Georgia State University Law Review

Volume 12
Issue 3 *April 1996*

Article 4

4-1-1996

"Winning" Redefined: A Positive Approach to the Practice of Law

Patricia M. Killingsworth

"WINNING" REDEFINED: A POSITIVE APPROACH TO THE PRACTICE OF LAW

Patricia M. Killingsworth†

"What do you call 10,000 lawyers at the bottom of the ocean?"
"A good start."

I. STATUS OF THE PROFESSION

There can be little doubt that there is a crisis of confidence in the legal profession. Public opinion polls, even when given a generous margin for error, indicate a high incidence of dislike and mistrust of lawyers.[1] Jokes told at cocktail parties demonstrate lawyer-bashing in its more humorous form. Proposed legislative changes suggested in the United States Congress by Newt Gingrich, Speaker of the House of Representatives, demonstrate a much less humorous form of abuse.[2]

Trust is at the core of the legal system in this country.[3] Clients must be able to place complete faith in their attorneys and in our legal process. Attorneys are charged with being representatives of their clients in our system of law, but they are also charged with being representatives of the law itself.[4] Unfortunately, these two obligations are often perceived as conflicting, with the zealous representation of a client taking on a form that is the antithesis of the attorney's duty to the legal system. However, these obligations can and should be compatible.

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† Chief Administrative Law Judge and Legal Division Director, Georgia State Board of Workers' Compensation, 270 Peachtree Street, N.W., Atlanta, Georgia 30303. Much of the anecdotal information in this Article is expressly the opinion of the author, based upon her experience and observations as Chief Administrative Law Judge.

1. Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60.

2. *See* H.R. 10, 104th Cong., 1st Sess. 104 (1995) (the Attorney Accountability Act); H.R. 555, 104th Cong., 1st Sess. 101 (1995) (the Private Securities Litigation Reform Act).

3. *See* Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 634 (1994).

4. STATE BAR OF GA. CANONS OF ETHICS Canons 7, 8 (1994-95).

Making them compatible may be the key to regaining respect for and trust in the profession.

II. WINNING AT ANY COST

Ask any lawyer to state his or her goal in representing a client and that lawyer will invariably reply, "Why, to win, of course." What exactly does winning mean? To a litigator, it means to obtain a favorable verdict at trial. To a corporate attorney, it means to obtain the best possible terms in a negotiated contract. To every attorney, it means "to do better than the other side." Unfortunately, attorneys too often take on the personal challenge of proving themselves to be better than the opposing counsel, thus losing sight of the bigger picture facing their client.

Attorneys perceive their charge to zealously represent their clients, as outlined in the Canons of Ethics,[5] as free rein to use whatever tools are legally available to advance their cause. As litigators, they will play discovery games that amount to an advanced form of "hide and seek," stall proceedings in an attempt to "starve out" the opposition, churn out floods of paper to obfuscate legitimate issues, manufacture defenses with questionable witnesses to create reasonable doubt, and even raise unfounded character issues to chill opposition. In drawing up contracts, attorneys may take advantage of a temporary strength to negotiate for a position that is extremely detrimental to the opposition, but not of equal benefit to the client. They will modify clauses, hoping that the changes will not be detected before signing, or fail to reveal information critical to the negotiations until after the deal has been consummated.

Attorneys might argue that they take such actions because that is what they have been hired to do—to win. The public, looking at the same actions, will contend that they represent a total *lack* of ethics. In fact, any of those actions represents another nail driven into the coffin of the profession. The true cost of "winning at any cost" may be a complete loss of public trust in attorneys and, ultimately, the failure of our legal system.

Aggressive legal tactics emphasize and encourage an adversarial relationship between parties. Tactics that limit communication and fail to account for the long-term ramifications of the actions taken make everyone involved a victim of the

5. *Id.* at Canon 7.

process. People base their opinions of the profession and our judicial system primarily upon their own experiences. If those experiences involve adversarial, as opposed to conciliatory, processes, the ultimate impressions formed will be negative.

III. REDEFINING "WINNING"

What are clients looking for when they hire an attorney? Perhaps they need a resolution of a financial concern, a defense of a criminal matter, a divorce, or a deal. Any issue that they present to an attorney for review has a bigger picture—business, family, or societal considerations. Attorneys would be failing in their duty to their clients if they did not take these matters into consideration as well. Therefore, a determination as to whether a case has indeed been "won" must also include consideration of these factors.

