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LASCHER AT LARGE

By Edward L. Lascher

A pal reports a referendum taken by a bar association regarding some controversy, phrased: "Should we support the litigation? Answer 'yes' or no'," and "Should we oppose the litigation? Answer 'yes' or no'." He says he was almost overcome by an irresistible impulse to answer both in the affirmative. Since I can tell right from wrong, I was reminded of one of my Dad's favorite stories about the sentry who challenged, "Are you with us or against us?" and was answered: "We are." Or was it "Why is a mouse when it spins? The higher the fewer."(That oughta smoke out the over-40s among us.)

ON THE OWING OF LIVINGS

There was a saddening piece on the front page of this paper the other day (December 29) concerning a minority-bar session on legal economics. What bothered me in this instance was neither the racism involved or the "us against everybody else" orientation. (Not that those things don't appall me, plenty. But I'm getting used to, and hardened by, the prevailing, chic opinion that animosity toward everyone who is different is the key to eliminating ethnic hatreds. Accustomed, and maybe even resigned, but no less saddened and depressed for the impact of such attitudes upon the future. What did catch my attention was the chief complaint, that beginning lawyers who are members of minority groups are having a tough time making a go of it, and specifically that the big law firms aren't "referring enough business" to these, neophytes nor is the rest of the populace panting after their services.

So, the piper is presenting his bill! Take a look at the agenda that has dominated legal education, bar admission and similar endeavors over the last decade if you want to know why the wherefore. It's jolly fun to insist there be a law school on every major intersection, in order that anybody who thinks it would be nice to put "Esq." after his or her name has "access to the legal profession"; to demand that everybody who wants into those ever-proliferating law schools pops out the other end with J.D. degree affixed (whether or not he can spell "J.D."); and to urge that we add 20,000 or 200,000, or whatever the hell figure it is, to the ranks of the profession annually -- and I sure don't just mean people from ethnic minorities, but rather X thousand new Transylvanians, Y thousand ambidexters, and Z thousand over-seven-footers, whatever. OK, fun, but where do those recruits go? It appears to have escaped everybody's attention that they go into the marketplace, to compete with each other for a finite amount of legal business, not to mention the notably more finite quantity of good legal business.

COMING TO ROOST

The people who were hurting at that symposium are some of the same people who, a couple years ago, were begging for --nay, demanding -- more competition. The dream of a constitutional right to inflict a disastrous oversupply of unnecessary and unwanted admittees has finally reached fruition. Hasn't it just? And it's hurting precisely those who anyone with an ounce of common sense should have seen would be the people most hurt. I hope new lawyers who are falling over each other in pursuit of the nearest default unlawful detainer are suitably grateful for what the limousine liberals have bestowed.

And I presume it's essentially the same patrons who are telling the kids that it's "discrimination" that keeps them from getting "sufficient referrals" from the law factories -presumably meaning that too few members of the law school class of '79 are being asked to handle the Marathon Oil merger or to defend the asbestos industry. That is equally a crock. It's the way of the world. The big law firm keeps the good cases for itself; it refers out the default divorces and the 23102s. Or it did so when this profession was still shamefully lily white and all male, and it does so today.

I am white, male, a graduate of one of the finest law schools in the country and had five years of corporate experience (some of it rubbing elbows with pretty high-powered folk) when I first-hung out a shingle. In the ensuing 20 years -- that is "twenty" and "years" - I got none, nil, zero, zilch (count em!) referrals from big law firms. I would have fallen over in a dead faint if I had.

It is not racial prejudice, ethnic hubris, male piggery, social insensitivity, or any other hip failing that causes what these young colleagues are suffering. It is economics. Money. Profit. Acquisitiveness. Greed, even. The facts, in short, of life.

