

LAW 940: LITIGOTIATION

(The following article is excerpted from an address presented by Prof. Marc Galanter, who teaches a Law School course on Negotiations. Prof. Galanter spoke to the AALS Workshop on Negotiation/Alternative Dispute Resolution in Cambridge last October.)

On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation, it is litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call LITIGOTIATION — that is, the strategic pursuit of a settlement through mobilizing the court process. Full-blown adjudication of the dispute — running the whole course — is one infrequently pursued alternative, the cost and risk of which are compelling presences throughout.

The settlement process is not some marginal, peripheral aspect of legal disputing in America; it is the central core. Over 90% of civil cases are settled (and of course many more disputes are settled before reaching the stage of filing.) Lawyers spend more time on settlement discussions than on research or on trials and appeals. Much of the other activity that lawyers engage in is articulated to the settlement process. Even in the case that departs from the standardized routines of settlement, negotiation and litigation are not separate processes, but are inseparably entwined.

Negotiation is not the law's soft penumbra, but the hard heart of the process. The so-called hard law turns out to be only one (often malleable) set of counters for playing the litigotiation game.

How come, then, negotiation is put on the "alternative" team? Observing the litigotiation process from the command posts of our

courts one sees a tremendous flood of would-be adjudication decomposing into mediated settlements and negotiated ones. If the distinctive work of courts is full-blown adjudication, these cases don't require it and should go somewhere else! But from the point of view of the customers, things look different: it is the coercive, menacing character of the court process that is valued — it is the anvil against which the hammer of negotiation strikes; it is the second hand clapping.

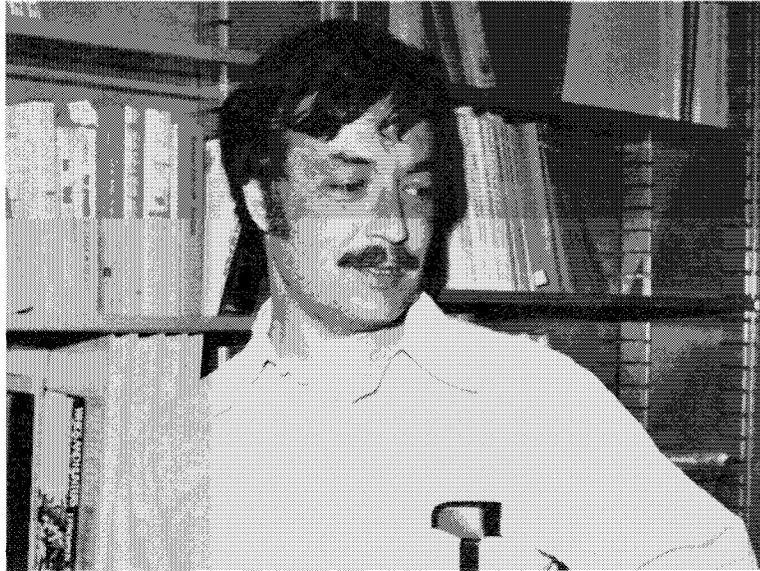
The courts are central to the litigotiation game not because of what they do but because of the "bargaining endowments" that they bestow on the parties. That is, what might be done by or in or near a court gives the parties bargaining chips or counters. Bargaining chips derive from the substantive entitlements conferred by legal rules and from the procedural rules that enable these entitlements to be vindicated. But rules are only part of the endowment conferred by the law — the delay, cost and uncertainty of eliciting a favorable determination also confer bargaining counters on the disputants. Everything that might affect outcome counts — all the outcome for the party, not just that encompassed by the rules. The ability to impose delay, costs, embarrassment, publicity come into play along with the rules. Rules are important but they interact with a host of other factors in ways that do not correspond to the neatly separated foreground and background of the law school classroom.

If negotiation is the largely unexamined heart of the legal process, a negotiation course is, for me, first of all a place to examine it. And by examining it to challenge students to reorganize the intellectual picture of the law implanted by legal education,

based on the reading of appellate cases. Students know that the picture of hierarchies of courts is a very partial and unrepresentative picture of the legal world. But law school tends to present the other components of the system in fragments and asides; it does not supply the analytic tools to hold these other aspects in mind and incorporate them into a coherent picture.

I confine the course to the negotiation of disputes. That is, I leave out the negotiation of deals per se and stick to negotiation of disputes of the sorts that make up the grist of legal practice. This is a matter of priority and inclination rather than principle. I don't confine the course to pure two-party bargaining because I think much of the most important legal negotiation involves the participation of third parties (mediators of various sorts, including judges) and I am interested in bringing out how the process is affected by their participation.

We move through a progression of units organized around particular kinds of disputes — personal injury, criminal, family, etc. We begin with automobile accident claims, then move on to look at big time personal injury litigotiation — the world of large claims, specialist lawyers, extensive expert testimony, pioneering theories of recovery — found in some medical malpractice, products liability, or disaster cases. We move on to units on the negotiation of criminal charges and family disputes. I cover these by a mix of readings, videotapes and presentations by visitors, and intersperse several simulations in which students take turns negotiating and observing. These simulations are not exclusively or even primarily intended to inculcate skills, but to cultivate understanding — to bring into the



Prof. Marc Galanter

foreground otherwise neglected aspects of the legal process. They provide the occasion for internalizing of some of the basic elements of negotiation theory — including such helpful analytic tools as notions of resistance point, settlement range, commitments, rationalizations, etc. This doesn't presume to make students expert negotiators any more than the torts course aims to make them personal injury specialists — it is there to give them a sense of the elements, the parameters, the possibilities.