For instance, when entering into a contractual relationship with another party, the possibility of additional opportunities for negotiations in the future should be factored into the equation. If you pursue an advantage so vigorously that you reap additional monies in this contract, but poison the well for any future deals, have you really won? And, if you push the other side to the wall, are they not more likely to make a subsequent effort to get out of the deal, instead of a sincere effort to comply with it? Further, if your contract ultimately winds up in litigation, has your client really won?

In a divorce action, if you obtain a large sum in alimony or child support for your client at trial, but wind up in constant subsequent battles for modification, have you really won? If the parties are required to maintain a long-term relationship because of their children, is it not in their best interest to reach a realistic settlement that all parties can live with? Obviously, the courts are of that opinion, as indicated by their increasing direction to parties to attempt resolution of disputes amicably through mediation prior to trial.[6]

In a civil action, if you win a substantial punitive damages award at trial, but the company then folds and fails to pay it, have you won? Certainly you have not won for the unemployed

6. *See* Pamela McKinsey, *The Use of Multidoor Courthouse Approach, in* INSTITUTE OF CONTINUING LEGAL EDUCATION IN GEORGIA, 2ND ANNUAL ALTERNATIVE DISPUTE RESOLUTION INSTITUTE 11-12 (1995).

members of the community, nor for your client. However, if you could have obtained a lesser sum in settlement, but also a change in practice to avoid future injuries to others while keeping the plant in business, would that not have been better? Should that not be considered a win?

Placing the emphasis on stabilizing the relationship between parties must inevitably result in a more positive view of the legal profession. When both parties reach a satisfactory conclusion to their dispute, there are no "victims."

IV. PRACTICING WHAT WE PREACH

We are also faced with these questions in the workers' compensation system. The goal of the Workers' Compensation Act[7] is to provide injured workers with prompt, quality medical care and supplemental income benefits while assisting them to return to work.[8] In exchange for providing these benefits to their injured employees on a "no-fault" basis, employers who are required to participate are granted immunity from civil liability for those injuries.[9] While the law is designed to be self-executing and nonadversarial, issues inevitably arise that must be resolved in a judicial setting.

The State Board of Workers' Compensation in Georgia is an administrative agency.[10] However, the Civil Practice Act[11] is applied to its judicial proceedings, with a few exceptions tailored to meet the needs of the system.[12] Hearings are conducted in a manner that is virtually identical to bench trials in state or superior court, before administrative law judges whose qualifications are equal to those of state and superior court judges and who are subject to the Georgia Code of Judicial Conduct.[13] In short, the workers' compensation system in Georgia presents a unique microcosm of the civil legal system, an analysis of which may yield valuable insight into the effects of a

7. O.C.G.A. §§ 34-9-1 to -421 (1992 & Supp. 1995).

8. GEORGIA STATE BOARD OF WORKERS' COMPENSATION, ALTERNATIVE DISPUTE RESOLUTION PROJECT (Oct. 1994) [hereinafter ADR PILOT] (available in Georgia State University College of Law Library).

9. O.C.G.A. § 34-9-11 (Supp. 1995).

10. *Id.* § 34-4-40 (1992).

11. *Id.* §§ 9-11-1 to -62 (1993 & Supp. 1995).

12. *Id.* § 9-11-81 (1993); *id.* § 34-9-59 (1992).

13. STATE BAR OF GEORGIA CODE OF JUDICIAL CONDUCT (1984).

change in direction from an adversarial to a cooperative and more positive legal practice.

In 1993, the workers' compensation system in Georgia was straining under the number and expense of claims being filed and litigated at the board.[14] The Monthly Consolidated Report for the Trial Division of the Board for Fiscal Year 1992-93 reflects the following statistics:[15]

Total new cases received for hearing:	15,642
Total hearings held:	3,208
Average number of days from request for hearing to award:	210

Administrative law judges, who are responsible for their own calendars and who work without the benefit of law clerks, were scheduling an average of 125 cases per month, handling office conferences and motions as needed on a current average caseload of 250 to 300 claims, and writing 14-18 awards per month (board awards require findings of fact and conclusions of law and generally run several pages in length).[16] As litigation continued to increase, the average number of days required to obtain an award also increased.[17] This proved costly to employees, who were often without income or medical benefits during litigation, and to employers, who were unable to cut off payment of some benefits without an award.

But of most concern to the board was the clear increase in the level of hostility between the parties. Once a claim was placed on a calendar and formal discovery commenced, actual communication between the parties virtually ceased. Disputes over medical treatment might result in injured workers going for months without any treatment at all pending resolution of the issue at trial. Disagreements about the exact duties required in a light duty job offer might result in an injured worker remaining away from work while continuing to receive income benefits until the issue was resolved at trial, sometimes months later. And, in the worst cases, an employee with a catastrophic injury[18] might

14. *See generally* GEORGIA STATE BOARD OF WORKERS' COMPENSATION, 1994 ANNUAL REPORT (available in Georgia State University College of Law Library).

