Throwing Down the Gauntlet- Joseph Markowitz

Some suggestions for incorporating mediation into the mainstream of the litigation process, instead of as an afterthought

Why does a lawsuit begin with a complaint? This procedure must have evolved from the earliest days when litigants had the option of trial by battle or trial by ordeal, and eventually were offered the more civilized form of combat known as trial by jury. That history represents a progression from the idea that disputes must be decided by God or the King or at least a higher authority such as a judge, to a recognition that people can resolve disputes among themselves. The complaint might be seen as a remnant of a more adversarial process than the one that we actually use. A lawsuit begins with a challenge. The complaint calls an opponent out to a fight; it sounds like a declaration of war. But a lawsuit rarely ends with a fight. The vast majority of cases never end up going to trial, and most cases are resolved by a negotiated agreement among the parties somewhere along the way, perhaps after they are worn out with litigation. That being true, why start the process off on the wrong foot? Why do we pretend that we are initiating a trial process when we know that most likely the case is not going to be resolved in a courtroom?

Arbitration rules are more up-to-date. In initiating arbitration, a party files a demand for arbitration, not a complaint. While such a demand is assertive, it sounds more like an invitation to a meeting where the parties' competing claims will be dealt with in a business-like way. And that is what arbitration is supposed to be in fact.

Nowadays the procedure of choice in dispute resolution is mediation, and mediation takes place in one form or another in more and more of the cases initially filed as lawsuits in court. But the procedure is tacked on as an adjunct, or alternative, to the standard, even though rare, process of resolving the case by trial. The judge and the rules encourage the parties to cooperate in the discovery process. Then the court suggests, or perhaps requires, the parties to participate in a court-sponsored or private mediation program. Cases move down the litigation track, but the court encourages most cases to fall off the track. The alternative has become the mainstream, and the trial has become an anomaly.

Would it not make more sense to initiate a court proceeding by serving one's adversary with a paper called something like a "notice of dispute," rather than a complaint? Most people's natural response to a complaint is outrage or defensiveness. The complaint provokes an adversary to fight. But a notice advising an adversary that the parties have a conflict that they have not been able to resolve, merely reminds the adversary that both parties have a common problem, and that they need assistance in solving it. So instead of filing an answer, which I once heard a judge call the most useless piece of paper filed in a case, the defendant would file a response indicating that he either agrees that the parties have a dispute, or he agrees with some or all of the claim that the plaintiff is making. Either way, the parties are already making progress in acknowledging their common problem, and beginning to deal with it.

A notice of dispute might suggest ways in which the plaintiff would be willing to resolve the dispute: a trial, if necessary; an arbitration, if the other side is willing to waive their right to a trial; or some kind of mediation procedure. The defendant would then have the option of agreeing to the plaintiff's suggested procedure, or suggesting a procedure of his own. When the parties first meet in court, in a scheduling conference not too dissimilar from what occurs now, the court would send the parties down a mediation or arbitration or litigation track.

Of course, care would have to be taken to devise rules to prevent parties from gaming that kind of system. The rules would have to cover all kinds of cases, from the ones that under current rules

turn into default judgments, to the highly contested cases that demand resolution by trial. But for all of the cases in between, the courthouse should more openly function as a facilitator of the resolution of disputes, and the parties would more openly acknowledge that that is what they came to court to do.

A thorough re-thinking of the rules only begins with the complaint. After that, it would be interesting to re-think the rest of the process, including the architecture of the courthouse itself, to incorporate mediation into the normal processing of cases, instead of having it take place in the hallways, or in an unused courtroom, or a mediator's private office, as if mediation were an unwelcome stepchild that does not belong in court, when in fact it is becoming the court's favorite tool to resolve cases.

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