Reflections In Retirement

By William I. Cowin

At age 34 in 1972, I voted in favor of an initiative petition that amended the Massachusetts Constitution to provide for the mandatory retirement of all state-court judges who reached the age of 70. I thought it was a good idea at the time and still do. Besides, I thought it unlikely that I would ever be a judge, and it was by no means a certainty that I would ever reach 70. Wrong on both counts, I awoke on my birthday in 2008 to the realization that I was out of a job.

I need to have work to do (if only as an excuse to get out of the house), and I have been fortunate to have positions both in the Government Bureau of the Massachusetts Attorney General’s Office and at JAMS, a national mediation and arbitration firm with a regional office in Boston. Each has given me opportunities to participate in interesting and meaningful cases, and I have been privileged to work with stimulating colleagues of great ability. Perhaps more important for the purposes of this piece, I have had a chance during the past three years to breathe mentally, and to step back somewhat from the day-to-day pressures of judging (and the years of private practice that preceded it) and think about some aspects of the profession in which I have worked for half a century.

At the outset, I believe that the technical competence of attorneys as a class is greater than it has ever been. Lawyers simply know more and can do more. This may have come about in part by increased concentration in defined subject-matter practices, which in turn enables attorneys to learn...
more about their particular specialties; or it may be a product of intensifying competition and client expectations; or it may be that our system of educating lawyers, and of continuing to train them after they enter practice, has improved substantially.

At the same time, lawyers appear to be more aware of ethical obligations than ever before. They engage to a greater extent in continuing education. They play an increasing role in community activities, both public and private. Pro bono efforts are widespread and the profession’s commitment to them grows each year.

So why is it that lawyers are so often the subjects of derision and even hatred? Some of that is undoubtedly attributable to public uncertainty regarding what the lawyer does and the difficulty and expense associated with doing it well. Some is a product of the reality that clients often encounter lawyers in times of trouble: a criminal charge; a frustrating business negotiation; a civil law suit; settlement of a difficult estate; a divorce. Some is simply the product of class warfare and the perception (frequently not true) that lawyers make a great deal of money. Perhaps all we need is a good public relations firm.

I think it is going to take considerably more than that. I recall that a number of years ago Harvard President Derek Bok wrote a report containing the famous reflection that “there is too much law, not enough justice.” I would revise the sentiment somewhat to say that there is a great deal of lawyering, a lot of which serves no discernible legitimate purpose. Put differently, we know how to do it; but we often fail to consider whether doing it is useful.

Because my experience as lawyer and judge has been in litigation, I draw my examples from that discipline. I suspect, however, that they would have their counterparts in transactional or other aspects of legal practice. For one thing, there are too many law suits. We have encouraged American society to view the courts as the place to resolve all grievances. In fact, courts are often an undesirable place. Litigation is a blunt instrument, not a scalpel, and is often ineffective in dealing with the subtleties that may have caused the controversy. Likewise, it falters when forced to confront other disciplines, such as medicine, that have different ways of doing things, different means of communication and different patterns of reliance. It can be cumbersome, time-consuming and expensive. Yet lawyers can, for various reasons, be ineffective in advising clients that access to the courts may not be the right answer for them.
(Keep in mind that a very high percentage of civil cases settle before trial. Many of those disputes could be settled without the commencement of a formal proceeding.)

Assuming that a law suit takes place, lay criticism of the process is in many instances justified. The proceeding is episodic, with meaningful events frequently months apart. It can be hard to get a judge’s attention. Discovery abuses have been well-documented. But I wonder whether there is sufficient recognition of how wasteful much of civil discovery is. Experienced trial lawyers know that much of the discovery product is never used even if a trial takes place. Much of it merely reiterates what the parties already know; revelation of “smoking guns” is extremely rare; and parties who are determined to conceal unfavorable information are often successful in doing so. Ordinarily, you win cases with your own evidence, not from what is obtained from the other side. Yet voluminous discovery has become the norm, a trend that will only be exacerbated by the opportunities and temptations that the advent of e-discovery will generate.

Similarly, motion practice, particularly with respect to attempts to obtain summary judgments, has become excessive. Many motions for summary judgment fail, and in a substantial percentage of those cases competent attorneys should have concluded in advance that the motions could not succeed. Many discovery motions escalate to court attention disputes that counsel operating in good faith should have resolved by themselves. In addition, much of the paper that is filed in connection with motions of all kinds is made up of useless repetition. Is it really necessary to reiterate over and over the criteria for summary judgment that judges and lawyers can recite in their sleep?

As the process becomes more detailed, complex and protracted, the right answer in any given case becomes more elusive. The difficulty and expense by themselves frequently dissuade parties from pursuing meritorious claims or asserting valid defenses. Even when parties are willing to tolerate those burdens, the search for truth is often frustrated, not facilitated, by the sheer volume of paper and the many opportunities to use the system to distract and to obfuscate.

As with most things, there are multiple reasons why we have come to this point. Lawyers are trained and encouraged to consider all possibilities, to look beneath surfaces, and not to surrender opportunities. We are less adept at determining what overtures are likely to be productive, and at calculating what level of effort is reasonable in light
of the value of the case. There is a cultural pressure within the profession, a pressure applied particularly to newer lawyers, to do more rather than less in preparing a case without sufficient regard to whether the client’s prospects are likely to be improved as a result. And inevitably money is not far from the heart of it. As expenses of operating law practices increase, and as partners and associates achieve or maintain substantial incomes, work expands in order to generate the revenues necessary to support the business.

The “more is better” principle is now so engrained in the litigation psychology that it will not change absent the introduction of an economic disincentive to the continuing of present practices. It seems to me that it is time for a meaningful reappraisal of the “American Rule” that each party bears its own litigation fees regardless of the outcome. While the policy is modified on occasion by fee-shifting provisions in certain statutes and contracts, most cases are not affected. Furthermore, judges rarely take advantage of opportunities to shift fees even when forced to endure frivolous claims or defenses that would justify fee awards under G.L.c.231, §6F or Mass. R. App. P. 25.

I understand the reluctance to superimpose a factor that could chill the ability of litigants to seek access to courts or to defend themselves when sued. At one time that was the dominant consideration. In my view, conditions have changed to such an extent that concerns with the system’s capacity to function must take precedence. I can think of nothing that would more effectively bring to the process a renewed sense of sanity than the realization that losing the case will expose the litigant to liability for the prevailing party’s reasonable fees and expenses.

It will not work in all cases. Obviously, it is not feasible in criminal proceedings. It is undesirable in personal injury actions where, absent contingent-fee arrangements, many injured parties would go unrepresented. There may be other categories that should be exempted, especially when low-income parties are involved. I recognize also that it would create work for judges who would be required to act on fee applications; but that additional effort would be offset by a large margin by the reduction in workload brought about by fewer and more streamlined cases.

I have through much of my life defined myself as a lawyer. Being a judge for a while did not change that. I have always liked being a lawyer, and have always believed that what we do is important. But “retirement” has not relieved me of the increasing concern that the system’s arteries are clogged and that some new thinking about the process is long overdue. If we do not do it, others will do it for us. Just ask your doctor.