15. GEORGIA STATE BOARD OF WORKERS' COMPENSATION, MONTHLY CONSOLIDATED REPORT FOR THE TRIAL DIVISION OF THE BOARD FOR FISCAL YEAR 1992-93 [hereinafter MONTHLY REPORT] (available in Georgia State University College of Law Library).

16. ADR PILOT, *supra* note 8, ex. 1.

17. *Id.*

18. To be considered catastrophic, an injury must fall within the definition of

have to wait for months, even years if appeals were pursued, before obtaining appropriate housing or transportation. Even though rehabilitation conferences could be held to discuss these issues, these conferences proved insufficient to meet the needs of the parties, and hearings were often requested following the conferences. Unfortunately, once a claim is litigated, it is likely to remain in litigation to resolve any other issues. Recent statistics reflect that over forty percent of all requests for hearing are in ongoing compensable claims,[19] thus indicating that the parties are simply unable or unwilling to work out the issues as they arise.

Claims involving catastrophically injured workers present the worst scenario for resorting to litigation to resolve disputes. When employees suffer catastrophic injuries, they are in need of immediate quality medical care. They are unlikely to return to work and will be heavily dependent upon the employers and insurers to assist them and their families in making the transition in their lives. They will require extended medical care, special provisions for transportation and accessible housing, and family counseling. The relationship between these parties will be intensive and long term, requiring constant communication.

Unfortunately, when disagreements arise over the provision of some of these benefits and litigation ensues, communication between the parties almost ceases. They take up their adversarial positions, become distrustful of each other, go to their respective corners, and come out fighting. In the heat of the dispute, they forget the very important fact that they are in a

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catastrophic injury as defined in O.C.G.A. § 34-9-200.1:

> (1) Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk; (2) Amputation of an arm, a hand, a foot, or a leg involving the effective loss of use of that appendage; (3) Severe brain or closed head injury . . . ; (4) Second or third degree burns over 25 percent of the body as a whole or third degree burns to 5 percent or more of the face or hands; (5) Total or industrial blindness; or (6) Any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work or any work available in substantial numbers within the national economy. A decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act shall be admissible in evidence and the board shall give the evidence the consideration and deference due under the circumstances regarding the issue of whether the injury is a catastrophic injury.

O.C.G.A. § 34-9-200.1(g) (Supp. 1995).

19. MONTHLY REPORT, *supra* note 15.

long-term relationship and will have to continue dealing with each other for years to come. Once they define each other as adversaries on a single issue, they generally remain adversaries for the duration. This phenomenon is obviously applicable to any claim.

Once it has been determined that a compensable accident has occurred, the parties need to work together to resolve issues of entitlement to income benefits, extent and duration of medical treatment, applicability of rehabilitation, and the availability of suitable employment. Preferably, the employer will allow the employee to return to work with the employer at the appropriate time. Clearly, as in any other human relationship, the best results will be achieved through cooperation, not adjudication.[20]

Administrative law judges were becoming extremely frustrated with litigated catastrophic claims. For example, there appeared to be little excuse for requiring a quadriplegic to testify at a hearing in order to resolve a transportation issue. In addition, most of the issues were, of necessity, presented to the bench as a choice between two extreme positions, with no room for compromise. Rules of evidence made it difficult to determine the real needs of the parties, and rules of procedure prevented mandating a compromise. Because the choices presented were so extreme, often neither choice was palatable or presented a valid avenue for resolution of the conflict.

In an effort to improve the situation, in October 1993, the board began requiring that all hearing requests in catastrophic claims be directed first to the office of the Chief Administrative Law Judge,[21] where a mandatory "mediation" conference was scheduled prior to placing the cases on a hearing calendar.[22] All parties and their representatives were required to attend. The purpose of the conference was to provide a forum for everyone involved in the claim to meet face to face, typically for the first

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20. *See* Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements*, 11 MEDIATION Q. 157, 170 (1993).

21. ADR PILOT, *supra* note 8.

22. The administrative law judge is given all powers necessary to implement the Workers' Compensation Act. O.C.G.A. § 34-9-102(c) (1992). As Chief Administrative Law Judge and head of the ADR Pilot Project, the author had the authority to set rules for the mediation process. No official rules have been promulgated at this time for the sake of flexibility. However, all parties have the right to request a hearing if the mediation is unsuccessful. *See generally* ADR PILOT, *supra* note 8.

time, where creative solutions to the problems could be discussed. Although attendance at the conference was mandatory, if the parties could not reach an agreement, a hearing would be scheduled promptly.

