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## How to Take Control of the Runaway Litigation Train

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# How to Take Control of the Runaway Litigation Train<sup>1</sup>

Jeremy Fogel, United States District Judge<sup>2</sup>

Good afternoon. I'm very pleased to be here. As one of Silicon Valley's three resident United States District Judges, I have a very personal interest in the topic of this conference. That's because the conflicts that Silicon Valley companies can't resolve within and among themselves usually end up on my docket. To the extent that a conference such as this offers corporate decision-makers and their legal counsel useful tools for resolving disputes in a more effective and lasting way, there is a direct and immediate benefit not only to the parties but also to the judicial system of which I am a part.

My subject today, however, is not court management but how informed and appropriate use of alternative dispute resolution can benefit the parties in a business dispute, both by reducing costs and by producing qualitatively better results. As I will explain, although my colleagues and I do not mind presiding over your cases, litigating a commercial case rarely is the best means of advancing the interests of the companies involved.

Before speaking about practicalities, I need to describe briefly our cultural assumptions about conflict. The notion of rights, a concept at the core of our Anglo-American legal heritage, is so deeply embedded in our culture generally that it has become almost visceral. As a society, we assume that people's views of their rights will conflict, often in irreconcilable ways. We also assume that when parties believe that they can't resolve their differences on their own, the appropriate alternative is litigation, a controlled form of combat in which each party stakes out its position and hires its own trained advocate or gladiator. Although this approach often is enormously expensive, dehumanizing, and in the end unnecessary, most of the time adherence to its protocols does have the effect of preventing actual violence, and thus we have come to see it as a rational, civilized way of resolving our differences. We cherish the rule of law,

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1. Speech given at the Conflict Management Culture seminar, hosted by Pepperdine's Straus Institute for Dispute Resolution.

2. The author has been a United States District Judge for the Northern District of California since 1998, having been a trial judge in the California state courts from 1981 through 1998. He has served as a mediation trainer for the Federal Judicial Center since 2001, and has taught mediation and civil case management to judges and lawyers around the world through government-sponsored legal exchange programs. He has been a lecturer at Stanford Law School since 2003. He received his J. D. from Harvard Law School in 1974 and his A. B. from Stanford University in 1971.

and around the rule of law we have created a rich culture of expectations and entitlements.

We also have created, particularly in the commercial arena, a fascinating denizen of that culture known as the civil litigator. In business disputes involving high tech companies, the typical civil litigator is an extremely capable graduate of an elite Law School with a seemingly inexhaustible ability to work nights and weekends churning out briefs and motions and to accumulate billable hours, all to advance, at least in theory, a client's tactical and strategic position in a lawsuit. In major cases, teams of litigators vigorously contest every point, including in the most contentious cases such things as the appropriate number of written interrogatories or the number of pages necessary for an adequate legal brief, often keeping the court apprised of these earth-shaking disputes through simultaneous faxes and hand-delivered hard copies of their correspondence, with an additional courtesy copy by express mail. I describe these phenomena not to be critical of the people involved but simply to paint a picture of how the world of litigation sometimes operates.

I don't need to tell anyone here how expensive all this can be, not only financially but also because of the extent to which major litigation can disrupt ongoing business activity. Even if a case ultimately is settled, as almost all cases are, the traditional settlement is a zero-sum compromise following a war of attrition in which the financial and operational costs of the conflict force an unwilling and unhappy party to forgo what it perceives as a just result and accept something less. Countless settlement judges have commented that "both sides seemed equally unhappy, so it must have been a good settlement." Even with the continuing growth of alternative dispute resolution programs, this view of conflict and conflict resolution is still the dominant one in our society, even among some private providers of settlement services.

My subject this afternoon properly is called alternative dispute resolution because it is a process derived from an alternative paradigm, a paradigm based on interests rather than rights. It is a fundamentally different way of thinking about what keeps people apart and how to bring them together. It considers and values personal and business relationships, explores the unacknowledged motivations that underlie many conflicts, and helps to develop resolutions that leave all parties with the sense that their real concerns have been acknowledged and respected. It is an approach by which many apparently intractable conflicts can be resolved, by thinking about them differently and by seeking common ground defined not simply by a desire to end or avoid the burden of litigation but by genuine, skillfully facilitated communication.

