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THE LAWYER'S ROLE IN CLIENT COUNSELING: NEW THEORETHICAL APPROACH OF BEHAVIORAL LAW AND ECONOMICS

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Abstract. *In this paper, the author first discusses the standard theoretical models of counseling clients (principals) by lawyers (agents), their advantages and limitations. In addition to these standard models, the paper focuses on the cognitive lawyer-client counseling model, developed within the framework of scientific discipline of Behavioral Law and Economics. This model casts a different light on the relationship between clients and lawyers, introducing certain psychological factors that are related to cognitive errors in client ' s reasoning. Some typical cognitive errors that justify a lawyer intervention in client's decision concerning the choice between a trial and settlement will be described. The author concludes that it is necessary to take into account the findings stem from a cognitive model to better understand the relationship between lawyers and clients.*

Key words: *lawyer, client, cognitive errors, trial, settlement.*

1. INTRODUCTION

Does out-of-court settlement put the two disputing parties in a better position as compared to the position they would have acquired if they had gone to trial, particularly considering that their decisions to settle are made under the influence of their lawyers (agents)? The Pareto efficiency[1] is certainly achieved if the parties have voluntarily started to negotiate and eventually concluded a settlement agreement. The voluntariness is a key criterion for exercising Pareto-efficient allocation of resources which occurs in any exchange of goods or services. But if the settlement agreement is concluded as a result of the lawyers' influence on each party (client) separately, the question is whether the Pareto

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[1] *The Pareto improvement* is a concept where it is possible to make the allocation of resources in order to improve one's position without worsening the position of another individual. The Pareto optimum exists when no one can be better off at the expense of making others worse off.

efficiency is being attained, due to a violation of the criterion of voluntariness. It further raises an issue of the clients' autonomy and the lawyers' role in client counseling. In this regard, the paper describes the standard models of lawyer-client counseling but also analyzes an innovative cognitive model, developed by the proponents of a new direction within the Economic Analysis of Law (EAL) – the Behavioral Law and Economics (BLE).

2. STANDARD LAWYER-CLIENT COUNSELING MODELS

In theory, there are a several well-known lawyer-client counseling models. The essential difference between these models is reflected in the degree of the client's autonomy underlying the specific relationship with the lawyer.

One of the most influential is *the model of client's autonomy*. In this model, the client is the central figure in the lawyer-client relationship and the role of the lawyer comes down to exploring the various alternatives arising from the case and the consequences of those alternatives. The lawyer should refrain from giving any advice regarding how the client needs to act, even when it is expressly requested by the client requests. This model of client counseling implies that the lawyer must observe the case from the client's perspective, not from his/her own perspective, and assist the client only on procedural matters (Korobkin, Guthrie, 1997: 127-128). On the other hand, the model of client's autonomy has been criticized by those authors who point out that in practice the lawyer is often forced to assess the case by considering the best interest of the client, as well as to exert pressure on the client to accept his/her assessment (Simon, 1991: 213-226).

Furthermore, there are models of counseling that are based on the idea of *clients' limited autonomy*, which implies that the lawyer may give the client amicable advice. In essence, it has a different view on the idea of autonomy in general; it implies that none of us is completely autonomous, considering that we are all born and brought up in a family and educated in a society. Thus, the model introduces certain social factors when considering the idea of autonomy. In a broader sense, this reasoning can be applied to the lawyer-client relationship, and the moral duty of the lawyer is to refuse the request of the client which is aimed at causing any harm to another party or a third party, even if it is a legitimate interest of the client. In such a situation, the lawyer should try to convince the client to change his/her course of action, despite the risk of losing him/her as a client (Morgan, 1990: 447).[2]

Then, as an antipode to the model that emphasizes the full autonomy of the client, there is a model of counseling that emphasizes the active role of lawyers in advising clients (Simon, 1991: 213, 223-224). It is the so-called *paternalistic model*, which suggests that the lawyer knows what is best for the client and justifies the lawyer's intervention in client's decision-making processes (Ellmann, 1987: 764). Thus, this model gives a specific weight to the lawyer, resting on the assumption that the lawyer is professionally more competent than the client, for which reason he/she has a legitimate right to override the client's decision with regards to all contentious issues.