Since this procedure was instituted, there have been almost no further trials in these cases.[23] Only two claims with catastrophically injured workers have reached the trial level, and both of them required a legal determination of liability—an issue that could not be resolved through conference.[24] This extraordinary success may be attributed to a number of factors. First, this procedure provides an opportunity for all the players to see each other as unique individuals, not merely as voices on the telephone or statistics. It personalizes the process. Second, it provides a neutral ground where everyone can vent their frustrations. "Getting past the past" is a very important step toward arriving at resolution of any issue. Third, the board representative provides a sounding board for new ideas and a credible "reality check" for unrealistic expectations. Fourth, creative solutions can be explored and agreed upon without the limitations imposed in a trial setting. Finally, and probably most importantly, the groundwork is laid between the parties for future negotiations without board intervention. Cooperation and communication are stressed, and a strong emphasis is placed on rebuilding damaged relationships.

The remarkable success of this effort encouraged the board to create an Alternative Dispute Resolution Unit (ADR Unit) within its Trial Division in 1994.[25] The ADR Unit was initially staffed with two administrative law judges, two mediators, and two secretaries and was charged with reviewing issues in active claims in which conferences would be effective.[26]

Because of staff limitations, conferences have been scheduled to resolve only the following issues to date, all of which arise in compensable claims: medical disputes, change of physician or treatment requests, all issues arising in catastrophic claims,

23. *See* ADR PILOT, *supra* note 8.

24. The files of these cases have been reviewed by the author, but because workers' compensation files are not public record, rules of confidentiality prohibit citation.

25. ADR PILOT, *supra* note 8.

26. *Id.*

attorney fee liens, and settlement of claims over three years old.[27]

In addition to mediation conferences, claims are resolved in the ADR Unit by interlocutory order and telephone conferences.[28] The mediation conferences are scheduled and held at a number of locations throughout the state.[29] Again, the attendance at a conference is mandatory, but the resolution of any issue will be by consent only.[30] The proceedings are confidential, and any information divulged during the course of the mediation cannot be revealed thereafter.[31] If a hearing is requested after a conference, one will be promptly scheduled in the Trial Division.[32] The judge hearing the case will not have access to any information acquired during the course of the mediation.[33]

The ADR Unit has achieved a high rate of resolution and has proven extremely cost effective.[34] The statistics reveal a high concentration of mediation conferences and orders involving medical issues.[35] Because these issues are time sensitive for the parties and cost containment is a high priority, they have proven to be more effectively resolved by mediation than by litigation.[36]

Attorney fee disputes are now exclusively resolved in the ADR Unit, with a resolution rate approaching 100%.[37] This has completely eliminated hearings on the issue and has sped up the resolution of claims by stipulated settlement.[38]

Settlement conferences in claims that are more than three years old have resulted in immediate stipulations in over 59% of those claims, with a 70% overall resolution rate and a high rate of agreement within two weeks of the settlement conference for those claims that did not immediately settle.[39] Mediation of old

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27. *Id.*
28. *Id.*
29. *Id.*
30. *See supra* note 22.
31. *Id.*
32. *Id.*
33. *Id.*
34. ADR PILOT, *supra* note 8.
35. *See* GEORGIA STATE BOARD OF WORKERS' COMPENSATION, MEDIATION CONFERENCE STATISTICS, Jan.-July 1995 (available in Georgia State University College of Law Library).
36. *See* ADR PILOT, *supra* note 8, ex. 1.
37. *See id.*
38. *See id.*
39. *Id.*

claims is time consuming and, because of the high volume of requests by the parties, the board is straining to keep up with the demand to schedule conferences for settlements.[40]

The net effect of these conferences on trial activity at the board has been encouraging. In fiscal year 1994-95, the number of hearings held at the board was down to 2735, a 15% reduction from 1992-93, even though the number of claims filed at the board has increased.[41] Concurrently, the average number of days for a claim to reach resolution through trial has dropped from 210 to 143.[42] The average number of days for an issue to reach resolution through the ADR Unit is 51 days,[43] which presents an even more rapid avenue for dispute resolution.

These statistics, as remarkable as they are, do not tell the whole story. The workers' compensation system has a fairly well-defined list of players, including employers, insurers, medical providers, and attorneys who specialize in handling workers' compensation claims and who must deal with each other regularly over an extended period of time. Respect is reserved for those individuals able to handle their cases most effectively. Litigious behavior has not proven to be the most effective means of resolving differences because it is more time consuming, costly, and less likely to produce a lasting result.[44]

"Winning" in the workers' compensation arena today is defined as the most effective resolution of an issue—not the most depositions taken, hearings held, or cases appealed. Honest, courteous behavior is highly regarded and rewarded. The old adage, "what goes around comes around," is absolutely on point. The board is not oblivious to the questionable practices of some adjusters, medical providers, and attorneys and strives to limit those activities. Such practices are, in fact, minimal.