My own introduction to the power of this alternative paradigm occurred in my experience as a family court judge. Child custody disputes are as psychologically complex and emotionally charged as any matters that find their way into our legal system, and except in some very extreme cases it is difficult to imagine any disputes for which the adversarial "rights" model is more poorly

sued. Protracted child custody litigation almost always permanently traumatizes its participants, and it is especially harmful to the children in whose name it ostensibly proceeds.

In this tragic context, interest-based mediation facilitated by mediators with training and experience in family psychology has been of inestimable value. While we still hear about occasional train wrecks, a substantial majority of child custody disputes in California that are not resolved through direct negotiation between the parties are resolved through mediation, sometimes with judicial involvement but usually without it. While protracted adversarial proceedings still occur, they are an anomaly. Parents who enter the process talking about rights leave it talking about resolutions that recognize their own and each other's interests in a way that best serves the interests of the children. But to me the most remarkable fact about child custody mediation is the way the participants feel about it when it is over. According to a study done some years ago by the administrative office of the courts, more than seventy percent of the parents who participated in child custody mediation had a favorable view of both the outcome and the process. In stark contrast, the level of satisfaction for people who participated in litigation was in single digits.

When I left family court to manage a civil calendar, I was very curious about whether an interest-based approach would work in civil cases. Would civil litigants and their lawyers be open to a process in which posturing and strategic bargaining are irrelevant and both parties and lawyers are encouraged to identify and try to address the interests of all parties rather than fight endlessly over seemingly conflicting rights? This question has been at the core of my interest in ADR for the past fifteen years.

I have learned that there are significant cultural and institutional obstacles that must be overcome if the hegemony of the rights paradigm is to be broken. While most lawyers and judges with substantial experience in family law recognize at least some of the limitations of the adversarial model and thus to varying degrees are interested in a broader way of thinking about their cases, their civil counterparts have been trained and have practiced in an environment in which litigation and the rights paradigm are not only firmly embedded but even exalted. Lawyers are expected to litigate, with virtually every major civil law firm requiring a high quota of billable hours from each lawyer. Without an analogue to the clearly defined societal interest in protecting children acting as an inherent restraint, those involved in civil litigation, from litigants to judges, simply assume that the adversarial approach is all there is. Settlement judges and even some mediators tend to focus narrowly on pragmatic compromises between

rights and positions rather than a process in which parties are fully heard and interests are fully developed.

Yet I also have learned from my experience that an interest-based approach can work spectacularly well in civil cases. More often than not, civil cases are driven to a significant degree by factors that are the classic stuff of facilitative mediation: strained personal or business relationships, feelings of entitlement, competitive zeal or victimization, and the persistence of painful emotions such as anger, grief, guilt or fear. While such factors lie beneath the surface and are rarely if ever acknowledged by the parties or their lawyers, they show themselves repeatedly in petty conflicts, pursuit of unattainable objectives and other irrational litigation behavior. When cases driven by such motivations present themselves, or in any case in which it appears that the parties cannot achieve what they really want through litigation, there is a golden opportunity for the use of a fundamentally different approach to dispute resolution.

High tech cases are particularly good candidates for interest-based ADR because of their specialized subject matter. Just as a lack of training in the principles of family psychology often makes it difficult for judges to understand the real dynamics of family law disputes, sometimes leading to outcomes that while well-intended and legally defensible are not in the best interests of the parties or their children from a developmental or psychological point of view, the absence of a technical background frequently tempers the quality of judicial decision-making in high tech litigation. As some of you know, students up the road at Stanford tend to identify themselves as either “fuzzies” or “techies;” like most judges, I’m pretty much a hard-core “fuzzy.” Because it focuses on the process of helping parties to find common ground rather than on making substantive legal and factual decisions, interest-based mediation tends to produce qualitatively more appropriate outcomes than litigation.

