

ACCESS TO JUSTICE IS RESTRICTED:

A Call For Revolution

October 21, 2010

Remarks by

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Addressed To The Faculty Of Federal Advocates

Arraj U.S. Courthouse

Denver, Colorado

Most discussion about access to justice is focused on the Right to Counsel. That right in criminal cases is explicitly set forth in the U.S. Constitution and is provided for, however inadequately, by public defender systems and court appointed --- and paid --- counsel. In civil cases, the right to counsel has an equally recognized provenance, but the furnishing of counsel to those unable to afford to hire their own attorneys is honored more in its aspiration than in its performance. In these remarks I want to expand the discussion beyond the topic of legal aid as it presently exists to what I perceive to be a menacing crisis of denying access to justice to everyone. Please understand that not for a second do I wish to minimize the provision of legal aid to the poor, but I do want to place it into a larger context.

Access to justice is denied or restricted not only by the failure to provide affordable legal assistance to those untrained in the intricacies of the legal system, but also by the inadequacies of that legal system itself. It is hard to imagine a more obvious example of the decline of civilization than its inability to provide adequate and timely justice for its citizens, yet governments and the private sectors have de-emphasized the public funding of our justice systems and increased the costs of it in the private sectors to the point at which more and more Americans simply cannot get their day in court. These processes of removing access to justice from the core of our society were soundly in place before the current economic recession began, but the alienation advances at an increasing speed.

In a nutshell, we are paying far too much for the value we are receiving and we are paying far too little for the infrastructure that is necessary to provide justice. We are paying far too much for the wrong things and we stubbornly refuse to recognize that obvious changes are required.

In March, the Los Angeles judicial department drastically reduced the number of courts, laid off hundreds of employees and reduced days in which the courts were open. By the end of this year, that 5,400 worker system will be

reduced by about 20%. More than 50 of its 580 courtrooms will be closed. Case filings, however, continue to grow and the inevitable consequence is an increase in delay. In Los Angeles, it now takes 8 to 10 weeks to get on a court calendar with a motion, even for such dire matters as child custody, support and family violence issues. In New Hampshire, a statewide hiring freeze is in effect so judicial positions are left vacant, court hours have been cut, satellite offices have been closed and forced furloughs are closing court sessions to the equivalent of 30 court days a year.

Other states are having the same problems with forced furlough days and staff reductions of as much as 10%. Florida has a hiring freeze and has laid off 280 staff out of a 3,100 work force. These jobs, I might add, require skill, extensive training and experience. Moreover, pay for judges and management officials has been cut 2%. The hiring freeze is also in effect in Minnesota where court hours have been cut and hearing delays increased. New York is contemplating 2,000 layoffs of judicial employees this year. In Colorado over 100 positions have been lost due to budget cuts. All of these states are overloaded with criminal cases which for reasons of public safety must receive priority. Domestic cases are given short shrift though they are the cases in which most individuals are directly

involved.

The shift in the federal system, in Colorado, and in some other states has been to increase the use of arbitrators, mediators, masters, referees and assistant judges. All of these measures necessarily reduce the personal involvement of judges and increase the bureaucratic treatment of cases. Over the past 25 years, civil jury trials have dropped from 20% of cases filed to less than 2%. All over the United States court systems are ebbing away from their central place in the life of the community. As I shall discuss in a moment, the increase in the cost of lawyers' services has made representation by legal counsel nearly impossible for most Americans in many cases.

People representing themselves, so-called *pro se* filings and defense appearances have increased at alarming rates. Reliable numbers are hard to find, but *pro se* litigants are no longer confined to the poor who have been unable to secure legal aid. My rough estimate for our court is that more than 25% of civil cases involve some *pro se* activity. Nationally there is no tracking system and each jurisdiction follows its own rules. Many people hire lawyers, but then run out of funds and are forced to proceed on their own. Others simply drop out, bare their

necks and abandon claims or defenses, submitting to the juggernaut. Also, there is an increase in so-called “self-help” kits that attempt to provide forms and directions for individuals at a nominal cost. A majority of states have amended their attorney ethics rules to promote a growing practice known as “unbundling,” in which a lawyer ghost writes documents for a contract, lawsuit, divorce or other litigation for a reduced fee, rather than taking on the entire case. In so doing, the ethical obligation to represent the client with unfettered loyalty and skill is abandoned. My personal opinion is that unbundling legal services is the moral equivalent of putting someone to sea in a lifeboat without oars, sail or compass.

