Truth on the Market

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Walter Olson on Careful What You Unleash

Posted by totmauthor on September 19, 2011

As a libertarian, I mostly concur in the critique of occupational licensure made famous by (among others) Milton Friedman. For the most part, licensure is a consumer-unfriendly affair that protects incumbent practitioners from competition, locks out promising new methods of service provision, and interferes with voluntary dealings between professional and client. It is dubious enough as applied to occupational groups such as doctors and plumbers, and downright ridiculous (as the Institute for Justice keeps reminding us) as applied to groups like cosmetologists, florists and interior designers.

But lawyers are different. No, seriously — they are. Most other professional groups deal with a clientele that, even if unsophisticated, is at least participating voluntarily and exercising a choice of providers. This is true of lawyers as well for the majority of the services they provide — advising on the state of the law, drafting contracts, negotiating business deals, devising estate plans. But lawyers also are given a litigator's hunting license to initiate compulsory civil process against unwilling (often wholly innocent) opponents and third parties, and deregulating *that* power is a good bit more problematic.

The coercive powers wielded by private lawyers are more akin to the powers wielded by prosecutors and other government officials than to the powers wielded by, say, optometrists or dentists. They include the power not only to initiate a lawsuit — something that, even if disposed of at an early stage, can inflict hundreds of thousands of dollars of financial cost (plus reputational damage and distraction) on an adversary — but also the power to pursue discovery under our remarkably broad American rules, an extraordinarily coercive and invasive process by which opponents are compelled to hand over private emails, memos and doodles for hostile scrutiny, attend and endure hostile depositions in person, undertake vast file searches at an unreimbursed cost that can exceed the value in controversy in the suit, and more. I am not convinced that deregulating the power to commence this sort of civil process and demand money from an opponent for calling it off — in effect, to widen the existing *pro se* exemption so as to allow anyone to proceed *pro se* on behalf of anyone else they can get to sign up — would reduce the amount of unjustified legal aggression in a system that already has plenty of it and to spare.

It will not do to say that abuse of the power to litigate can be sorted out after the fact as it allegedly was in the cases of Scruggs and Lerach, years after the ethical lapses began. Much experience suggests that sanctions, disbarments, countersuits and prosecutions are

typically belated and spotty as it is (for many examples, check my website Overlawyered). True, abusive lawyering would be far better checked if we had loser-pays, a strong Rule 11, serious constraints on the use of discovery for cost infliction, and so forth. But we don't — and the Law Lobby will not let us win those remedies any time soon.

The way forward might be to split the tasks of a lawyer in two, moving to deregulate the advisory and document-preparation functions (which could indeed be a way of saving consumers large sums) while continuing to apply appropriate scrutiny to those in the profession who presume to wield coercive litigation powers. Although the British separation of highly regulated barristers from less highly regulated solicitors does not precisely track this distinction, it is worth keeping in mind as a possible model for a division between an "outer" legal profession whose operation might be entrusted to general business principles and an "inner" group of professionals of whom more is expected, as we expect more ethically and legally from judges themselves, public prosecutors, and others cloaked in public authority.