The demagogues who told these fledglings the 14th Amendment guaranteed them a law degree and a passing score on the bar exam are the same ones who snowed their impressionable but unwitting audiences with the myth that the stork brings clients. Unfortunately, it is not the silly soothsayers who will suffer for that sanctimonious fraud; it is the waifs who believed and trusted them, and who now confront reality. The prototypical primrose-path travelers are the tyros who went to that ABA seminar to express amazement that the world wasn't following through and providing them with a living.

The sad truth is that these lawyers are going to survive, if at all, by virtue of the same things that have spelled survival to the vast majority of lawyers throughout history: working their weary tails off, being committed to being a little bit better than they need to be (which means way better than the average), and having more than a little bit of luck. That's where survival in the real world comes from, not from special dispensations, not from slogans, not from, acronyms. It's a hellish disappointment. The truth often is.

SOLOMONS TO LET

All of the foregoing is not to suggest that the marketplace for the talents of new lawyers is the most competitive sector of current endeavor, not by a long shot. It's urban molehill over development -- inventing new hysterias, finding new mortal dangers lurking under the bed, and suchlike -- as we smartly match our stride to the tempo of the ninth decade.

The current frontrunner in that category is the brouhaha over the rent-a-judge concept. (Although I hasten to add that the Henny Pennies must never let down their guards; something even more ludicrous is probably waiting in the wings.) There has been a firestorm of panic because some litigants have been exercising a right that's been in the statutes for some 110 years -- and in the Constitution-at least that long. What those subversives have been up to is pulling their cases out of the usual, clogged, harassed court system in favor of a variation of arbitration by which retired judges are selected as either pro tem judges or special referees to determine nonjury trials -- where all the parties and their lawyers agree on the idea, and on the judge.

It has been perceived, and decreed, by Public Advocates, a San Francisco-based coterie of itinerant, free-lance dogooders that this is A Bad Thing. Naturally, that's all it took to get the Judi Council/AOC and the State Bar Board of Guvs into full cry, with separate but equal investigations of this nefarious aberration. Heck, there's even a Harvard Law Review article that meanders all over the place (or am I being redundant?) but finally concludes that consensual arrangements of this type for the resolution of disputes should be stamped out, because we can't have parties -- of all people! -- figuring out ways to resolve their own differences. The government, through the judiciary (or am I being synonymous?), must have a monopoly on human disputation.

Most people who react to this cacophony of calamity do so with incredulity. 99-44/100ths percent of the populace, if told that some people are willing to go out and foot the bill for what amounts to the Federal Express of the judiciary, ask: "What the hell's the matter with that?"

Don't look at me for the answer. Everybody knows I'm an insensitive clod who wouldn't know a threat to individual freedom if I saw it. I, and the rest of us head scratchers, can't begin to comprehend the lurking dangers to freedom involved in allowing people to determine controversies their own way if they choose, can't envision the loss of human rights and human dignity which can occur if the apparat ever allows individuals to get out of line and into the clutches of self-determination.

I was intrigued to read the other day of one member of the ranks of the baffled Judge Tony Kline, of the City himself, and an alumnus of the very same Public Advocates, a progressive whose sensitivity knows no whicher, and a trenchant if not exactly reticent critic of judicial status quo. When he says he can't figure out what's wrong with allowing people to resolve matters this way, it shows just how many of us are out of step with so few.

WHAT IT'S NOT ALL ABOUT

Let's make it clear what rent-a-judge isn't. Most importantly, it isn't compulsory, in any way or under any circumstances. Nobody can be forced or pressured or ordered onto -that track. Both sides must agree, both have to waive jury, both are required to pony up their share of the cost, and both have to agree on the judge. Those are some fairly substantial bones of noncontention.

(I can't help digressing on the last factor. There must be about 40 or 50 retired judges available for performing the service in the Los Angeles area alone. You can count on the fingers of two hands -- maybe even after a couple of amputations -- the number whose doors are being beaten down with requests to serve; most of the others get a nibble now and then, but only occasional bites, while an eye-popping handful are in the "you've gotta be kidding" class. One might even suspect that some of the hysteria emanates from the fact that this is the ultimate judicial evaluation system, and who knows where that might lead? It's like the pro football draft: When the chips are down, you pick the real stars.)