None of these models provides a satisfactory answer to the question of choice between trial and settlement, an issue that has been occupying the attention of economic theoreticians, such as: Friedman (Friedman, 1969), Landes (Landes, 1971), Gould (Gould, 1973), Posner

[2] In essence, this model is approaching the so-called paternalistic model (see further).

(Posner, 1973), and others.[3] Simply put, these models ignore this issue as well as the lawyer's role in making the choice. On the other hand, this issue has been addressed in the new model of lawyer-client counseling, the so-called cognitive model, developed within the scientific discipline of Behavioral Law and Economics, which provides satisfactory answers to the questions raised. Moreover, these answers shed a different light on the former findings of the standard economic models, for which reason the cognitive model acquired additional recognition.

3. COGNITIVE LAWYER-CLIENT COUNSELING MODEL

In terms of the prominent issue of choice between a trial and a settlement, behaviorists come into play by developing a new model of counseling, so-called *the cognitive error approach to counceling*, which highlights the active role of lawyers in advising their clients but under one condition (Korobkin, Guthrie, 1997: 129-136). The specific requirement relates to the fact that a lawyer must recognize if his/her (different) assessment of the choice between a trial and a settlement as compared to the client's assessment is in fact a consequence of the cognitive error in the client's reasoning. If so, the lawyer should take an active role in advising the client and helping the client recognize this mistake and indentify the consequences arising thereof. For example, if a lawyer rationally estimates that the settlement is a better option for the client but the client believes, due to the cognitive error in reasoning, that the trial is a better one, then the lawyer should intervene in the client's decision on going to trial or settlement. Conversely, when the lawyer's assessment departs from the client's one due to theirs different functions of expected utility, then the lawyer should refrain from the intervention in the client's decision regarding the choice between a trial and settlement. For example, the client may prefer trial to settlement because the monetary compensation that he/she expects to gain at trial gives him/her the opportunity to preserve the position that he/she had before the damage occurred. For the client, this makes trial a more preferable option than settlement. In this case, the lawyer should not influence the client's decision since such intervention would change his/her expected utility function, which is unacceptable. Otherwise, maximization of subjective expected utility by rational individual is a standard assumption in the Law and Economics literature. However, due to the limitations in cognitive reasoning (or cognitive limits), the behavior of individuals often deviates from a rational one. There are many cognitive limits, such as the bounded human rationality in collecting and processing information, or a tendency to unrealistic optimism (Eisenberg, 1995: 213).

We should emphasize that the creators of this model of lawyer-client counseling are aware of all the difficulties of its application in specific cases (Korobkin, Guthrie, 1997: 131-136). They limit its implementation only to those situations where a lawyer can really recognize the cognitive errors of his/her client, i.e. the difference between his/her and the client's function of expected utility function. At the same time, the lawyer should certainly influence the client in the direction of giving up the trial option because of the minimization of the expected social costs of legal (civil) proceeding.[4] In other words,

[3] These are the pioneering works in the economic analysis of the choice between a trial and settlement.

[4] The expected social costs of civil proceeding is a sum of two types of costs: *the cost of judges errors* and *the administrative costs* (the costs of filing a claim, the costs of negotiations between the parties, the costs of

there is no economic justification that the client should go to court if he/she erroneously believes that a trial is a better option. Although there are cases (such as, defamation) where the trial option may be justified in order to satisfy certain emotional desire of the parties involved, there are also cases where such a claim cannot be justified (e.g. in traffic accidents cases). There is no *a priori* justification for taking such cases to court since the plaintiff's decision on the trial option may be a consequence of a bad cognitive reasoning. If such a case came to trial, the principle of minimizing the expected social costs of legal proceedings would be violated. From the economic point of view, it would be better to resolve these cases by settlement, thereby saving significant resources. It follows that the lawyer's intervention in the client's decision-making process can be justified (Korobkin, Guthrie, 1997: 137-141).

It is this particular aspect of the lawyer-client relationship that the Behavioral Law and Economics researchers have drawn attention to in their numerous empirical studies. They have proven the existence of a cognitive error in client's reasoning, and clarified when the lawyer's intervention in the client's decision-making is justified in terms of the choice between going to and settlement. Hereinafter, we present the most important empirical findings.

