

LASCHER AT LARGE
By Edward L. Lascher
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The blessedly many who read these lines for a well deserved respite from serious thought (the world suffers from too much of that already) should turn to the classified ads. I want to address something I've pent up: Impatience with the notion that judges and their satellite agencies have some handle on how to repair what ails the juridical apparatus. (The "If it ain't broke, don't fix it" adage quoted last month, while of continued validity, is not relevant to this topic.) My dyspepsia is inspired by one minor and one major outcropping of blackrobed misapprehension which occurred almost simultaneously.

The minor one is our Judi Council's proposed Rule 310, which would require lawyers to meet and confer before the hearing of all law and motion matters. I am reminded of the onetime joke about a kamikaze recruiting service and the condition of Honorable Emperor's mind.

In the first place, this brainstorm is at war with possibility. Do Dick and Jane get together and decide whether Jane's complaint is demurrable? Whether Dick should have summary adjudication in his favor? Whether the venue that one of them already chose was proper? If the parties could decide these things, they wouldn't have filed a motion. There are those of us who had the quaint idea that courts exist to decide questions the parties can't decide for themselves, not just to put a blessing on the ones they can. (Don't get me wrong, I realize that a judicial nudge can often bring things together – even contested legal points. But this rule is designed to eliminate that.)

More importantly – and more consistently with my theme – this proposal reflects naive belief in a world which doesn't exist; the proponents don't understand the game. Establishment of a "meet and confer" requirement for all contested legal proceedings will have all the same wonderfully benign effects on the costs and duration of litigation which discovery has bestowed.

The economic subsistence level of the profession has long been deemed to be around one lawyer for every thousand members of the populace. There is currently one lawyer for every 350 or so. That means about two thirds of our profession inescapably must turn to scrabbling desperately after anything they can scratch out. Meeting and conferring would not be a bonanza, but it would constitute a new and welcome form of pump priming.

Just think of the secondary paper storms that could be generated to demand, confirm, redraft, claim, object, reconsider, reserve, append, supplement, offset, disclaim, elaborate, protest, annotate, you-name-it, the result of each such conference. We have a file in our office today in which one of three parties has literally generated more than three feet of documents in seven months – with a grand total of two court appearances, but plenty of meeting and conferring, court-ordered. That party's attorney plainly has no other client, while the other two (we're on a fringe) face spending more than the case is worth just in meeting and conferring. It is a device to generate either extortionate results or unconscionable fees. It is not only court tolerated, it is court engendered. Innocently, to be sure, but nonetheless existentially factual.

The greater stimulus to dyspepsia comes from the ever eloquent Chief Justice of the United States. Having noticed that there is something wrong with the legal system, he was good enough to supply us with the cure: "A few, carefully considered, wellplaced penalties of \$5,000, \$10,000 or \$15,000 will help focus attention on the subject." Hogwash.

Responses that are few, far between and well chosen – for which read idiosyncratic, unpredictable and visceral would simply be another brass ring for the grabbing. Just as every personal injury case nowadays engenders a second lawsuit against an insurance company for punitive damages, and every motion by the other side inspires a request for sanctions, thus fanning the flames to which the alarms are addressed, anything as capricious and subjective as such fines is ineffective by definition and destructive by probability.

Potent, Painful Panacea

There is no secret what is needed; it is obvious, to all rational, non knee jerk observers. The problem is, it doesn't come in a tasty emulsion, and it collides with the great shibboleth barrier.

The only workable avenue of relief for the cause of all the groaning would be adoption of the English system by which the losing party pays the actual expenses (i.e., attorneys' fees, investigation costs, everything).

It needs one refinement in this country: imposing the same proportion of answerability for those costs upon contingent fee counsel as was his vested interest in the potential recovery, something which is unnecessary in Blighty because they don't have contingent fees. Moreover, of course, it has to apply across the board. Recent steps giving attorneys' fees to certain parties in certain kinds of cases are part of the problem, not the solution. They create an illusion of burden-shifting, a come-on, without the reality. Besides, if it's legitimate in a few kinds of

cases, why doesn't everyone get equal protection?