A major concern of critics of *assisted pro se* representation is two-fold. First, appropriate forms with rudimentary directions cannot provide substitutes for skills developed through extensive training and practice such as conducting depositions, drafting and arguing motions, conducting legal research, examining and cross-examining witnesses, analyzing and arguing points of law in open court, identifying and interviewing witnesses and examining documents. Second, by launching a *pro se* litigant into court with documents suggesting greater sophistication than the litigant has, the court often develops the false impression that the litigant is more knowledgeable and hence more capable than is actually the

case.

There is an undeniable problem with the ability of *pro se* litigants to perform the necessary requirements to handle a case in court. Imagine putting an untrained person in control of an aircraft, giving him a few pointers, and hoping for the best. As the equivalent of an air traffic controller, the judge expects the litigant to know what to do, follow directions and appreciate consequences.

If you get a traffic ticket, you can't afford to fight it and the state and local governments build in to the statutes and ordinances an automatic and nearly compelling plea bargaining program. If you insist on a trial, you will pay more if you lose and you will lose much more than a day's wages just getting a trial date, which in all likelihood will be continued to another date at least once. Put another way, you get a discount for pleading guilty and that amounts to rationing justice.

If you have a minor civil matter such as an employment dispute or a collection case, it will take months to obtain a trial date. And that is rationing justice. If you file a substantial lawsuit, it will take literally years to get a trial date and you will be penalized if you don't settle it. And that is rationing justice. If

you need a quick hearing on a defense motion, you will have to wait in yet another line. And that is rationing justice. The legal landscape is fast becoming a barren wasteland in which rationing rather than nurturing justice is the accepted reality.

One of the most significant documents in our legal heritage, the Magna Carta, was signed in 1215 at Runnymede. Clause 40 provided the guarantee that “(t)o none will we sell, to none deny or delay, right or justice.” In 1494 the Tudor statute established a right to counsel for indigent civil plaintiffs, requiring a court to assign to the same poor person or persons, counsel learned in the law who shall give their skills at no fee. Later the right to appointed counsel was expanded to include civil defendants. These English charters and statutes were incorporated into the common law that formed the basis of the American legal system in each colony and then in each state other than Louisiana.

In 1981 the United States Supreme Court was asked to recognize a constitutional right to counsel in civil cases in *Lassiter v. Department of Social Services*. In that case a mother asked the court to rule that parents like her, who faced permanent loss of their parental rights, were entitled to counsel. The court said that while courts could appoint counsel on a “case by case” basis, there is no

categorical right to counsel in civil cases. The court created a presumption against appointing counsel in any case in which physical liberty is not at risk.

More than 45 million individuals have incomes low enough to qualify for federally funded legal aid, but equal access to the courts is hard to find. The largest federal source of funding for free legal services in civil cases, The Legal Services Corporation, reported in 2007 that:

1. Legal Services Corp funded programs turn away some one million cases annually due to lack of resources; untold additional clients never find their way to the programs.
2. Each year fewer than one out of five low-income people with civil legal problems obtain the legal assistance they need.
3. Counting all (not just Legal Services Corp) legal aid programs, the U.S. has one lawyer for every 6,861 low-income people, but one lawyer for every 525 people in the general population. A recent study shows that this gap may well have been understated and other evidence indicates the gap is widening.

What about the middle class?

About five years ago, I was assigned a case in which a plaintiff was attempting to proceed with a class action against General Motors, Chevrolet, GMAC, a regional distributor and an authorized dealership. At the initial scheduling conference, for the benefit of the court reporter, I asked the plaintiff's attorneys to identify themselves for the record and then turned to the defendants' table and asked the several people there to identify themselves and the party each represented. All but one stood and made the necessary disclosures. I asked the man who had not spoken if he was representing anyone. He stood and very nervously said he was not an attorney, that he didn't have an attorney and that he was representing the dealership which he owned. I told him that he couldn't do that because the law did not allow a corporation to appear without a lawyer.

