Cost of Civil Justice

BY M. KELLY TILLERY

Every few days I receive an online report of all civil cases filed in the local federal and state courts. It occurred to me that these reports tell us a lot about our profession, our legal system and our community. If an alien arrived and had only this evidence about how we resolve civil disputes from which to judge us, what an odd and troubling view she would have.

Cases filed show us a bigoted, sexist, racist, mean-spirited, careless, fraudulent, heartless, pornographic, thieving people who do not honor our obligations. Or at least, as alleged.

Of course, this slice of life does not include other dispute resolution fora such as those that handle domestic, criminal, administrative, workers' compensation and other civil disputes. Though viewing those as well would not likely give our alien visitor a more favorable impression of us.

This accounts for only a fraction of the billions of our annual personal and commercial interactions, most of which proceed peacefully, without dispute. Perhaps this mirror is more like that in a fun house, distorting reality. One can only hope.

Civil disputes in a complex society are inevitable and we are part of a system that purports and strives to resolve them fairly, expeditiously and economically so as to maintain peace, order, freedom, expansion of commerce and the pursuit of happiness. But our system is in danger of failing to achieve those noble goals by systematically excluding many who require it.

Fortunately, we resolve most disputes without lawyers or litigation, and even when we must engage, we seldom require final adjudication by judge or jury. If the civil disputes that went to trial increased by even one percentage point, the system would grind to a halt.

At some point, we all should be required to hire a lawyer and, more importantly, to pay a lawyer's bill. While sending legal bills and even handling client complaints about same can be enlightening, there is nothing quite like having to receive and pay another lawyer's bill. You will quickly come to believe that the cost of civil justice is too high.

Perhaps we have raised due process as societal value above all others instead of balancing it against limited time, money and resources. U.S. District Court Judge Ernest Tidwell of the Northern District of Georgia once told me of defendant counterfeiters, when I expressed concern in an ex parte application, as he signed my proposed injunction, "Counselor, this is all the process they're due."

As a litigator of intellectual property disputes I earn my living based on civil disputes and as such am most familiar with the extraordinary costs of these battles. Though more than 5,000 patent infringement complaints are filed each year, only about 200 actually go to jury verdict. There is good reason for this.

The American Intellectual Property Law Association's most recent "Report of Economic Survey" says that the median cost to litigate a patent dispute with $1 million to $10 million at risk is $2 million and $5 million when more than $25 million is at risk. Other similar surveys, such as those done by the National Center for State Courts (ncsc.org) and the American Board of Trial Advocates (abota.org) show similar commercial litigation is seldom less expensive.

Does it really have to cost so much to render justice in such disputes? Or in any disputes?

The Constitution authorizes The Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries," but a dispute resolution system that is so costly may not be promoting such "Progress," it may, in fact, be inhibiting it.

And, while the Fifth Amendment provides that no person "be deprived of … property, without due process of law," a prohibitively expensive civil justice system hardly does so.

The Pennsylvania Rules of Professional Conduct imposes duties on us not to abuse legal proceedings (R.3.1), not to wrongfully obstruct (R.3.4(a)) and to expedite litigation (R.32), yet none specifically require us to create and implement innovations to minimize the cost of litigation. Our Rules of Civil Procedure impose a duty that we not present anything "for any improper purpose such as to …needlessly increase the cost of litigation," F.R.Civ.P.11(a)(1) and PA.R.Civ.P. 1023(1)(c)(1), but you will search in vain for cases in which courts have sanctioned for violating same, at least not for that reason alone.

I do not pretend to address the equally serious problem of the almost 400,000 in this city living in poverty unable to access the system in any meaningful way. This Bar Association's Civil Gideon and Access to Justice Task Force and others continue this noble fight.

My focus here is on individuals and small and non-Fortune 500 businesses, those who comprise the bulk of the producers in this nation.

In no particular order, I posit seven possible remedies: 1) alternative fee arrangements, 2) loser pays, 3) early mediation, 4) accountable arbitration, 5) "grand bargain" model, 6) "Feinberg" model, and 7) closer court control.

Some say the days of the hourly rate are numbered. Whether true or not, we have entered a new era in which clients of all types are demanding creative solutions to mushrooming legal fees. The variety of alternative fee arrangements is only limited

by our creativity and willingness to take risk. If nothing else, competition requires that we look here.

The British rule of loser pays has a long and venerable history, though only two states, Alaska and Texas, have adopted any version, both watered-down. While not appropriate for all types of disputes, for some it seems ideal.

Federal courts in California and Florida have mandatory early mediation with mediators experienced in the area of law at hand. I was, at first, quite skeptical but have resolved many cases in both venues, early and economically, and am now a true believer.

Arbitration, once thought the panacea for all our litigation woes, often now involves greater expense and lacks any accountability, souring many. A recommitment to speed and economy seems necessary along with provision for accountability, such as appellate review for errors of law.

This year, the 100th anniversary of the Pennsylvania Worker's Compensation Act, we celebrate the prime example of a societal "grand bargain" in which workers give up chance of recovery of unlimited compensation in litigation, for the certainty of recovery of fixed compensation. This originally innovative model has worked and has real possibilities for application in other areas.

Kenneth Feinberg, a legendary figure in alternative dispute resolution, has (almost) perfected a model for resolving mass disputes used with the September 11 Fund, the BP Deepwater Horizon Fund and others. While also not applicable to all types of disputes, "The Feinberg model" has proven an effective, economical method of handling many. It, too, must be considered for broader application.

And last, but not at all least, there is a dire need for closer control by courts, in particular, of discovery. Whether it be by Rule 11 or similar tools or by better scheduling control, something must be done. There was a time when I did not wish two things on my worst enemies – back problems and divorce. I have now added electronic discovery to that list.

This new tool of torture has become the discovery tail that wags the merits dog. Whether a document has been preserved and produced has become more important than its possible content. "Spoliation!" has become the rebel yell of the litigation tactic du jour. At astounding expense, we gather and produce millions of documents, only to have a handful actually used. U.S. District Court Judge Sue L. Robinson observed that in nine patent trials over which she presided, only an average of 87 documents were admitted.

The "elephant in the room" (or sacred cow) here is legal fees. The expense of discovery services, investigators and experts can be exorbitant, but the overwhelming factor is our fees. The practice of law is a profession, and a noble and honorable one at that, but, we must acknowledge that it is also, and has always been, for most, a business.

We must strike the proper balance between making our courts economically accessible to all who require dispute resolution and providing sufficient compensation to advocates to ensure quality and honorable representation. This requires innovative thinking, experimentation and bold leadership. Unless we act with purpose and dispatch, there is a very real risk that just resolution of important civil disputes will be available only to the wealthy, the insured and those with contingent or statutory fee recovery.

Until we can, as Rodney King pleaded, "all just get along," we will require civil courts to adjudicate disputes and we must make them economically accessible to all. Otherwise, the more powerful and well-heeled will win most disputes, even when in the wrong. ■

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