

## Seven Suggestions

By Claude Ducloux

**E**very now and then, even we mice need to roar. Those of you who have enjoyed or merely tolerated my columns over the past 12 years realize that delight in lampooning the problems which lawyers face, from the unique and sympathetic perspective of a daily "grind-it-out" practitioner, perplexed by changing laws, and generally representing real folks who dig into their own pockets to pay me. What I hope comes through, even in the most irreverent criticisms, is my deep appreciation for what we lawyers and our clients face to obtain some semblance of justice and at least some protections of the "Rule of Law" we're always bragging about.

We are all distressed at the beating our profession has taken, primarily at the hands of those who will benefit by discrediting our quest for justice. And too many lawyers run and hide rather than stand up for a system under attack.

The result: cures that are worse than the disease. Polarization of society. Additional barricades to justice. Again, the vast majority of lawyers are silent. (Not to mention, some of these new statutes are baffling: charging lawyers an extra \$65 fee per year to fund access to justice for the poor is an absurd abdication of the state's responsibility to fund an appropriate system. As if it's a "lawyer" problem, and that fee is going to solve it. It's like charging plumbers for excess rainfall.) Well then: we get what we deserve.

As a card carrying "bar groupie," I have served on more committees, task forces, and boards than sanity dictates. After 25 years of it, it's become clear that constantly re-inventing the

wheel isn't working. But I have formed certain conclusions which are distilled into the big seven issues which we must address, in my opinion, and think about every day, and use every opportunity to advance.

### 1. First and Foremost: Stop Bashing Each Other

Don't send around lawyer jokes; don't perpetuate myths, like those Internet awards for the most frivolous suits. The suits are fake, and sending them on as humor only serves to destroy the public's confidence in the legal system. And quit whining about it. We win, we lose, folks dislike us. It comes with the territory. Handle it with dignity.

And to all of us: Remember that there is nothing unseemly about being a plaintiff's attorney, or a family lawyer. To hear the politicians speak, they want the public to believe that representing injured parties is work for scum. Is it more or less noble to file forms at an administrative agency? Or draft wills? Or represent citizens accused of crime? Each area of the law provides necessary service. Bashing each other only makes us all look stupid.

And here's a special message to Senior Lawyers: You're not helping when you wistfully pretend the practice of law was so much better and more ethical 40 or 50 years ago. Hogwash. You guys have a short memory. Now that I've been practicing over 25 years, I know there are just as many war stories then about how you old guys screwed each other in the 1960's as happened in the 1990's. You just did it in different ways. Some time-honored mischief remains the same: Withholding evidence (why did you think discovery rules origi-

nated?), sending witnesses out of subpoena range; and suborning perjury (Yeah, don't lie, you knew at the time your sleazoid client was lying). And my goodness, *ex parte*-ing the judge prior to trial was considered "due diligence." So what if your generation "didn't need Rule 11 agreements to honor deposition dates." Listening to you guys pretend you were all angels makes most of us hurl, and publishing that nonsense doesn't help our current public image that the profession has gone to hell. So, sell it somewhere else, pops.

### 2. Make it cheaper to go to trial.

The single biggest problem the middle class client faces? Access to the courts. Young lawyers who desire courtroom experience are very limited in their options. Why? Litigation costs are absolutely out of control. Ask any judge, including federal judges. They'll tell you they only see trials involving the well-heeled, and, of course, those disfavored "plaintiff's lawyers" working on contingency (who are the ONLY chance a poor guy has to hire a good lawyer). Why? Because we insist on "discovering" every molecule of information that the opposing party ever handled, including his high school prom tickets. Then we're forced to mediation. I've handled many mediations that lasted longer than it would have taken to try the case. Is this progress? It's horribly expensive, and, not surprisingly, some folks like it that way. This is a rising source of discontent in society. And who gets blamed? We do.

I would suggest that, in certain matters such as cases involving damages of under a certain level (say \$25,000) or simple collection cases on sworn account

(even when the amounts exceed that level), there should be a "Trial Ready" rule. By that, I mean that, after a certain period of time passes following the answer date, the party proposing trial can declare that all relevant documents have been tendered, and set the case for trial, regardless of whether depositions have been taken. If the opposing party objects, and delays the trial with additional discovery matters, and ultimately, the objecting party loses, all costs and attorneys fees accrued by the winning party may be awarded at trial, regardless of the nature of the case, including tort cases. Having such a rule would dramatically reduce the costs to consumers, and would require each lawyer to inform the client of the availability of the rule, and the downside of protracting the cost of simple cases vs. the utility of further discovery. Once the client grants informed consent to the trial under this rule, the lawyer is protected against later claims by his client that additional discovery should have been undertaken.