He said, "Judge, I've been told you would say that, but please hear me out." I told him to go ahead. He said, "I know my dealership is a corporation, but my wife and I own all the stock. We have a lawyer near our business who handles our regular matters such as filings with the Secretary of State, employee and customer disputes, and personal matters such as our wills and taxes, but when I took the papers in this case to him he told me that he couldn't handle a federal case, that it would bankrupt him and he would have to drop all the other matters he was

handling for other clients just to deal with this one case. He said there were law firms in downtown Denver he would refer me to who regularly appeared in federal court. He gave me a list of three firms and I went to each one of them. Judge, each law firm wanted at least \$100,000 up front and said they didn't know how much more it would cost until the dust settled. Judge, I don't have \$100,000. After I meet my overhead, I'm lucky to get that much out each year in salary for me and my wife who works at the dealership. I've got two kids. One in college and the youngest in high school. I doubt seriously I could net \$100,000 if I sold the business. And with this lawsuit hanging over my head, I couldn't sell it anyway."

I told the gentleman that there was little I could do. I couldn't represent him. I couldn't appoint a lawyer for him. The other defense lawyers couldn't represent him because that would be a conflict of interest. "All I can tell you," I said, "is to sit tight and I will do my best to see that you are not taken advantage of." The story has a somewhat happy ending. For entirely separate reasons and months later, I denied certifying the case as a class action and it promptly settled, but the experience has stayed with me. This man and his family did not qualify for legal aid, could not afford competent counsel and were denied access to justice. As the case turned out, I don't think he would have had to spend the entire \$100,000 in

fees, but neither he nor the law firms he contacted knew that when the need arose. Simply stated, he didn't have the price of admission to the halls of justice.

In a few minutes I shall try to explain why attorney fees are so high, but first I want to present you with some figures showing the ever spiraling trend. "Firms have been able to raise rates in excess of inflation for close to 20 years." So says the general counsel of a large American corporation. Another said recently, "Our company refuses to pay law firms for the hours spent by first and second year associates because they are worthless." That's easy to say, but who is going to pay for the necessary training of budding lawyers. The cost will be reflected in the increased rate of billable hours.

In 1961, my first job as a lawyer out of law school was with a small firm in Brighton, Colorado. The three partners discussed what my hourly billing rate should be. Because Brighton is about half way between Greeley and Denver and the firm did business in both, the question was whether to charge the \$10 per hour Greeley rate, or the \$15 per hour Denver rate. While it was not the most confidence inspiring event for me, one of the partners said, "It doesn't matter, he won't be worth either and we will have to write off most of his time for the first

year anyway.” He was right, of course, and I wasn’t worth the \$350 a month salary I was paid. I also recall that I was assigned a good deal of *pro bono* work the firm took on as a matter of professional responsibility.

On September 1 of this year, Simpson Thatcher & Bartlett, a global law firm of more than 800 lawyers, raised its top rate to more than \$1,000 per hour from \$950. Firm partner Barry Ostrager, a litigator, says he is one of the firm’s thousand dollar an hour billers. He is not alone in that firm or in others. The top biller at New York’s Cadwalader, Wickersham & Taft LLP hit the \$1,000 mark earlier this year. At Fried, Frank, Harris, Shriver & Jacobson LLP, also of New York, bankruptcy lawyer Brad Scheler now at \$995 per hour will soon charge over \$1,000. Bankruptcy law, as you might suspect, is a growing industry and skilled practitioners are greatly in demand. I need to add that these rates are not equivalent to “take-home” pay.

At law firms throughout the country, billable rates have climbed steadily over the past 20 years, rising an average of 6 to 7% annually. In Denver, it is not uncommon to see “customary billing rates” of 4 to 6 hundred dollars per hour.