Moreover, although it is theoretically possible to utilize this program for jury trials, such does not appear ever to have occurred, and no one believes there is any likelihood it will. That's due in part to logistics, but much more to the fact that insurance companies uniformly (and for reasons that are fairly evident but needn't be examined -- at least this outing) decline to utilize this method, as do litigants with starry-eyed dreams of stratospheric punitive damage awards and the like.

Instead, the program seems to have been employed, in practice, for exactly the kind of cases it best suits. Ones where the judge can give his undivided and uninterrupted attention, can adjust schedules to working half-days, starting early in the morning to accommodate transcontinental communications, sitting on weekends, ignoring the proliferation of court holidays, making firm commitments for witness convenience, all with-out any worries about a sudden injection of a criminal case that must be tried; where imaginative and sometimes unorthodox methods may be brought to bear -- if the parties agree. In other words, cases which will work better with procedures that are out of the ordinary -- which is just what they can't get otherwise.

These are also cases which tend to tie up huge bundles of judge and court time so, although the gross number of rent-a-judge cases may be unimpressive, the actual contribution to docket calamity-avoidance is significantly greater than meets the eye. Removal of just one corporate fraud/trade secret case from the calendar allows more than one guy who needs compensation for a leg off, or who'd like to get back the dough his cousin conned him out of in 1965, to get his case heard.

SOUR GRIPES

Actually, the most vocal griping about the system has come from the Attorney General, who agreed to try some sort of complicated air pollution case in front of a retired judge and apparently got bombed. The deputies are now screaming that the court shouldn't have gone along with their agreement. While I understand the feeling (there are precious few litigators who've been around much who haven't reacted the same way on occasion), I can't manage to give it much weight. How many briefs filed under the name of Messrs. (or should it be Generals?) Brown, Mosk, Lynch, Younger and Deukmejian prominently assert waiver and/or estoppel and/or the demerits of renegeing on one's own tactical decision? Moreover, I have a hunch that the AG would be saying the identical things, given the outcome and rulings and the like, if Judge Sax were still drawing his full salary, rather than a retirement allowance.

The press has weighed in with the point that litigation should not be conducted in secret. Agreed; that is a legitimate concern -- but only a concern. There is no empiric evidence of the press' being denied access to the record of the oral proceedings or the files and documents in any case tried in either a pro tem or special reference manner. If a problem exists, it can be obviated by simple and trivial rule-making.

The chief complaint seems to be that there is something inherently wrong with allowing parties to devise private means of resolving their disputes. I simply disagree, having understood it to be the traditional, historic and emphatic public policy of California -- and of virtually every other jurisdiction -- to encourage private resolution wherever possible and, more to the point, to encourage doing so through the quasi-judicial machinery of arbitration.

The difference, I am told, is that arbitration does not take place under the court's "imprimatur"; the court just reinforces the result. Again, with respect, Lascher dissents. I haven't been suffering from many imprimatur bites lately, but when it comes to the distinction between arbitration and the rent-a-judge system urged by foes of the latter -- that, in arbitration, the court "only" applies the weight of the state to enforcement of an award -- I at least have the wit to perceive distinction sans difference. Didn't some folks named Shelley and Kraemer get into a lawsuit about 30 years ago over racially restrictive covenants, one of them contending that those were private matters which the courts "merely enforced?" Even in an era which current constitutional faddists deem paleolithic, the Supreme Court called that one out of bounds.

The judicial branch has more than ample work to do and quite enough problems crying for solution. The cynical, extermination of civil relief in many of our counties is one among many pertinent examples. I would strongly recommend that our limited resources and energies be devoted to those real problems, and not to headline-grabbing and hysterical panics such as The Great Temporary Judge Scare of 1981-1982.

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