Several years ago I mediated a patent dispute. Because the mediation was confidential, I will have to be general about the details, but I think I can give you a reasonably good picture of the case. The plaintiff company was an acknowledged pioneer in its particular field, a field with a virtually unlimited commercial upside. The company filed suit against a competitor for allegedly infringing several of the company’s patents. The competitor counterclaimed, seeking a judgment that the patents were invalid, and also filed its own lawsuit to establish the priority of its own subsequent patent application that the plaintiff company had successfully blocked in interference proceedings before the patent and trademark office. The technology was very sophisticated, probably about a nine on a scale of ten in terms of how difficult it is for a layperson to understand.

Both parties hired major patent litigation firms, and both spent many hundreds of thousands of dollars in attorneys’ fees in pursuing discovery, arguing for favorable claim constructions and filing motions for summary judgment. As both companies were publicly traded, the litigation cast a cloud over the reputa-

tions of both parties. Although the lawyers were thoroughly professional and avoided pettiness, the tenor of the litigation was bitter.

Several years into the case, perhaps because the bursting of the high tech bubble made it increasingly difficult for them to absorb litigation costs, both companies were seeking a way out of the process. We conducted a mediation that spanned numerous sessions over several months, and ultimately achieved a global settlement. That there was a settlement isn't very remarkable in and of itself, as most civil cases eventually settle before trial. What are worth telling you about is what I learned about the unstated interests that had been driving the case, and how those interests were acknowledged in the final agreement.

I knew that the CEO of the plaintiff company also was the principal inventor of the patented technology. What I didn't know was that a number of years before, the CEO had a collaborator with whom he had a falling out, that the collaborator had taken a job in academia, and that in the course of his academic work the collaborator had developed the technology that led to the defendant company's competing patent application, which actually was a joint effort with the academic institution.

It became obvious that the CEO's feelings of betrayal had been an unstated but powerful force in the decision to commence and pursue the litigation. It also became clear that another major obstacle to settlement was the academic institution's strongly felt need to obtain public exoneration with respect to the plaintiff's claim of patent infringement. Neither of these interests was monetary, and absent a total victory for one side, something that was extremely unlikely and the cost of which clearly was prohibitive, neither could be addressed by litigation.

The mediation succeeded in large part because all of the parties' interests, as opposed to their narrow legal positions, were identified and acknowledged. Through a facilitative mediation process, the parties sought to address a far broader range of concerns than they ever could have addressed in the courtroom. Their settlement, while it certainly involved compromises on both sides, also provided the foundation for a new business relationship that promises to be profitable for all concerned. And it included a number of non-monetary terms that in a symbolic but meaningful way addressed the perceived injuries that had made the dispute so protracted and bitter.

Unlike litigation, in which it is assumed that one party's rights must give way to another's, facilitative mediation seeks first to identify as many of the parties' interests as possible and then to develop a resolution that meets as many of those interests as possible. While the parties' respective legal rights are not irrelevant, the process of identifying a party's interests is not limited by legal

considerations. Do the parties have an interest in a continuing business relationship? Is there a potential for new business arrangements or technical collaborations that could be mutually beneficial? Are there unresolved personal or reputational issues and grievances that can be aired out and defused, if not entirely resolved?

Given the pervasiveness of the rights paradigm in our society, not to mention the superficial and largely inaccurate view of the legal system promoted by television reality shows and similar media, it doesn't surprise me that most litigants are unfamiliar with the potential benefits or even the existence of an alternative approach. But I often have wondered how it is that sophisticated people such as corporate executives and in-house counsel get caught up in the spiral of litigation. I suspect that even with this group the problem in part is one of education, which is why conferences such as this one are so valuable. But I also think that the phenomenon has something to do with the relationship between business clients and the litigators they hire. There are powerful cultural forces—among them, the nature of traditional legal education and the structure of incentives within large commercial law firms—that influence litigators to counsel and pursue litigation; if clients simply assume that the lawyers know what they are doing and refrain from asserting themselves and entering into a dialogue with their lawyers about the clients' long-term interests, both disputes and expenses can get out of hand quickly. This is why virtually all professional mediators insist that the clients themselves participate personally in the mediation process.