Moreover, starting salaries for newly admitted lawyers have increased significantly in no small measure because of the six figure student loan debts that become due and payable at graduation from law school. Due to the recession, starting salaries have dropped and, more importantly, hiring of new lawyers in both the private and public sectors has taken a drastic fall. About half of recent local law school graduates do not have employment in the six months following graduation.

At one time, bar associations published customary fee schedules, but in 1975 that practice was prohibited by the U.S. Supreme Court in the case of *Goldfarb v. Virginia State Bar*. The fees charged are even greater than the announced rate because there are minimum time units of usually five to fifteen minutes no matter how much time is actually spent. So a client may be charged for fifteen minutes of work when the attorney spent only a minute leaving a voice mail or reading an email. There is a common joke in the business community that there are only 24 hours in a day — except in law firms.

Let me take a few more minutes to explain why I think legal services are so expensive and why access to justice is being severely restricted. I think it has more to do with a resistance to change and a confusion of complaints and their causes than to greed and penury. It seems highly likely to me that using only existing funds significant improvements in the administration of justice could be realized. To do so, however, we would have to take the giant step of throwing out all of the rules of civil procedure and start out with a brand new paradigm.

In 1921 the great and famous jurist, Learned Hand, said, “I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.” He was preceded in that sentiment by Voltaire who said he was only bankrupted twice in his life: once when he was sued and lost and once when he sued and won. Both of these giants were commenting on the courts long before the technological avalanche that is presently sweeping over us. I don’t think it is excessively alarmist to say that we are facing a very loathsome and tangled thicket of procedural chaos and collapse of the administration of justice.

It is not surprising at all that lawyers charge so much for their services when

you consider the confused and antiquated system in which they must work. As in the case of the car dealer I described, lawyers are unable to predict how much time and expense will be necessary in any given lawsuit “until the dust settles.” There are no specifications and blueprints upon which to base a bid. That dust includes what is euphemistically called “notice pleading” in which the complaint says next to nothing, motions that require extensive briefing and abstraction from an ever-increasing sea of legal precedents, and “liberal discovery” which means, in this age of data glut, sifting inch by inch through the desert to find one particular grain of sand. No longer is the lawyer’s task to find a needle in a haystack! That went out with the dial telephone.

The Rules of Civil Procedure were first implemented 72 years ago. They were drafted without any reference to changes in technology. There was no consideration of computers, fiber optics, jet air travel, the internet or even xerography. The notion of a trial with thousands of exhibits extracted from millions of documents found in warehouses around the world was not even a gleam in the eyes of the beholders. Later, with consistent insouciance to the demands of the technological revolution, the Rules of Evidence were promulgated. Before there was a body of law based on the premise that evidence was excluded from

consideration unless it fell within the ambit of a rule. The change transformed the system to one of inclusion so that all evidence is admissible unless specifically excludable.

Cases that once took two or three days to try now take two or three weeks. The common place personal injury suit used to involve the traffic patrolman, the treating physician and possibly an expert. The medical record was what the doctor brought with him along with a couple of X-Ray photos and a view box. Today, the same case brings out accident reconstruction engineers, four or five medical experts including the surgeon, the attending physician, the radiologist, the physiatrist, the rehabilitation expert, a psychologist — and an economist. An entire industry of experts called “forensics” has been set firmly in place. Experts are called by the plaintiff. The defendant has a similar team. Each expert has to prepare a report, submit to a deposition and frequently testify at a separate hearing to decide whether the report is based upon acceptable methodology. I have tried a jury trial for five and a half months that included the testimony of 45 experts.

Absolutely no effort is being made to junk these archaic rules and institute a new system that accommodates current technology, much less a system that

anticipates more tectonic shifts in the acquisition, distribution and absorption of data. I think I need comment no further on what happens to species or processes that fail to adapt to essential changes in their environment.

Regularly, I conduct scheduling and discovery conferences and observe that the costs of discovery planned by the parties greatly exceeds the amount prayed for in the complaint — and that is calculated without even considering the public costs of the court and those fees charged by the court reporters for transcripts and video presentations.