Attorneys are an integral part of this system and are more valued for their advice on procedure and their negotiation skills than for their adversarial abilities. Defense firms regularly schedule seminars and publish newsletters to educate their clients on the best practices in the field, encouraging the

40. *Id.*

41. GEORGIA STATE BOARD OF WORKERS' COMPENSATION, MONTHLY REPORT, CASE COUNTS, July 1995 (available in Georgia State University College of Law Library).

42. *Id.*

43. *Id.*

44. ADR PILOT, *supra* note 8.

avoidance of costly litigation.[45] This has not resulted in a loss of business, but has resulted in increased respect for participating members of the bar. It appears that Abraham Lincoln may have been right when he made this statement in 1850:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good [person]. There will still be business enough.[46]

CONCLUSION

This redefinition of winning, in which compromise and communication are stressed, has been put into practice in other areas of the law with equally positive results. The construction industry has been particularly innovative in its approach to resolving disputes without litigation and has created the Dispute Avoidance and Resolution Task Force (DART) to serve as a clearing house for information and education about construction dispute prevention and resolution.[47] Construction projects can be completed without the need to resort to mediation, arbitration, or litigation with intelligent risk allocation at the contract stage, improvement in communication, and incentives that encourage cooperation throughout the project.[48] Lawyers are a vital and positive force in this process.[49]

In the domestic dispute arena, courts are increasingly requiring the parties to attempt to mediate a solution to their disagreement before the case will be set on the trial calendar.[50] A survey of disputes directed by the Ventura County Superior Court to the Mediation Center for Family Law in Ventura, California reveals that over 75% of individuals who participated in the process and reached an agreement believed that the

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45. The Workers' Compensation Section of the State Bar of Georgia is an active and cohesive group. Many law firms distribute their own publications highlighting current case law.

46. Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), *in* THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 329 (Philip Van Doren Stern ed., 1992).

47. James P. Groton, *The Newest in ADR Approaches: A Review of Some Innovative Techniques the Construction Industry has Developed that are Transferable to Other Industries*, ALTERNATIVE DISPUTE RESOLUTION INSTITUTE (1995) (program materials).

48. *Id.* at 1.

49. *Id.* at 18-19.

50. McKinsey, *supra* note 6, at 11-12.

agreement was fair to them, 93% believed that the agreement was fair to their spouse, and 78% of the agreements were being complied with fully.[51] Overall, 95.8% of the respondents indicated that they would not have wanted to litigate in court and 97.5% would recommend the process to others.[52] As Nina R. Meierding, conductor of the survey, noted: "The high level of satisfaction as well as the durability of the agreements reached in the mediation process through the Mediation Center for Family Law illustrate a sharp contrast to traditional feelings about the adversarial process and the correspondingly lower compliance with litigated orders."[53] Attorneys who participate in this system are a positive force in the resolution process, obtain better long-term results for their clients, and are the attorneys who truly win.[54]

This redefinition of winning should be made the focus of the legal training process, continuing throughout an attorney's career. Law schools should make classes in alternative dispute resolution mandatory and emphasize negotiation skills over litigation skills. Law firms should continue in this training process, focusing on the positive roles of attorneys in the avoidance and resolution of conflicts, with litigation seen as a last resort. Communication should be encouraged, not discouraged, and professional conduct absolutely required. The bench should actively discourage litigious and discourteous behavior, utilizing tools that are currently available to them. The bar should emphasize continuing legal education courses in conflict avoidance (the best methods of negotiation and contract drafting) and alternative dispute resolution. Attorneys can and should become valued members of the business and social community through their services.

It is within the power of each individual attorney to create a practice that is beneficial to his or her clients over the long term, taking fully into account the clients' emotional, societal, and business needs in every instance. Encouraging communication and flexibility in every case will result in less litigation and a higher degree of satisfaction with the profession. This practice will not prove costly; indeed, there is business enough. The end

51. Meierding, *supra* note 20, at 165-68.
52. *Id.*
53. *Id.* at 170.
54. *Id.* at 167.

result will be reflected in the positive public perception of attorneys as counselors-at-law, as opposed to the current public perception of attorneys as "hired guns" who will do "anything for a buck." This positive change is taking place in the workers' compensation community now. Extend it to yours.