Adoption of that practice would put the burden where it belongs, and so do because of the nature of what happens, not because some individual judge, after deep deliberation, considers some off the wall case a good target for a one-in-a-million gesture.

It makes potential cost a factor in deciding whether to start a lawsuit (including a questionable one), whether to interpose a defense (including a far-fetched one), and how to go about litigating after a case is started (including the taking of 97 depositions), since the piper may arrive with a bill for what it cost the other side. It also harmonizes litigation with other facets of modern life – in which, if you cause harm to someone else which he or she would not have sustained but for your action, you must make that person whole. It has nothing to do with vengeance, punishment, example, or anything of that ilk – just with paying the tab. In the general experience of mankind, inherent, reparational factors of that type seem far more effective sanctions than sporadic bolts of lightning – which every miscreant knows will never hit him, her, or it.

Objections Overruled

Now, then, the first thing you're yelling is that this would "chill access to the courts". I demur. Isn't chilling precisely what we're talking about? Aren't we just haggling over methodology? I'm not in the least confident that access to justice is more threatened by the simple prospect of paying the other side's actual loss than it is by the possibility that some judge, responding ad hoc to the dictates of his breakfast, may choose to zap an individual whose legal position he doesn't like.

And, when you stop to think about it, is the unchilled temperature we so revere all that sacred? How about the person on the other side? Most people who have been dragged into courts as defendants – and most people who have brought suit on an obvious right, only to be stalled for years of legalistic maneuvering – might not agree that a little bit of airconditioning is such a bad idea. How come we only worry about the temperature of the party who, by definition, was wrong?

Next, you're going to say that such an approach discourages innovation and development in the law. Okay, it would. Before one tried something new, one would have to factor in the chances of its succeeding and the economic impact if it didn't. Forgive me, but what's wrong with that? I don't think that means nobody will ever take a chance; it just means they'll put some thought into taking the chance – unlike the present system in which they do all the experimenting, and the other side does all the risking.

Finally, you're going to tell me it's bad for business. You got me, pal. If we were to shift to this system, there would be a horrible shakeout period for our overswollen profession. But that happens sometimes. When it was over, there would be plenty of good business for good lawyers. Somehow, I think that's better for our professional image than is all the flackery and gimmickery that's being employed and proposed these days. Certainly, it would be better for the reality.

It will never come about. It is too simple, too obvious, too unsexy. And that realization, my friends, is why my face is so long.

1984

Despair over the possibility of finding an amusing cartoon or joke about 1984 reckoned without Punch. A middle aged man is walking along a street of fast food stores and news vendors headlining terrorist bombings, amid glowering, angry looking people, threatening police and punk rockers. To companion: "There are times when I wish it was as nice as George Orwell said it was going to be." Could be the official chuckle of the 1984 Summer Olympics.

Case of No Comment

Not quite so amusing (but illuminating) was my adventure with Case & Comment. You know, that's the Lawyer's Coop giveaway that used to have the great cartoons. These days, it takes itself tres seriously and doesn't amount to much. With one exception: the monthly observations of C. L. Gaylord, a lawyer in River Falls, Wisconsin (how could anything from those precincts not be delightful?) who apparently splits his practice between the Iowa and Wisconsin courts. Every time I get around to reading his piece, I chide myself for not doing it sooner – which is quite a litmus.

In the January/February issue, he wrote on getting older in the legal profession in a manner that so moved me I wanted to quote a few snippets for my readers, and – since, unlike videotape, the print media are disentitled to steal – I wrote the magazine (which is the copyright proprietor, as I think fancy folks say) for permission. Back came the letter thanking me for my interest in the magazine – which assumed facts not in evidence – and granting permission, but on two provisos: First, I had to contact Mr. Gaylord, and second, I had to run four lines of acknowledgment.

Forget it. Deadline practicalities apart, I suspect that's about as atypical of Brother Gaylord as one could imagine – though not much out of character with today's legal profession. Like he, I find myself increasingly

practicing in a world peopled by strangers.

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