker. The purpose of civil litigation is fair dispute resolution. Judges focus on deciding cases based on the substantive merits of each side's position. Not surprisingly, judges are impatient with gamesmanship and lawyers' short-sighted procedural gimmicks.

Winning at the "game" of litigation should be about both sides presenting their best case on the merits. As Axelrod advises:

> Asking how well you are doing compared to how well the other player is doing is not a good standard unless your goal is to destroy the other player. In most situations, such a goal is impossible to achieve, or likely to lead to such costly conflict as to be very dangerous to pursue.

Axelrod's analysis demonstrates that starting with cooperation and returning to mutual cooperation as soon as possible helps both sides. He also concludes that when adversaries believe they are likely to see each other again, and when they have the ability to inform themselves about the prior actions of an opponent, cooperation is more likely to emerge. These conclusions are consistent with the observation that, in litigation specialties (for example, construction defect) or other close-knit practice groups, lawyers tend to find ways to cooperate on procedural aspects of a case. Axelrod's conclusions also suggest why organized bar associations are useful to their members. Opportunities to interact and develop personal relationships in ways that build trust reduce incentives to provocative behavior and increase expectations that cooperation will be reciprocated.

Axelrod's work demonstrates that, while it might "feel good" to win a procedural point now and then at your adversary's expense, in the long run the probabilities are against you and you are likely to end up a loser. The evidence shows that "winning through intimidation" is oxymoronic.

Hon. Carolyn B. Kuhl *is a Judge of the Los Angeles County Superior Court and sits in its Complex Civil Litigation Program.*