VIEWPOINT

Lawyer-Bashing, Litigation Costs And ADR

BY DAVID A. HOFFMAN

HOFFMAN

With the presidential campaign now behind us, the bar may be looking forward to a respite from the persistent lawyer-bashing emanating from the White House during the Bush-Quayle years. For example, we are unlikely to hear from Messrs. Clinton and Gore (as we did from their predecessors) that trial lawyers deserve a significant portion of the blame for the nation's economic woes.

But putting the rhetorical excesses of the campaign to one side, lawyers ought to reflect on why the partisan attacks on lawyers and the cost of litigation were a persistent feature of the presidential campaign. Is it solely because trial lawyers are a convenient target of abuse? Or is the public genuinely fed up with litigation as a method of dispute resolution?

One answer can be found in the public opinion survey done for Chief Justice Paul Liacos' Commission on the Future of the Courts. The survey results, which were issued in May 1992, provide a sobering—but not entirely surprising—indication of the extent to which the public has lost faith in our system of justice:

- 81 percent of the public believe litigation is too expensive.
- 88 percent believe that court proceedings are too slow.
- 79 percent believe that court proceedings are too hard to understand.

For minorities, the responses to these questions were even higher, ranging from 84 percent to 87 percent.

These views are apparently shared to some extent by trial lawyers themselves: in a recent poll of litigators by the American Bar Association, the vast majority described the cost of litigation today as "excessive." Some lawyers have suggested that, with the steep increase in attorney compensation in the 1980s, lawyers may have priced themselves out of much of their potential market. But even if attorneys earned less, litigation would still be so expensive that the vast majority of people in this country, and many businesses, could no longer afford to have their day in court.

The primary reason why litigation is so expensive in the United States is well known: pretrial discovery and discovery-related motion practice. These expenses stem from the liberalization of discovery rules which began in 1947 and reached full flower in the 1970s and 1980s. Discovery-related expenses are difficult to control because opposing parties can impose them unilaterally on each other by choosing to take a multitude of depositions or to request a staggering number of documents. Ordinarily, the courts step in only when these requests become truly outlandish.

The theory behind such open-ended discovery is that, with a full exchange of information, cases will settle. And they do—at the astonishingly high rate of 95 percent in both state and federal courts. In most cases, however, cases do not settle until a substantial amount of expensive discovery and pretrial preparation have occurred. According to a recent study of the federal courts by the Brookings Institute, 60 percent of the cost of litigation is attributable solely to pretrial discovery.

To be sure, efforts to streamline discovery are now under way. The new local rules of the federal district court in Massachusetts impose limits on discovery and provide for automatic disclosure of "core" documents in each case. (See Local Rule 26.2.) These limits may be relaxed only upon motion by the parties. It remains to be seen, however, whether these rules will ultimately reduce the expense associated with litigation or instead shift some of that expense from discovery to discovery-related motion practice.

The most promising feature of the new local rules is Rule 16.4 which *requires* consideration of alternative dispute resolution (ADR) in *every* case (the court "*shall* encourage the resolution of disputes by settlement or other alternative dispute resolution programs"). ADR gives lawyers and the courts tools (such as mediation, arbitration, case evaluation, mini-trials and various hybrid processes) that can reduce dramatically the cost of dispute resolution. ADR does not eliminate the need for discovery and investigation; indeed, some discovery and disclosure is probably needed in most cases before ADR can be used effectively. But ADR does give lawyers an opportunity to limit such discovery to what is needed to resolve the case short of a full-blown trial.

The evidence to date suggests that ADR does in fact reduce costs. A recent study by the Rand Corporation found that arbitration reduced the cost of litigating high-stakes cases by more than 20 percent, and a national insurance company found that using ADR cut its outside counsel fees by 35 percent.

The incorporation of ADR into the federal local rules marks a significant step toward making ADR more than just an adjunct to trial practice in Massachusetts, but instead an integral part of the handling of every case. Several other recent developments suggest progress in this direction.

For example, in the state courts, the number of mediators used in the Superior Court has recently been doubled, and the Legislature is considering a mandatory mediation proposal. In Middlesex County, the experimental "multi-door courthouse" program now steers litigants to mediation, arbitration, or the courtroom, based on an early evaluation of the case by court personnel.

In addition, the organized bar has picked up the ADR banner. The American Bar Association is currently considering setting up a division for lawyers involved in ADR, and over 3,000 lawyers have signed up. They consist not only of lawyers who are learning the ropes of ADR but also the growing number of "recovering litigators" who have set up private ADR firms.

Such firms have become a virtual cottage industry in Massachusetts and around the country. Ten years ago, ADR firms were practically non-existent, and the non-profit American Arbitration Association had the field to itself. This fall, the Boston Bar Association published a directory of ADR providers that listed over 100 firms and individuals providing ADR services in Massachusetts.

These developments presage an emerging consensus that ADR must be considered in nearly every case lawyers handle. Chief Justice Liacos' Commission recommended the following: 'In every appropriate case, attorneys should discuss with their clients the advantages and disadvantages of all available dispute resolution options.' A similar statement, circulated by the non-profit Center for Public Resources, has been signed by several hundred large corporations and leading law firms around the country. Harvard Law School professor Frank Sander, one of the pioneers in the ADR field, has even suggested that lawyers may have an ethical duty to discuss ADR options with their clients.