4. EMPIRICAL FINDINGS ON THE LAWYERS' INFLUENCE ON THE CONCLUSION OF SETTLEMENTS

The extensive law and economics literature dealing with the lawyer-client relationship unfortunately does not provide a satisfactory answer to the question concerning the lawyers' influence on the conclusion of settlements. This literature is mainly focused on the study of the behavior of a lawyer as an individual, as well as on his/her incentives to maximize personal gain. This huge gap in the literature on this topic has served as an incentive for the researchers of behavioral law and economics to address a specific question: taking into account that clients have autonomy to decide whether to enter into a settlement or not, do lawyers have an impact on the conclusion of settlements? (Korobkin, Guthrie, 1997: 77-141). In order to give an answer to this question, the BLE researchers have started from a wider question concerning the actual rate of concluded settlements. The USA is known to have a high percentage of concluded settlements, which has considerably contributed to lowering the total costs of legal proceedings. More specifically, 95% of civil cases in the USA end up in settlement (Loewenstein at al., 1993: 135). On the other hand, in France for instance, the rate of settlements is lower than in America; apart from the court jurisdiction and the sort of disputes, it amounts to *22,9%* (Doriat-Duban, 2001: 183-197).[5] In this regard, the researchers have investigated the factors that have contributed to the high percentage of concluded settlements. But before previewing these factors, it is important to make a few remarks.

First and foremost, behaviorists (Korobkin and Guthrie above all) have tried to strengthen the explanatory power of the economic models of trial and settlement, expanding them by *psychological factors*, such as the perception of the parties on the issue of a fair settlement. The basic idea is that the parties do not tend to maximize only financial gains but also those gains that are estimated to be just. Therefore, these authors emphasize the

information exchange between the parties, the costs of taking a legal actions in civil proceedings, the costs of filing for legal remedies on appeal, etc).

[5] This fact stems from the empirical study on the ADR methods in France.

importance of the alternative dispute resolutions (ADR) methods in which a neutral third party (such as a mediator) works on changing perceptions of the parties concerning the conclusion of settlement. This further means that improving the exchange of information between the parties is not enough for efficient conclusion of settlement. Forth, in order to identify factors that contribute to a high settlement rate, the BLE researchers have started from *the behavior of the parties*. The analysis focused on a number of factors that influence the behavior of the parties in the direction of deviation from the standard criterion of wealth maximization. Namely, the classic economic models start from the fact that litigants compare the benefit of concluding the settlement with the benefit of going to trial and, on that basis, they decide what kind of action to take. However, recent empirical studies have cast a different light on the behavior of the parties. These studies call into question the basic assumption in economic models that litigants maximize the benefit, in terms of wealth, and behave in a rational way to achieve this goal. In others words, litigants do not go to trial only to maximize wealth but also to achieve other *non-economic* goals. For instance, in a defamation cases, the basic motive of litigants to engage in litigation is not economic in nature. The motives may be totally different: to restore the reputation, to revenge, to rectify something that the plaintiff considers to be false or wrong, and more. In addition, the studies of defamation cases have shown a great interest of plaintiffs in using the ADR methods (Bezanson, 1986: 789-808). Further, individuals sometimes initiate proceedings only to express their feelings or to highlight their problems, rather than to achieve any tangible benefit (Sarat, 1976: 339). Then, the choice between a trial and settlement depends on the context in which that option is exercised. For instance, a choice between two offers for the conclusion of settlement depends largely on whether there is a third offer for the conclusion of settlement (Kelman et al., 1996: 287-318).

All these examples show that individual decisions are not systematically based on the criteria of expected costs and benefits of a trial and settlement. There are many other factors governing their choice between a trial and settlement. The existence of these factors indicates that the litigants' behavior differs from the behavior described in the standard economic models. These models suggest that rational litigants will opt for negotiation and conclusion of settlement because it is a cheaper option as compared to trial. In other words, settlement is an alternative option by which litigants avoid expensive lawsuits, thus putting themselves in a better position than the one they would have found themselves in if they had gone to trial (the Pareto improvement).

