

# BAR BULLETIN

## Declaring Independence from a Flawed Legal System

By **Larry G. Johnson**

History seems to have times when revolution is in the air and everyone feels it. It certainly was in the air in 1776 when stalwart citizens felt it necessary not only to declare their independence from a distant and unfair mother country, but they also chose to launch a revolution in how they would govern themselves going forward. Thanks to their courage and foresight we enjoy the blessings of freedom we too often take for granted.

Many people feel that revolutionary spirit is abroad again in the political campaigns of Donald Trump and Bernie Sanders. Their supporters share a common theme: The time has come to upend a status quo that has become so sclerotic that it benefits only a tiny few, as out of touch with their fellow citizens as King George III was with his colonies back in 1776.

So, why don't we as lawyers take this moment to look at our legal system afresh and do what the Founding Fathers did in Philadelphia when they took blank sheets of paper and declared fundamental principles for what would become the United States of America? What changes would you like to see? What would you get rid of in our legal system and what would you add?

I asked myself those questions and what follows is my own Declaration of Independence from the dully accepted norms of our current legal system and from those in charge of it.

### First Off, What Isn't Working?

Here are some common complaints I hear often and happen to agree with:

- Justice costs too much, i.e., lawyers are too expensive.
- The courts are too slow and inefficient. It's too easy for lawyers to plod, delay, obfuscate and game the system.

- Lawyers do not do enough pro bono work.
- Most judges do not work hard enough.
- State court judges subject to election are too prone to political influence.
- There is too much waste and absurdity in civil motions and, above all, unchecked discovery.
- Criminalization of drug use has swamped and corrupted the criminal justice system.
- The threat of draconian sentences from overzealous prosecutors forces too many unfair plea bargains.

### Thoughts for Reform

So, what to do? Here are some ideas that could make a big difference and are really not all that radical:

- Limit the scope and use of juries in civil cases.
- Make more frequent use of special masters in complex cases for swift adjudication of issues
- Severely limit discovery — Europe does almost entirely without discovery; so pray tell, *how do they do that?*
- Require the losing party to pay the prevailing party its attorney fees and costs (Alaska has that).
- Raise the mandatory arbitration limit to \$150,000 or more.
- Require mediation in every civil case; try doing that online via Skype, GoToMeeting or other such technology, so mediators can be drawn from anywhere and mediation conducted in virtual space.
- Use a single, neutral eDiscovery expert for all the electronically stored evidence (ESI) in a case. The expert is either agreed to by the parties or appointed by the court. The expert's task would be to cull and search all the parties' ESI to avoid trust issues and inconsistent protocols. The parties' data would

be fire-walled and kept confidential to the extent allowed.

- Promote technologies, such as artificial intelligence and advanced data mining techniques, to predict the probable outcomes of a case based on its data profile, with the goal of settling cases sooner and faster. These technologies are much farther along that path than you might think.

- Provide an independent citizens' review board for plea bargains to determine whether they were fair and not coerced. The board would be empowered to reduce or vacate the sentences in appropriate instances.

That would be my wish list. What's yours?

I will be the first to admit that some of the foregoing ideas may be half-baked or impractical. But the time has come to shake the salt shaker and come up with something better than the flawed and archaic justice system we currently have.

Perhaps it is naïve to think that there can be big changes anytime soon in our lumbering judicial processes. But as guardians of that system, if we don't come up with some innovative changes soon to satisfy the needs of an unhappy public, in these turbulent times people just may take it upon themselves to make those changes without us, just like those upstarts Jefferson, Washington, Hamilton, Adams, Madison, Franklin, et al. ■

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