ADR is not without its critics, however. Some contend that private dispute resolution creates a dual system of justice, in which only the wealthy can get their disputes resolved quickly, while the less fortunate languish in court. Yet to an increasing extent ADR procedures are available through the courts at a very low cost.

Other critics of ADR have questioned whether the ADR movement will eventually stall because lawyers, out of self-interest, will resist more streamlined methods of dispute resolution. But the truth is that with our expensive litigation system, many if not most disputes are currently priced out of the market for resolution in our legal system. In effect, ADR expands that market, and thus gives lawyers an opportunity not only to serve their clients more efficiently but also to begin restoring our legal system to the point where it is available to all rather than the few.

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THE WEEK'S OPINIONS

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U.S. Court of Appeals

CONTINUED

grounds for the trial court to hold the owners in civil contempt.

Affirmed

The court also affirms summary judgment against the defendants on the plaintiff-lender's suit for repayment of loans personally guaranteed by the stations's owners.

Civil Contempt

"[A]ppellants displayed a clear pattern of resistance, overt as well as surreptitious, to the enforcement of the receivership order. The contumacious conduct included their dilatory FCC applications to transfer the station licenses to the Companies following dismissal of ... chapter 11 proceedings[] rather than directly to the receiver; their notification to the receiver that his FCC applications for approval of the license transfers to himself should not be filed until their own dilatory transfer applications had been processed; and the misleading FCC filings (including the 'creditors committee' filing signed by [owner] Robb's receptionist), designed to impede enforcement of the receivership order, notwithstanding the fact that appellants were explicitly enjoined to cooperate and to 'refrain from ... imped(ing) the receiver in the performance of his duties in any way.' (citation). Appellants do not cite (and neither we nor the district court have discovered) any authority which would support the claim that their actions were 'compelled' by FCC regulations. We discern no abuse of discretion in the district court's contempt finding or its imposition of sanctions.

"Affirmed; double costs to appellee."

Rhode Island Hospital Trust National Bank v. Howard Communications Corporation, et al. (Lawyers Weekly No. 01-369-92) (14 pages) (Cyr, J.) Appealed from the U.S. District Court for the District of Massachusetts, Freedman, J.; John F. Henning, Jr., for the defendant-appellants; Sabin Willett and Patricia J. Hill for the plaintiff.

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Criminal Law

Sentencing - Career Offender - Conspiracy To Break And Enter A Commercial Structure

Where a defendant has previously been convicted of conspiracy to break and enter a commercial structure, this conviction qualifies a predicate crime of violence for purposes of the career offender provisions of the federal sentencing guidelines.

Affirmed.

Discussion

"This appeal asks us to decide a question of first impression: Does a prior conviction for conspiracy to break and enter a commercial structure qualify as a predicate offense for purposes of the career offender provisions of the federal sentencing guidelines? We answer the question in the affirmative and, therefore, allow the defendant's sentence to stand.

"Defendant-appellant Anthony Fiore, a man of mature years but apparent criminal predilection, pleaded guilty to four interconnected felonies, at least one of which constituted a 'crime of violence' as that term is defined in U.S.S.G. §§4B1.2 (Nov. 1991). The district court sentenced Fiore as a career offender. To merit such a sentence, a defendant must be (1) at least eighteen years old at the time of the offense, (2) guilty, presently, of 'a felony that is either a crime of violence or a controlled substance offense,' and (3) guilty, historically, 'at least two prior felony convictions of either a crime of violence or a controlled substance offense.'

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LETTERS

Whatever Happened To 'Inalienable Right To Life'?

Dear Sir:

I read the letter authored by several former members of the Massachusetts Attorney General's Office with sadness. The letter tells us of the fine work of a current member of the Civil Rights Division of the Attorney General's Office who is committed to defending civil rights. The letter speaks about blockades, injunctions and constitutional rights to choose abortion.

What saddens me about all this is that sparks fly about what, in my opinion, are the peripheral issues that surround the abortion controversy. The central issue concerning what happens behind closed doors in the abortion clinics is ignored. The lives of defenseless, innocent children are being taken repeatedly, and our nation has enshrined the practice as a constitutional right. The Civil Rights Division prosecutes rescuers while those who operate the clinics are legally permitted to continue with business as usual.

The other day a newborn baby was found dead in the rear of a church, and a homicide investigation was launched. Days earlier, the mother could have had an abortion and it would have been her constitutional right. Justice has truly been turned upside down and America's indifference shocks me beyond belief.

What ever happened to the inalienable right to life?

John Michael Callahan Jr.
Hanover

Reasoning Of Overseers Reprimand Questioned

To the Editor:

The Board of Bar Overseers' notices published Nov. 23, 1992 reprimanded a lawyer who asked a divorce client to sign a note and mortgage to secure fees and costs. The reasoning is "avoiding acquisition of interest in litigation."

Maybe I am missing something but, since *all* assets are subject to division, how can a lawyer expect to be paid except out of assets of a party which are all subject to division? I always thought this rule meant a lawyer couldn't charge a percentage or contingent fee in a divorce case. If you think about it, allowing the note and mortgage serves a public purpose in making legal services available in a lot of cases where there are insufficient liquid funds to retain a lawyer early in the case.

David Valdina
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