One of the required readings for my course on the psychology of litigation at Stanford Law School is an article on legal ethics by Mary Ann Glendon, a professor of legal ethics at Harvard Law School. Professor Glendon writes about the emergence over the past century and a half of two distinct classes of lawyers. The principal motivation of one group, whom she characterizes as “raiders,” is the acquisition and protection of legal territory. The other group, whom she calls “traders,” focuses on creating the relationships and social stability necessary for ongoing and successful trade.

Glendon believes that both groups are necessary in modern society, but she also believes that in the modern era the “raider” ethic has become ascendant, that in the legal community at least the greater attention and prestige has been accorded to the big firm litigators who “win” major cases rather than to those who exemplify the interpersonal skills that are so important in traditional commerce. Referring often to Abraham Lincoln, she suggests that “what [has gotten] lost along the way [is] Lincoln's unpretentious, pragmatic attitude, rooted in the trader understanding that any business, including law business, thrives best on honesty and cooperation.”

I suspect strongly that most business people know instinctively what Professor Glendon is talking about. Individuals or companies that develop a reputation as unrestrained predators that will stop at nothing to acquire territory are not respected by their peers. Individuals and companies that exhibit honesty, integ-

rity and a willingness to cooperate and build relationships with others usually thrive. A problem-solving approach that draws upon ‘trader’ values intended to build and sustain cooperative relationships seems no less appropriate for the business community today than it was in Lincoln’s time. While both profitability and the ability to compete are entirely legitimate objectives in a market economy, neither is irreconcilable with the notion that the vast majority of disputes can be resolved through a process focused on an open and thorough consideration of each party’s interests.

Obviously, the ability to litigate and even to litigate aggressively is a necessary option in any system based on the rule of law. In real life, there are “unrestrained predators that will stop at nothing to acquire territory” and a variety of other bad actors. There are litigants who for a variety of reasons can’t or won’t deal in good faith. We need courts, litigation and skilled litigators to protect both the rights and the interests of those affected by such conduct.

What I am suggesting is not that we abandon the use of litigation but that our conditioned response to conflict change. Instead of **assuming** that we need to litigate, or more commonly, assuming consciously or unconsciously that a problem should be defined in terms of conflicting rights, we need to develop the habit of thinking about conflict in terms of the underlying interests involved. To borrow a term from computing, our default setting should be to seek solutions that recognize and reflect interests rather reflexively to claim rights or stake out positions.

As a family court judge, I used to begin every calendar with a brief orientation for the litigants who had come to court that day. I would begin by acknowledging that the matters that had brought them to court were as important and difficult as any case a judge could ever hear, cases in which the fate of young children often hung in the balance. I would tell them that of course I was prepared to decide their case and that I would do so as fairly and conscientiously as I possibly could. But I also would tell them that leaving the decision to me might not be in their best interests or even the children’s best interests. I would point out that while they obviously were intimately familiar with the particular facts and circumstances of their family, I knew them only from a few pages in a court file and what I would be able to observe in the brief time I had available for a hearing, that it was completely unrealistic for them to think that I somehow magically could do perfect justice. I would note that litigants invariably underestimate the time and money involved in pursuing a matter through trial. And finally, I would observe that judgments forced upon an unwilling party by a court often have unintended and sometimes even disastrous consequences, including the permanent destruction of relationships, lasting bitterness and con-



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tinuing problems in enforcing rights supposedly won through litigation. I would conclude by telling them that voluntary agreements, however hard they may be to fashion given the emotions surrounding the breakup of a marriage, last longer, work better, and allow all parties to move on with their lives.

As corporate decision-makers, the attendees at this conference can exert significant leverage in changing expectations about the way business disputes should be resolved. Moving from a paradigm of conflict based on rights to a paradigm of problem-solving based on interests will improve the bottom line not only by reducing the magnitude of the line item for litigation expenses, but also by preserving and improving business relationships and building a company's reputation for honesty, integrity and cooperation.

Thank you very much for this opportunity to share my perspective with you.