It used to be that every party was responsible for his, her or its own attorney fees. It was called the American Rule to distinguish it from the English Rule in which costs and fees are assessed in favor of the prevailing party according to a set schedule. The American rule no longer applies in many areas. Congress and state legislatures have passed laws awarding fees and permitting contracts to provide that the loser pays. The Equal Access To Justice Act requires the federal government in some circumstances to pay prevailing rates to the opposing party. The Rules of Civil Procedure have been amended to provide that attorney fees may be assessed in favor of parties and against the opponents for violations of the

Rules. For the first four years of my judgeship, I never awarded attorney fees.

Today, assessing attorney fees is a near daily occurrence.

I know that 25 years ago the average time from filing of civil cases to trial or other disposition was 5 months and today it is 20 and that our court is one of the more efficient courts operating in the federal system. I know that the overwhelming amount of my work does not take place in the courtroom, but in chambers deciding motions — especially summary judgment motions— and I’ve heard more than one law professor say that if a case gets past summary judgment there has been a failure in the system. I try not to be cynical, but sophisticated lawyers tell me that the object of litigation is no longer to bring a case to trial, but rather to force the opposing party to the bargaining table.

We don’t say this often enough: The intent of the Rules of Civil Procedure and the law of evidence was to lead us to a public trial by jury in which the art of advocacy would flourish as its most highly vaunted characteristic. That is at best an illusion. Virtually every study presently available shows that lawyers and judges are not perceived by the public as performing a valid social function in an

efficient, economic and successful way. Should this be changed? Yes. Change should occur and I will devote the rest of my remarks to telling you why.

The primary reason is that any system of government, including the legal one, requires public acceptance. Without the confidence that justice is a predictable reality, social life degenerates into violence, chaos and narcissism. Without a complete modernization of our courts and their procedures, we will get to the point, sooner rather than later, where justice isn't even sought and access to justice is considered irrelevant. We are rapidly shifting from a system of adjudication to one of bureaucratic administration of disputes.

Georges Clemenceau once said that "War is much too serious a matter to be entrusted to the military." Much the same can be said of Justice: It is far too important to be left to the legal profession. We judges and lawyers are trained, in fact indoctrinated, to rely on precedent. We have failed entirely to consider how changes in technology, some not even presently imagined, can affect the processes required for the just, speedy and efficient determination of cases. That is the way we think. We look to the past and ignore the future. We march bravely into an unknown world looking backwards. The result of that habit of thinking is with us

now. We are a roadblock on the information highway. Our present system cannot accommodate the glut of data that society produces. Not only does our present system fail to accommodate the data, we are presently incapable of absorbing it and making sense out of it.

I suggest to you that one of the reasons, in fact the principal reason, why access to justice is so severely restricted is our collective failure to create a process that is compatible with the conditions of life as we know it to be lived. Instead of creating an efficient and speedy means of processing and absorbing data, we continue to engage in mindless ritualism. It should be clear to everyone, whether lawyer, judge, academic, student or concerned citizen that the present system grounded on notions of notice pleading, wide-open discovery and profligate obstructionism by filing legions of motions is an anachronism.

What we need in the way of reform is the conceptualization of an entirely different paradigm of procedure. One that not only takes into consideration existing technology, but one that can adjust to inventions and discoveries scarcely imagined. We need to accept that computers have actually changed the hard wiring of our brains. We need reform that implements neurobiological developments

more than it merely adjusts to new models of computer hardware.

In sum, we need to be creative enough, and daring enough, and imaginative enough to achieve a far better competency than presently exists in the procedures we use to administer justice. To put it bluntly: There is no sane reason why we should think that access to justice is the same now as it was thought to be at Runnymede in 1215. We have computer engineers and programmers in abundance. Why not put them to work on something in addition to — and far more important to our quality of life — than sticking gas pedals and space capsules?

The court system is the third branch of government. Judging from news coverage, the third branch has fewer scandals about corruption, hypocrisy and folly than the other two branches and it is regarded as more reliable and less inefficient. Could this public perception be true — or is it that nobody cares to look more closely? In the absence of substantial reform, the answer to that question may well be that we get precisely what we deserve.