The U.S. Civil Court System---the other crisis

Copious quantities of talk, ink, and spin are currently being devoted to the U.S. health care crisis, but the U.S. civil court system is every bit as much in crisis. The U.S. criminal "justice" system is, if anything, in even greater crisis, but that is another subject.

Unfortunately, as with health care, unimaginably powerful vested interests with vast, multi-billion dollar stakes in keeping things just as they are, make sure no attention whatsoever is focused on the real underlying problems, thus assuring that any "fixes" will be anything but.

The U.S. has about 4.5% of the world's people, but fully two thirds of the world's lawyers. Whether too many lawyers make the U.S. so litigious, or whether lawyers simply respond to the demands of a litigious culture, is hard to tell. Regardless, to a degree unparalleled throughout the rest of the world, when presented with conflict, Americans seek out lawyers more readily and more often than any other people by huge margins.

To litigate, however, that is, to hire an attorney to research, file, prepare for, and try a case in a Federal District Court or in the average state court of general jurisdiction,

* Costs each side a minimum of $50-60,000, and often more than $100,000;
* Takes an average of three years;
* Requires an average of 1,000 hours of the litigants' personal time, not including trial;
* Admission of testimony is strictly controlled by the Rules of Evidence, a body of law which in large part dates back centuries, and often prohibits judges and juries alike from considering facts that truly are essential to arriving at a full understanding of the matter at hand, and therefore a fair and reasonable resolution of same;
* Inflicts enormous emotional stress on litigants during the entire process; and
* Ends, at best, in a "win" for one of the litigants, and a loss for the other, but with "wins" typically so costly in every sense that a frequent end result is lose-lose for all concerned, except, of course, the attorneys.

If trial court rulings are appealed---by either side---that's another two to three years, at least another $100,000 in legal fees and costs, and yet more mental anguish for litigants.

As litigants wait for trial courts and appeal courts to grind through their interminable machinations, the litigants' lives and businesses, at least insofar as they relate to the issue being litigated, are on absolute hold.

Assuming the accuracy of the old adage, *justice delayed is justice denied*, civil justice in the U.S. is routinely denied.

By entrusting and, in effect, surrendering, their conflicts to lawyers, judges, and juries, litigants largely forfeit their ability to participate in solving their conflicts. Then, when a jury or

a judge or a court of appeals renders its final decision, that decision becomes mandatory on the litigants, whether such decision truly serves even one of the litigants, much less all of them.

As both a lawyer and a mediator, I am repeatedly dismayed at how, notwithstanding all the threatening letters back and forth, complaints, answers, counter claims, cross claims, motions, briefs, interrogatories, depositions, and other endless "discovery," not to mention testimony elicited at trial, more often than not the real reason party A is mad at party B, and vice versa, is never actually touched on. Why? Because people are seldom if ever angry (or, for that matter, sad, lonely, depressed, frightened) for the reason(s) they initially assert---presumably because they are vaguely embarrassed, or at least unsure, about the real reasons---and there is little reason (or professional training) for "the system" to probe any deeper. Moreover, lawyers are bound by their own canons of ethics to zealously present their clients' case in the best light possible. If there is any sense that revealing the real reason(s) for their clients' ire (or other distress) will somehow weaken their case, lawyers, with no obligation to bring them to light, simply ignore them. Consequently, in addition to its costs, delays, time demands, and infliction of mental anguish, litigation's biggest shortcoming may that it fails to do precisely what it is supposed to do: actually resolve conflict and the issues giving rise to conflict.

With the important "stuff" between the parties left unaddressed, and with litigation greatly aggravating already contentious relationships between litigants, relationships stand no chance of being repaired so parties can continue to deal with one another. Litigation, in effect, creates enemies for life.

Contrast the foregoing with mediation. Often, cases that have dragged on for months, if not years, can be resolved in a day or two, or less. Costs and fees are consequently very modest. Mediation is conducted in a neutral, confidential, non-threatening, non-adversarial setting. The parties in dispute---with the professional help of the mediator---craft their own win-win solutions to their own problems. Who better to do so? There is no "disinterested" third party decision maker cramming his/her idea of what's "right" down their throats. If, despite the best good-faith efforts of the mediator and the parties, the conflict simply cannot be resolved, little time and money have been expended, and, if they must, the parties are free to then pursue litigation. By law, nothing said or otherwise revealed during mediation is allowed to be used in any subsequent litigation. With mediation, there is essentially nothing to lose, everything to gain.

But mediation can go well beyond simply guiding parties as they work out constructive resolutions to conflict. Done properly, it creates choices that might otherwise never occur to the parties or their attorneys. It helps dispel illusions that people have accepted about themselves, about others, and about their conflicts. In so doing it allows them to abandon stories that cast them as victims and others as demons. It assists in recognizing the essential interconnectedness of all peoples, and provides support in overcoming irrational fears and addressing sub-conscious beliefs that serve little useful purpose. In the final analysis, mediation aids people to move to the center, to the core of their conflicts, where they can discover that reaching the center *any*where in life allows them to locate the center *every*where.

In a few jurisdictions---very few---mediation is required either before a law suit can be

filed, or at some critical juncture along the way. In all the rest, mediation can be initiated only by mutual consent of the parties---both as to the process and as to the chosen mediator. With attorneys perceiving mediation as a major potential threat to millions of hours of billable time, and with attorneys functioning as the primary "gatekeepers" of conflict in our society, all too often the idea of mediation is never even raised.

In short, for more conflicts than not, mediation is a superior and more enlightened approach for all concerned. Our present system of civil litigation is badly broken and serves litigants poorly. It is high time that courts, lawyers, potential litigants, and the public at large give serious consideration to an alternative to conflict resolution that holds so much promise.

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