Okay, I realize there are many aspects which we'd need to think about carefully, but this would actually put a premium again on trial skill, rather than giving the advantage to the richest client. I also predict it would encourage the same analysis parties undertake in early mediation and foster settlements of these simple cases. And face it, after I've heard both parties' versions in mediation, I can predict with fair certainty who's going to prevail at trial if the case doesn't settle. Most of the time, it ain't brain surgery.

### 3. Change the way judges are selected

Please, open your eyes.

Allowing goobers to get elected in Texas because their names "sound right" is a travesty. And face it – lawyers paying for judicial campaigns just flat out stinks. But, it's currently the only game in town. We should have a mechanism for the informed selection and review of judges other than what has become an election charade. Now, the only way we express our disapproval is by writing smaller campaign checks.

*Disclaimer: None of the above applies to our Travis County Judges, all of whom were personally delivered on the wings of Pegasus (except, apparently, municipal judges).*

**Make the award of fees and costs a realistic threat**

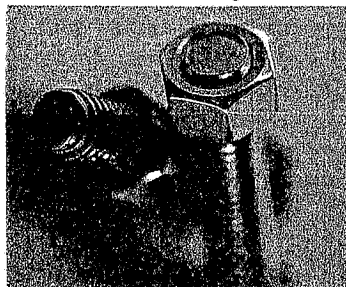
When a party has abused or wasted the Court's time with meaningless motions or repetitive testimony, courts should not be reluctant to award fees. I am convinced that judges' reluctance is related to the need to curry campaign favor from the same lawyers who appear before them. Okay, then just hit up those annoying out-of-town lawyers. (Kidding, of course, except for Houston attorneys).

**5. Continue to make the law more accessible to the public**

Informative, impartial Websites that explain various facets of the law and the public's legal rights are valuable. Although we shouldn't encourage folks to handle complicated problems *pro se*, allowing public access to legal information and thereby understand complicated issues only serves to boost confidence when their lawyer confirms their understanding and de-mystifies the process.

**6. Make sure every young lawyer has access to mentoring or feedback**

We all know that it is absolutely impractical to open a law office right out of school. The British insist on a Clerkship, whereby young lawyers, in effect, apprentice under the tutelage of experienced lawyers. This is irreplaceable experience. What we are finding now is that even the large firms, are



***"We must also re-invigorate the 'nuts and bolts' practice skills courses."***

not really showing the young lawyers how to do the job. It's far more profitable to learn on the client's tab, thus resulting in huge bills for researching issues that experienced lawyers will already know. And joining a discussion group, breakfast club, or section of similarly-interested lawyers is incredibly valuable. The feedback and free advice you obtain from your peers is irreplaceable.

We must also re-invigorate the "nuts and bolts" practice skills courses. Continue to foster accessibility and publicity for the State Bar's Law Office Management services. They are excellent. And, although I really hate to "impose" any new requirements for lawyers

when it comes to CLE, it wouldn't hurt to require a certain annual number of hours (5?) for newly-licensed lawyers in practice skills and management over the first three years.

**7. Finally: Get involved in your profession**

Joining your local bar is a must. First, the bar is your best access to peer groups of similar interests. And bar projects are key to enhancing the profession's standing in the community. The good will that lawyers earn through projects that don't involve the practice of law is enormous. I realize, with great regret, that many young lawyers,

burdened with ever-increasing student loan debts are focused on retiring that indebtedness, and those concerns outweigh their desire to participate in bar projects. But we should all have a regular professional outlet to serve the public. I assure you the old saying is true: You, and the profession's standing, will be rewarded in ways which exceed your investment.

Okay, there are my "seven." I'm interested in your thoughtful (or insulting) feedback, so feel free to contact me at [cdcluoux@onr.com](mailto:cdcluoux@onr.com). In the meantime, I've got a great new wheel design to propose at the next committee meeting.

Keep the faith. • AL

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