Learning to negotiate is not only a question of acquiring skills, but of learning to read the landscape, dope out the features of the bargaining arena — whether you are dealing with people who are concerned to deal with you again, whether deals are standardized here or custom made, what are the shared expectations about the process and outcome.

In a curious reversal of the classical legalist view, a benign and cheerful view of bargaining has become the received view of important segments of the legal establishment. Thus a draft of the proposed new Model Rules of Professional Conduct simply observed that “a fairly negotiated settlement generally yields a better

conclusion [than litigation]”. Others have been more impressed by infirmities of the negotiation process as it is institutionalized in American litigation. Thus Earl Warren worried about the injustice and suffering caused by “inadequate settlements which individuals are frequently forced to accept on . . . account [of delay].”

I am comfortable with the “mixed” view that justice does not reside entirely in the realm of formal legal processes nor is it entirely absent from the world of bargaining. The question — both for research and practice — is how to locate it and to augment it.

One way to pursue it is through better negotiating. Lurking in many discussions of negotiating style is a sort of negotiation utopia, a method of transcending the “strategic” world of intractably opposed interests to produce an optimal outcome.

Our question has two levels. First, in what ways (and how much) does this kind of “good” negotiation depend upon the qualities of the individual negotiators — their skills, preferences, temperament, etc.? Second how much does it depend on the way that the institutions of negotiation are constructed?

I think it is important not to be

so captured by the dispute perspective that we see the world of negotiation as a series of discrete cases. It is important to step back and examine our negotiation institutions. Law students will not only be players in these bargaining arenas, they will also (as legislator, judge, member of bar committee, etc.) have a hand in designing and reforming them. Therefore I spend the final sessions considering the systemic problems that attend the litigation game — e.g., the expense of remedies, the problem of disparities of skill/experience/bargaining power; etc., for different kinds of cases. We examine some proposed solutions and consider the variety of devices that might be used to address these problems: certification, judicial supervision, disciplinary enforcement, malpractice, peer review (audits), etc.

Although I am skeptical about the negotiation utopia, the questions it raises for both action and research are the right questions, for they ask about the big world of litigation rather than the small world of formal adjudication. These are the questions.

Report of the Wisconsin Law Alumni Association Board of Visitors

On October 24-25, 1982, the Board of Visitors of the Wisconsin Law Alumni Association conducted its annual inspection of the Law School. The Board's responsibilities include review of the School's "... facilities, curriculum, placement, admissions and public relations..." As always we visited classes and met with students, staff and faculty to gather information concerning the operation of the School. We recommend that next year's visit reinstate the open forum session to insure that everyone with something to say has the opportunity to say it.

General Comments: Once again, overall we are impressed with the quality of the education being offered. Despite an ever-tightening budget, morale is good. Budget cuts have resulted in some reduction in course offerings because money is not available to hire lecturers. The faculty who are teaching continue to impress us. While we viewed only a portion of all courses being offered we feel that the quality of instruction overall is well above average. Based on our limited opportunity to observe, we wish to particularly commend Professors Clauss, Davis and Irish. Issues raised by students during our visit do merit our consideration, but they do not include the critical concerns that have troubled past visitors. We would also like to commend the administration for the improvements it has already made in advanced course scheduling. Since our suggestions on this subject last year, a system of scheduling a semester in advance has been instituted. We understand that an advanced registration plan is also being developed. These two developments should resolve complaints lodged during earlier visits.

Minority Students

Law School's recruitment of minority students and the problems faced by those students while in school provoked perhaps the most discussion. Students were critical of insufficient minority recruitment. It was their feeling that the best qualified minority students were not being recruited by our Law School, and that many of the problems minority law students faced could be traced to this failure. We learned, however, that a new Assistant Dean has joined the staff this fall. This Dean has minority recruitment as one of his principal duties, and has already begun to improve our system.

Students also voiced concern that lower grades for minority students may, in some part, reflect perhaps unconscious discrimination. It was suggested that even in a "blind" grading system the writing styles of minority students may be recognizable and different enough from the norm to result in unequal consideration.

Obviously these are serious concerns and must be seriously treated. We feel, however, that after our brief exposure we are insufficiently informed to render either an opinion or suggestions for correction of faults that may exist. We therefore ask that all parties report back to us next year. We want to know what problems do exist, if any, what actions the School has already taken and their results; and suggestions for other improvements the School can make.

Class Attendance

Our observations cause concern in the area of class attendance. We suspect that not only is there great variation from class to class, depending on the subject matter, size and teacher; but also from day to day, and year to year and that some absence is unavoidable and probably should not be of great concern. But our discussion with some professors causes us to wonder if a regular pattern of absence is not a matter of concern deserving remedy. Consistently poor attendance creates at least an impression of superficial education and lack of professional dedication. While we recognize that law students are adults and are responsible for their own actions we believe that graduates of this Law School must possess legal qualifications beyond minimal competency.

We are unsure of what sanctions to suggest for students with poor attendance records. Our individual opinions range from prohibiting graduation to some drop in class grades to some symbolic wrist slap. We would like to hear the faculty's opinions on this matter.

In a related area, we have observed that student participation in class discussion seems to be enhanced when the professor can call on individuals by name. We understand that some professors use seating charts, and we encourage the rest of the faculty to consider doing so, at least in the larger classrooms.

Placement

In contrast to past years when complaints about the sign up procedure were common, the total absence of such complaints this year suggests that the "bid" system adopted two years ago is a great success.

The discussion we did hear concerning placement was a concern that there is insufficient emphasis on recruitment by employers other than large firms. We have learned that the placement office did offer a