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Charley's Corner:

Who Ya Gonna Call?

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Nothing in this column represents the view of my Library or its Board of Trustees. These are just my personal opinions.

The Rise of Arbitration

As a director at one of the many public law libraries which depend on a portion of the filing fee for civil court cases as the mainstay for our revenues, I have watched court filings closely here in San Diego County. The number of paid civil filings has been dropping for some ten years here. All across the United States, the number of civil cases filed has been dropping. Although an increase in the granting of fee waivers (*in forma pauperis* orders) accounts for some of the lost revenues, there are also just fewer cases being filed.

What are the several reasons given for the drop. Some of it is demographics, as Baby Boomers reach middle age and litigate less. Perhaps this signals a general drop in the total level of testosterone. Crime is down, too.

One thing it is not is economics. With the longest running upward business cycle in history, there is less unemployment and generally more wealth. More satisfaction means less interest in suing, or so it would seem. But history tells us that that is not the case. In prior business cycles, it was more common to see a rise in civil litigation when the economy improved. There would be more sales and commercial transactions, leading to more disputes. Employers also cannot lay off those they would discriminate against during an up-cycle, so there was generally more employment litigation over being fired for cause. Divorcing couples would fight in court over their recently acquired possessions. (In truly bleak times, couples breaking up would often not even bother to divorce.) Personal injury victims could find a deep pocket to go after.

The difference now is the rise in arbitration and non-court related mediation. Alternative dispute resolution has taken hold. Commercial litigation is often settled by arbitration. We have all heard of the shrink-wrap contracts which specify arbitration in some software-producer-friendly state. Well, much of our high tech litigation is occurring that way. In fact, it is not uncommon for many high tech firms to prefer arbitrators simply because they feel that certain arbitrators know the technology better. But the most compelling reason for arbitrators in this arena is a concern for trade secrets. When two high tech companies go after each other, they don't want the actual conflict publicly examined because of the competitive intelligence it gives away to third parties, i.e., the company down the road.

Most medical malpractice cases are now settled by arbitration, or occasionally mediation. The doctors are willing to arbitrate so that the case is settled without the glaring lights of news cameras. The victims get their money faster, and sometimes more of it.

Personal injury litigation is also accepting arbitration in leaps and bounds. Many insurance contracts call for it. Often, plaintiff lawyers like it, too. Video presentation of a "day in the life of" a paraplegic often convinces a CEO that he would rather settle than face a jury.

Although there are claims that insurance companies forum shop by choosing arbitrators a who have recently been friendly toward them, it seems that plaintiff's attorneys are also passing arbitrators' names around among themselves. Some local bar associations are even creating private databases, tracking arbitrators' decisions, as reported by their members.

Once again, secrecy is often a concern for personal injury defendants. The Ford Explorer–Firestone tire cases would have hit the airwaves two years earlier, except for the use of arbitration. A bill in the California Legislature, started by the Attorney General, that would require most large award arbitrated decisions to be made public has raised a huge hue and cry, both from large business and from the high tech community.

Another area being taken over by arbitration is employment law. I heard the prediction from a local arbitrator that, by 2005, 90 percent of all employment law decisions in California will be by arbitration. He went on to say that the remaining cases would be litigation over procedural matters. The occasional sore loser who would want to litigate after arbitration will try to make a procedural claim to bring it to court, but will usually fail. As employers become more used to the procedural aspects, even those claims will usually be lost in summary judgment.

The many lawyers and judges with whom I have had occasion to discuss this increase in ADR have all felt sympathy for me that civil filings fees will drop. But the inevitability of this development seems to them all to be the natural state of affairs.

Where is the Precedent?

Recently, though, I have begun to ask another question: "With all this alternative dispute resolution, won't we miss the natural progression of cases that feed the development of substantive law?" Arbitration is final; there is no appellate review. If 90 percent of the cases in a given field of law don't feed the system, isn't it likely that the law as developed by the appellate courts will be somewhat askew from what is actually going on in society? Do we want the settled jurisprudence for employment law or law for high tech companies to be created from those few cases that are odd-ball enough to miss out on the prevailing system of resolution? How can you develop *stare decisis* when the cases aren't published?

As law librarians, especially those of us in the public settings, we need to raise this question. Even if the arbitrated decisions were published, as sought by that bill in California, they certainly would not be synthesized by a duly designated appellate court. Each and every arbitrator is on a par with the highest supreme court justice. Decisions and final and never reviewed. Instead of fifty state jurisdictions and one federal one, we would effectively have as many jurisdictions as there are arbitrators. In fact, I would not be surprised if, as all these arbitrated decisions become at best merely persuasive sources for later arbitrators, we end up developing a non-regulated system of legal scholars who comment on these matters and who become the accepted text for the law, replacing the appellate courts.

Carrying this thought further, let's assume that these arbitrators, having few court opinions to look at, will start to use statutes as general propositions that they, as arbitrators and final judges, would apply "reasonably" as they see fit in their own particular cases. Without the courts to draw the lines between the classes of fact situations that are covered by the particular statute and those that are not, our statutes will begin to look and act like the codes found in civil law countries, such as France or Germany. But there is one notable exception: our arbitrators are under no obligation to find some statute that is applicable at all. So, unlike civil law countries,

our law would have large portions of "law" that is neither civil law (i.e., taken from broad interpretations of sections of generic codes) nor common law (i.e., dependent on integration or extrapolation from previous decisions).

I realize that there are huge areas of the law that will not become "arbitratorized" (sounds like "arbitrage," doesn't it). We will still have the courts, and court opinions. Yet, this trend bothers me. As a law librarian, I have enough trouble purchasing the information needed when I know exactly what I should be looking for, i.e., primary sources first. What do we give to our readers who want employment law, personal injury law, or commercial law?

A Hypothetical: Law in the Age of Arbitration

The doctor was beta testing this new micro-probe on a patient who had signed an agreement for an experimental procedure he had to have since the HMO wouldn't cover the more expensive standard procedure. The probe seems to have caused a gland to malfunction. The HMO was provided by his employer. Under the terms of his union contract, his LMO (legal maintenance organization) was obligated to tell him what the law is and to aid his settlement efforts. To the patient's surprise, his lawyer was less concerned about what state he lived in than who his arbitrator would be. Until that is resolved, the lawyer could not determine what the "law" would be. However, the lawyer did have access to the ATLA database of arbitrators, so he suggested several arbitrators who would be friendly to his claim. Getting the doctor, the HMO, the employer, and the union to agree to a single arbitrator might be tricky, but the lawyer would be able to help him. After all, when it comes to determining what the law is, it's who you know that's important.