A surface analysis based on the standard economic models may give rise to a conclusion that the high percentage of concluded settlements in America was caused by the litigants' behavior. However, the above findings of empirical research in conjunction with motives for going to trial call such a conclusion into question. Therefore, the BLE researchers tried to determine whether the high percentage of concluded settlements is conditioned by *the lawyers' behavior.* In other words, they tested the hypothesis *that lawyers, as a group, using rational analysis in the choice between a trial and settlement, contribute to the high percentage of concluded settlement in America*. To answer this question, researchers have conducted empirical research, whose results are summarized here in three points (Korobkin, Guthrie, 1997: 81-82).

Firstly, it has been proven that lawyers' assessment of the choice of going to trial or settlement differs from the parties' assessment. More specifically, lawyers consistently apply the criteria of decision-making based on the expected benefits and costs of a trial

and settlement. In contrast to lawyers, the parties are largely prone to a variety of cognitive and socio-psychological distortions that diverge from rational economic logic based on the expected benefits and costs. This means that lawyers more or less favor a settlement as a cheaper variant in relation to a trial. Secondly, there is some evidence that lawyers are able to influence the decision of a client in connection with the settlement or trial choice. In other words, lawyers may affect the client's decision to settle with the other party in a situation where a client might not take such a decision. Thirdly, given that their decisions are based on the criterion of the expected benefits and costs of settlement and trial, lawyers basically promote *efficiency in resolving disputes*. Based on these findings, the BLE researchers came to the conclusion that the lawyers have a crucial but not decisive role in the resolution of disputes by peaceful means. Their role is not decisive because clients can be encouraged by the desire to choose the lawyers who have built a reputation of lawyers who resolve disputes by peaceful means. In this regard, Gilson and Mnookin have showed that the so-called peaceful lawyers contribute to resolving the prisoner dilemma that exists between the parties (Gilson, Mnookin, 1994: 509-566). All in all, lawyers contribute to the high rate of the concluded settlements in America by rational economic analysis of the cases and by their ability to influence their clients' decisions.

5. CONCLUSION

Although important, the standard models of lawyer-client counseling do not give a satisfactory answer to the question of choice between a trial and settlement, which clients often face. This vacuum has induced the BLE researchers to examine the lawyers' impact on the clients' choice between a trial and settlement. The BLE studies have shown that this influence certainly exists, given that lawyers are guided to a greater extent than their clients by a rational economic logic based on the expected costs and benefits. On the other hand, the clients are prone to a number of cognitive errors, which significantly affect their choice. Finally, the BLE researchers developed a special theoretical model of lawyer-client counseling, called the *cognitive model*. The essence of this model is embodied in the fact that a lawyer has the right to intervene in the client's decision but only he/she estimates that a client is prone to some cognitive errors. These cognitive errors might generate waste of scarce resources, which is an economic justification for such intervention. Thus, the BLE researchers have strengthened the explaining power of the standard economic models on the issue of trial-settlement choice.

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ULOGA ADVOKATA U SAVETOVANJU KLIJENATA: NOVI TEORIJSKI PRISTUP BIHEVIORALNOG PRAVA I EKONOMIJE

U ovom radu autor prikazuje standardne teorijske modele savetovanja klijenata (principala) od strane advokata (agenata), njihove prednosti i ograničenja. Pored tih standardnih modela, biće prikazan i jedan inovativan model, tzv. kognitivni model, koji je razvijen u okviru naučne discipline Bihevioralno pravo i ekonomija. Ovaj model baca drugačije svetlo na odnos klijenata i advokata, uvodeći i određene psihološke faktore koji se vezuju za kognitivne greške u rasuđivanju klijenata. U radu će biti izložene neke tipične kognitivne greške klijenata koje pružaju osnov advokatima da utiču na promenu njihovih odluka u vezi sa izborom između suđenja i poravnanja. Autor zaključuje da je neophodno uvažiti nalaze koji proizilaze iz kognitivnog modela radi boljeg razumevanja principal-agent odnosa.

Ključne reči: *advokat, klijent, kognitivne greške, suđenje, poravnanje*.